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1942

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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ALLAHABAD HIGH COURT

1942

S. N. Dar
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351	,,	,,	200
357	,,	,,	145
360	,,	,,	261
368	,,	,,	326
373	,,	,,	224
376	,,	,,	222
377	,,	,,	227
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398	,,	,,	295
421	,,	,,	263
425	,,	,,	194
445	,,	,,	307
448	,,	,,	324
455	,,	,,	238
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478	,,	,,	308
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44	,,	,,	245
46	,,	,,	313
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Sheo Baram Singh v. Ranbir Prasad, ('38) 1938 A.W.R. 324=1938 A.L.J. 541=1938 All. L. R. 724=(25) A.I.R. 1938 All. 477=177 I.C. 215	Overruled in (29) A. I. R. 1942 All. 153 (F.B.).
Sundar Singh v. Commr. of Income-tax, ('38) I.L.R. (1938) All. 638 = 1938 A. L. J. 610=1938 A.W.R. 525=1938-6 I.T.R. 336=1938 All. L. R. 727=(25) A.I.R. 1938 All. 452=177 I. C. 260	Reversed in (29) A. I. R. 1942 P. C. 57 (P.C.).

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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1942
Allahabad High Court

(29) A. I. R. 1942 Allahabad 1

BAJPAI AND DAR JJ.

Kunwar Orendra Chandra Singh and others — Plaintiffs — Appellants

v.

Bulaqi Ram and others — Defendants — Respondents.

First Appeals Nos. 80 and 97 of 1935, Decided on 16th September 1941, from decision of Addl. Sub-Judge, Muttra, D/- 29th September 1934.

(a) Adverse possession — Possession of part when amounts to possession of whole — Land used by defendants for holding annual religious fair without let or hindrance—Defendants constructing temples, staircase, burj, shops, rooms, arenas and well and laying pipes on certain portion while rest lying vacant — Defendant held must be deemed to be in possession of whole.

Generally speaking possession of part is in law possession of the whole, if the whole is otherwise vacant. This constructive possession is an incident of ownership and results from title. Possession of land by a party not claiming title is confined to the part actually occupied by him unless it is accompanied by a definite claim of title to the whole. When a tract of land with a defined boundary has been throughout claimed as owner and the acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole. [P 6*f*,*g*]

The main use of the land with certain well defined physical features within specified boundaries was that it commemorated a well known scene of Hindu religion and mythology and for that purpose it had got to be maintained and preserved in its original form, that of a high mound. Over one-third western portion temples, staircases, burj, shops, rooms, arenas and well and pipes were constructed by the defendants and of which the defendants were in possession and on a plot occupying one-third eastern portion the effigy of demon Kans was burnt and an annual fair held while the rest lay vacant. The defendants without any let or hindrance used portions of the mound for sitting purposes and from a long time had been denying plaintiff's rights over the entire land and claimed it to be their own property:

Held that the entire land possessed such a common character that possession of a substantial part raised the inference of the possession of the whole. [P 6 *h*; P 7*a*]

(b) Adverse possession—Fluctuating and indefinite body cannot prescribe or acquire property by adverse possession—Religious property —Long possession cannot be lightly disturbed.

Apart from ancient possession where legal origin may be presumed and apart from incorporation and trust and like cases, the law in India does not allow a fluctuating and indefinite body to own and hold real property nor to acquire title to property of a secular nature by mere prescription or adverse possession. But where possession goes back to time immemorial and the property on the face of it is not of a secular nature and is a subject of religious use, long possession of the fluctuating and indefinite body such as the members of a particular caste cannot be lightly disregarded. [P 9*c*,*h*; P 10*a*]

In such a case the possession which goes to time immemorial should be presumed to have a legal origin and must be respected though it may not be possible having regard to the pleadings in the case to find the nature and the extent of the possession: (1882) 7 A C 633 and (1823-27) Turn and Russ 209, *Rel. on*; *Case law referred.* [P 10*c*]

P. L. Banerji and H. P. Sen — for Appellants.

S. N. Sen and S. C. Das — for Respondents.

Bajpai J. — This appeal and the connected Appeal No. 97 of 1935 are two appeals against the judgment and decree dated 29th September 1934 of the Civil Judge of Muttra by which the plaintiffs' claim for declaration of title to a plot of land in the city of Muttra was partly decreed and partly dismissed. The property in suit out of which these two appeals have arisen is a plot situated in the city of Muttra and is popularly known as Kans-ka-Tila. Muttra is a sacred city of the Hindus and from time immemorial the Kans-ka-Tila has been associated with some scenes of Hindu religion and mythology. The plaintiffs in the suit are the

executors of Lala Babu estate. Lala Babu *a* was a Bengali gentleman who flourished in the beginning of the last century and who leaving his original home in Bengal, came in the beginning of the last century and settled at Brindaban for a religious life. During the course of his sojourn in these parts of the country he acquired a considerable estate in Muttra and Bulandshahr Districts which has been in possession of his descendants and which at present is being managed by certain executors under a will who are the plaintiffs in the action. The defendants to the action are 76 Chaubes who reside in two streets of Muttra called Gali *b* Bhar and Gali Tiwari. These Chaubes belong to a priestly class who work as ministers to Hindu pilgrims and visitors to Muttra. The 76 Chaubes who are defendants to the action are said to be the representatives of a fraternity of about 200 Chaubes who reside in the said two streets, viz., Gali Bhar and Gali Tewari and the action has been raised against them in a representative capacity and proceedings have been taken under O. 1, R. 8, Civil P. C. For some time past, a controversy has existed between the plaintiffs and the defendants as to the possession and the title of Kans-ka-Tila and the plaintiffs *c* have raised this action for a declaration

that the plaintiffs be declared to be owners of the entire plot of land described below and that defendants have got no interest whatsoever in the said plot derogatory to the proprietary rights of the plaintiffs.

A number of defences were raised to the action. The plaintiffs' title was denied and it was pleaded that the plaintiffs' claim was barred by res judicata and by principles of acquiescence and estoppel and by S. 60, Easements Act, and S. 42, Specific Relief Act. It was further pleaded that O. 1, R. 8, Civil P. C., did not apply to the action and *d* necessary parties were not made defendants but the main defence to the action was expressed in paras. 3 and 4 of the written statement which are as follows :

3. The land in dispute is known as Kans Tila and the defendants and other persons of Chaube caste resident of Gali Bhar and Gali Tewari of Muttra city are the owners thereof. The plaintiffs' allegation that they are the owners thereof is altogether wrong.

4. The defendant and other persons by caste Chaube, residents of Gali Bhar and Gali Tewari whose number is at present about 150 or 200 and their ancestors have of old been in adverse and proprietary possession for hundreds of years and they have built temples and other kutcha land pucca buildings, wells, akharas, fitted pipes etc., and planted trees at an expense of thousands of rupees, mela fair of Chaubes known as Kans Ka mela has been annually held thereon for thousands of years and one pawan parksa has annually been held there since a long time on Asarh Sudi 15; *e* even if the right of the plaintiffs or their predecessors-in-title is proved at any time in the land in dispute which is not admitted by the contesting defendants, then as they have been in possession for more than 12 years, it became extinct and now they have no subsisting right in it. The defendants and other Chaubes aforesaid are the absolute owners of this and the said land is their tiratasthan.

The trial Court has found that the plaintiffs are the owners of the plot in dispute i. e., Kans ka Tila but the defendants have established a title by adverse possession on the Kans ka Tila excepting on a small portion towards the south which is marked on the plan with the letter I. It further found *f* that the plaintiffs' claim with regard to a portion of Kans ka Tila was barred by res judicata and by acquiescence and estoppel and the plaintiffs' claim for a declaration was misconceived. As a result, the trial Court granted to the plaintiffs a declaration of title with regard to a very small portion of Kans ka Tila which is marked with the letter 'I' on the plan prepared by the Commissioner in the suit and the rest of the claim was dismissed. Against this decree, both the plaintiffs and the defendants have made these two appeals which are numbered 80 and 97 respectively.

Kans Ka Tila is high mound of earth *g* occupying an area of .95 acres or 1 bigha 10 biswas. For the purposes of the trial, a Commissioner was appointed in the trial Court who submitted a report about the physical features of Kanska Tila and of its constructions with reference to a plan which has been referred to in these proceedings as the commissioner's plan. It appears from this plan that this high mound of earth consists of certain flat spaces, some of which are marked as Nos. 1, 2, 3 and 4 in the plan and one of which is marked as 'I' which is used for latrine purposes. One third of the western *h* portion of Kans ka Tila is studded with constructions. There exist over this portion a pucca well, some shops, a room and a chabutra, five temples, two wrestling arenas, a water pipe and a pucca staircase leading up to the temple. The eastern 1/3rd of Kans ka Tila which is marked G in the plain consists of a flat space where the effigy of Kans is beaten as hereafter explained and which is reserved for performance of an annual mela and ceremony. The lower southern portion of Kans ka Tila which is marked 'I' consists of a flat space full of self-grown shrubs which is used as a latrine. There is plenty of uneven and occupied space in the Kans ka Tila where self-grown

shrubs and plants are standing. Mr. Ram Nath Sharma the Munsif of Muttra had inspected Kans ka Tila for the purpose of a suit pending in his Court between the plaintiffs and some of the defendants and he has recorded his impressions of Kans ka Tila in his judgment dated January 1933, exhibit F in these words :

I have inspected the Tila and carefully noted all the construction etc. thereon. It is high mound of earth situate just by the side of the pucca road leading from Muttra to Agra. There is abadi all round but the Tila is distinguishable from its surroundings. It is bounded as follows :

East—Baghichi of Shrisma and Rangeshwar Temple.

West—Pucca road.

North—Dry nullah of Khar.

South—Way to Rangeshwar Temple.

Its surface is uneven but there are several flats on it where people can sit. About 3/4ths of its surface is lying as a waste land with wild shrubs growing and unfit for any use whatsoever. It is accessible from the road by a pucca staircase admittedly got constructed by Chaubes and one can also reach its top from the southern side near a Tiwari. A pucca drain has also been constructed by the side of the staircase and a water connexion laid both at the instance of Chaubes. There are certain temples at the flat just on climbing up the staircase and admittedly the Chaubes enjoy the offerings made by pilgrims in these temples. There is also an arena further up where they wrestle and do exercise. By the side of one of the temples there was a room fit for habitation and some utensils and earthen jars, &c. were placed there apparently for drinking water and preparing bhang which is the usual practice of the Chaubes of Muttra.

It may not be out of place to give a brief account of this Tila. Kan ka Tila, as it is called, is supposed to be the one from the summit of which the tyrant, Kans of Hindu mythology, was tumbled down by Lord Krishna and to commemorate that incident a large wicker figure of Kans is brought out on to the road on Kartik Sudi 10 of every year when two boys dressed to represent Krishna and Baldeo, mounted either on a horse or on an elephant, give the signal, with the statue all wreathed with flowers that they have in their hands, for an assault on the monster. The effigy is then beaten and torn by the Chaubes who then take out the shreds and pieces in procession. Before being beaten the effigy is taken up the Tila from the northen side and the ceremony takes place there. This fair is being held there admittedly from time immemorial.

Kans ka Tila at present is a part of the city of Muttra and is included within its Municipality and abadi. In the words of the Commissioner 'it lies in front of the District Hospital and the Head Post Office buildings' but like many cities in this province the city of Muttra has grown and expanded within the last hundred years, and it includes within its area land which at one time formed part of an agricultural village. The plaintiffs' case is that in the beginning of the last century when the city of Muttra came under the occupation of the British Government, it was regarded as a mauza or an agricultural village and the then proprietors of the mouza who were certain Chaubes by a deed dated 20th May 1812 transferred their proprietary rights in the said mauza to Krishna Chandr Singh alias Lala Babu, the founder of the Lala Babu estate, and the predecessor-in-title of the plaintiffs and by virtue of this assignment Lala Babu and his successors including the plaintiffs have been in possession of mauza Muttra, and Kans-ka-Tila being a part of mauza Muttra it became the property of Lala Babu and his successors by the same title under which mauza Muttra was held and enjoyed. The deed of assignment of 20th May 1812 was exhibited in the case and some witnesses were called to prove that the assignment was acted upon and in terms of the assignment Lala Babu estate was paying certain allowance to the descendants of the assignors. This document has not been printed in the record of the appeal, nor is there any evidence to show whether in pursuance of this assignment any mutation took place in fact, nor is there any evidence to show that the people who made the assignment had any title to convey. If the case had rested upon this deed alone it would have been difficult to maintain that the plaintiffs have established any title to the property in suit on the evidence on record. It is possible that the deed may be the origin of Lala Babu's title but connecting documents have not been produced in the case and it will not be safe to rely upon it as the basis of the plaintiffs' title. But there is evidence to show that in the settlement of 1876 Plot No. 4366 was a part of mauza qasba Muttra and its proprietor was Kunwar Girish Chandra Singh, a successor-in-interest of Lala Babu, and its area was .95 acres 1 bigha and 10 biswas and it contained :

Pucca house with temple of Mahadeoji—5 Pucca house—2 Pucca well 1 with wrestling area. One pucca well at Kans Tila.

There is evidence to show that old No. 4366 is now represented by No. 4364. It further appears from the extracts of wajib-ul-arz of the settlement of 1876 that the heirs of Lala Babu had no rights in the abadi of qasba Muttra and the Chaubes had certain rights in the self-grown trees which existed at Kans-ka-Tila. Paragraph 21 of the wajib-ul-arz relating to houses is as follows :

The abadi of this qasba is like that of a city. The heirs of Lala Babu malguzar cannot in any way interfere inside the abadi of the qasba. The Government has all powers of interference. No

other proprietor can interfere in any way except in
a respect of houses in his possession. All the matters relating to the abadi are decided by the civil Court.

The relevant entry in para. 21 of the wajib-ul-arz which deals with miscellaneous trees is as follows :

Dani Ram shall use the Kans Tila for sitting purposes and shall remain in possession of self-grown trees. But name of the zamindar shall remain recorded in the column of owners . . . . It is a place of pilgrimage, and if anyone plants any tree on the khalsa land in connexion with Kirpan &c., it cannot be cut by anyone, but if any tree falls down or dries up, it shall belong to the malguzar. The custom is still in force.

It further appears from the khewat of
b mauza Muttra mahal non-applicant of the year 1926-27 that the mahal contains 358.34 acres and is assessed to a revenue and cess of Rs. 541-12-0 and that the plaintiffs are its recorded owners and there is evidence to show that the old khasra number of Plot No. 4366 is now represented by Plot No. 4364 and the said plot is a part of mauza Muttra, mahal non-applicant of which the plaintiffs are recorded as proprietors. These documents, in our opinion, are sufficient to establish a prima facie title in favour of the plaintiffs even if the alleged assignment of 1812 is disregarded. In the records of the Muttra Municipality, for the purpose of
c assignment and water rate the Chaubes, that is some of the members of the defendants' community, have been recorded as the owners of Kans-ka-Tila and there are documents on the record to show that from the year 1880 onwards on three or four occasions the Chaubes had made applications and had obtained permission from the Municipal Board for making various constructions on the Kans-ka-Tila. One such application is dated 6th December 1880 and it was for 'permission to construct a staircase in Tila Kans situated beyond Holi darwaza.' Another application was made on 14th January
d 1880 'for repairs Kans ka Tila situated in Holi darwaza.'

In the year 1899, a Chaube named Lochan made a well on a portion of Kans ka Tila which is marked 'C' on the plan. The plaintiffs' predecessors-in-title brought a Suit No. 564 of 1899 in the Court of the Munsif of Muttra for a declaration of his proprietary title and for a perpetual injunction restraining Lochan Chaube from constructing the well. This suit was compromised between the parties and the compromise provided that 'the plaintiff has as requested by defendants kindly permitted the well to stand.' In 1908 the plaintiffs' predecessor brought another Suit No. 702 of 1908 against Lochan
e Chaube for demolition of a room made by Lochan Chaube in Kans ka Tila which is shown on the plan and marked 'B'. This claim was decreed in favour of the plaintiffs' predecessor and the decree was affirmed in appeal by a judgment dated 18th July 1910, but the decree was somehow or other not executed and when execution was finally taken out objections were raised to execution by other Chaubes and as a result of their objection on 16th December 1922, it was ordered by the Munsif of Muttra that the objectors viz., the other Chaubes, were in possession of the property in their own right
f and the plaintiffs' predecessor had no right to dispossess them. The plaintiffs thereupon instituted Suit No. 1053 of 1923 against seven Chaubes representing 200 other Chaubes for a declaration of their title and for demolition of the room which had been constructed and for restraining the defendants from interfering with the plaintiffs' possession. On a finding that the defendants were in adverse possession of the property the claim was dismissed and the said decree was affirmed by this Court in second appeal on 27th April 1928.

In 1932 the plaintiffs raised an action
g against Bulaqi Ram and two others, some of the defendants to this suit, for demolition of some fresh constructions, viz., shops made by Bulaqi Ram and others on a portion of Kans ka Tila marked with the letter A on the plan in the Court of the Munsif of Muttra. This suit was also dismissed by the Munsif on a finding that the Chaubes were in adverse possession of the property and although this judgment was under appeal when the present suit was tried out in the Court below, since then it has been affirmed up to the High Court in second appeal. It was from the Munsif's judgment in this suit that we have quoted above the description of the
h locality. It will thus appear that from 16th December 1922 onwards when the execution case was decided against the plaintiffs, the plaintiffs have been asserting their rights over the Kans ka Tila and defendants have been constantly denying the plaintiffs' title and setting up adverse rights for the Chaube community and in all the litigations which took place between the parties from 1922 onwards it has been invariably found that the Chaube community were in adverse possession of the property and so far as the property which is the subject-matter of those suits is concerned, viz., property marked A, B and C on the commissioner's plan, the plaintiffs cannot maintain any fresh action

and their claim is barred by res judicata. It further appears that in Suit No. 442 of 1923 in the Court of the Assistant Record Officer, Muttra, a dispute arose between the plaintiffs and the Chaubes with regard to the possession of Kans ka Tila and with regard to the correctness of the entry in the Khasra about it and the Record Officer by an order dated 7th April 1924 relying on actual possession as found and as it appeared to him ordered that the plot be recorded in possession of the Chaubes 'in the column of remark of the Khatauni. The plot is really abadi and no part of the jungle.'

At the trial a large number of witnesses were called by both sides to prove their respective possession. It is common ground that every year a mela is held in Kans ka Tila and on the occasion of this mela hawkers visit the mela and hawk their wares. The plaintiffs led evidence to show that the plaintiffs used to realize market dues from these hawkers and the plaintiffs further led evidence to show that Kans ka Tila was let out for grazing purposes and the lease money was collected by the plaintiffs. In support of the collection made from hawkers four receipts dated 1922, 1926 and 1927 were produced and certain witnesses were called to depose about this collection and in support of the collection of grazing dues a patwari was called and the person to whom grazing lease was given was called. The trial Judge has disbelieved all this evidence and we think rightly. So far as the grazing dues are concerned in the mahal in which Kans ka Tila is situate there are two other Tilas and the entry relates to an income from Tilas generally and there is nothing to show that the small income of Rs. 5 which is alleged to have been realized related to Kans ka Tila and was not confined to other two Tilas. With regard to the collection of hawkers there is reason to think that on the mela day on account of the rush of the crowd hawkers would not be seated on any portion of the Tila but would be seated somewhere outside as will appear from the observations of Mr. Sharma in his judgment dated 9th January 1933. This is what the Munsif says :

> I first inspected the place on the occasion of the last Kans fair and I did not find hawkers sitting on any part of the Tila. It was pointed out to me that they sat towards the north-western side below the Tila and close to a bridge over which the pucca road passes. As a matter of fact that was the only place where hawkers could sit at other times, but it was possible for them to sit on that day at the place as in my presence thousands of Chaubes were running with cudgels in procession with the effigy by that very way and the effigy was dragged up the Tila from that side. However Alli Khan says that he realized rent from that place even this year. He says that about five or six hawkers sat near the bridge and the rest in the nullah. I do not think that hawkers can sit on any portion of the Tila and the rent, whatever it be, is realized from hawkers sitting round about on other land owned by the estate. This income is entered as income from the Kans fair in the estate accounts. It is not therefore proved that the plaintiffs receive any income from the Tila proper on the occasion of Kans fair. . . . I do not therefore think that the cattle are grazed on this Tila and as a matter of fact I found the waste portion covered by wild shrubs unfit for grazing: *vide* inspection note of 14th December 1932.

This passage is not strictly relevant but it shows the nature of controversy which exists about identifying the collection with the property now in dispute and in a matter like this which rests upon the estimate of oral evidence we are not prepared to differ from the finding of the trial Court. The plaintiffs therefore have failed to prove that they have collected any income from the Tila or they have been in actual possession of any portion of the Tila. The defendants have called evidence to show that from time immemorial an annual religious ceremony with a mela is held over the Kans ka Tila and for the observance of that ceremony it is necessary that this mound should be preserved in its present condition and it cannot be built upon and its physical features cannot be substantially changed. Consistent with the maintenance of the Tila substantially in its original condition such use and occupation of the Tila as is permissible under the circumstances is with the defendants. On 1/3rd of the eastern portion they have built temples, arenas, wells, rooms, shops, staircases, turrets, burj and have laid on water pipes. In addition to these buildings and constructions the Chaubes use the Tila as their sitting place and for other purposes. In the previous litigations referred to above which took place between the plaintiffs and the Chaubes it was invariably found that they have been in effective possession of the Tila. Relying upon oral evidence of the defendants the trial Judge has found in this case that the Chaubes are in possession of the entire Kans ka Tila excepting a small portion on the south marked with letter 'I' on the plan.

We do not think that any legitimate distinction can be drawn between the nature of the possession of the Chaubes over various unoccupied portions of the Tila. There may be some distinction between that portion of the Tila which has building on it and the other portion which has no building upon it, but no legitimate distinction exists between one portion or other portions of the

unoccupied Tila and the question of possession must be considered with reference to the Tila as a whole as one unit, as one item of property enclosed within a specified boundary and when looked at that way the Chaubes appear to us to have been in possession of the entire portion of the unoccupied Tila, but whether that possession confers upon them any right or not is a different matter and will require a separate consideration.

The plaintiffs' contention is that the proprietary rights in the Tila are vested in them. It is true that they have lost their rights in that portion of the Tila which was the subject-matter of Suits Nos. 554 of 1899, 702 of 1908, 1053 of 1923 and 160 of 1932 and it may be that the plaintiffs further may have lost their rights over that portion of the Tila which is occupied by burj or by temples or by other buildings and houses and staircase and water pipe but the remaining portion of the Tila is unoccupied, and with regard to the remaining portion the plaintiffs should be deemed to be in constructive possession. The plaintiffs contend that the law does not allow constructive possession to a squatter and the trespasser has to prove actual possession of the property over which he claims adverse possession and that the use by the Chaubes of the unoccupied portion of the Tila amounts in law only to a license and the use by the Chaubes and by the Hindu public of a portion of the Tila for holding an annual fair may again amount to a license or to a customary right, but such uses do not establish adverse possession of the property. The plaintiffs, therefore, claim that a declaration should be granted to them of the proprietary title over the Tila excepting that portion which was the subject-matter of previous litigations mentioned above and that portion over which constructions mentioned above exist.

The defendants' contention, on the other hand, is that possession of the property depends upon the nature of the property and in this particular case the Chaubes have established such possession as the property was susceptible of. The property being a mound which having regard to its religious use has got to be maintained as a mound could only be subjected to a limited use. The defendants further contend that the whole of the Tila is to be regarded as one unit contained within specified boundaries and the Kans ka Tila is a property of such nature with regard to which possession of a part may be regarded as possession of the whole. The law applicable to a matter like this is well settled and is correctly stated in Mitra's Limitation and Prescription (Edn. 6), Vol. I at pp. 152 and 153 and Vol. II at pp. 1732 and 1733. The passage at pp. 152 and 153 is as follows :

> Generally speaking, possession of part is, in law, possession of the whole, if the whole is otherwise vacant. This constructive possession is an incident of ownership, and results from title. It is in no way applicable to a case where the occupant defends himself avowedly and exclusively on the ground of his own wrong, that is, on the ground of his possession only, and without claiming any title. Possession of land by a party not claiming title, is confined to the part actually occupied by him. It would be contrary both to principle and authority to imply constructive possession in favour of a wrongdoer so as to enable him to obtain thereby a title by limitation. The maxim '*tantum prescriptum quantum possessum*' will be rigorously applied in such cases.
>
> In the case of wrongful possession of a part by a stranger, his possession does not extend to the whole, unless it is accompanied by a definite claim of title to the whole.
>
> . . . . . when a tract of land with a defined boundary has been throughout claimed as owner, the acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole.
>
> . . . . . If a tract of land or water can be taken to a unum quid (a connected and unbroken entirety), exercise of dominion over certain parts in accordance with a claim of title to the whole may be evidence of the possession of the whole . . . . .

The passage at pages 1732 and 1733 is as follows :

> Generally speaking, possession of part is in law possession of the whole, if the whole is otherwise vacant. This constructive possession is an incident of ownership and results from title. Possession of land by a party not claiming title is confined to the part actually occupied by him. It would be against the policy of the law to imply constructive possession in favour of a wrong-doer so as to enable him to obtain thereby a title by limitation. The title founded by a trespasser on adverse possession will be therefore strictly limited to that area of which he has been in actual possession. *Tantum prescriptum quantum possessum.*
>
> . . . . possession is a question of fact and the extent of the possession is an inference of fact having regard to the nature of the subject and the possession of which it is susceptible.
>
> . . . . Acts indicative of possesssion must vary according to the nature of the property over which possession is exercised.

Now Kans ka Tila is a property with certain well defined physical features and is situated within specified boundaries. Its main use is that it commemorates a well known scene of Hindu religion and mythology and for that purpose it has got to be maintained and preserved in its original form—that of a high mound. The entire locality possesses such a common character that possession of a substantial part may

well raise the inference of the possession of the whole. It is not disputed that over 1/3rd western portion of the Tila, temples, staircases, burj, shops, rooms, arenas and well exist and these constructions have been erected by the defendants and the defendants are in possession of the same. It is not disputed that on a plot occupying 1/3rd eastern portion the effigy of Kans is burnt and an annual fair held. It is proved that defendants without any let or hindrance use portions of Tila for sitting purposes. It is abundantly proved that from a long time they have been denying plaintiffs' rights over the entire Tila and claim it to be their own property. In the written statement filed in various suits between the plaintiff and the Chaubes, the rights of the plaintiffs were expressly denied and it was asserted that from time immemorial the entire Tila had been a sacred property devoted to public and charitable purposes. In 1922 in a contest before the Revenue Court the plaintiff's right was again expressly denied and the Revenue Court accepting the defendants' contention corrected the village records. There is every reason to suppose that possession of the defendants goes back to time immemorial and plaintiff was never in possession of the Tila and from the first moment the plaintiff asserted any claim over the Tila a conflict arose between the plaintiff and the Chaubes who have been since asserting a hostile title to the knowledge of the plaintiff. We have then a case in which the property was—to use a common but somewhat inelegant expression or *unum quid*—a connected and unbroken entirety, a substantial portion of which was in actual possession of the Chaubes and with regard to the whole of it they claimed and set up a hostile title against the plaintiff to the plaintiff's knowledge. This being so, we think that if it were possible for the defendants to acquire a title to Kans ka Tila by prescription or adverse possession there is sufficient evidence in the record to enable us to hold they have done so.

This leads us to the question whether the defendants can acquire title by prescription or adverse possession. The defendants are 76 Chaubes residents of two streets in Muttra, viz., Gali Bhar and Gali Tewari. They are sued in their representative capacity as representing about 200 Chaubes residing in the same streets and the claim put forward by the defendants is that Chaubes who reside in Gali Bhar and Gali Tewari and who are known as Chaubes Tebari, Bharwali, Lor, Mihari and whose number is indefinite and fluctuating are owners of the said Tila and alternatively they are in adverse and proprietary possession of it. The said Chaubes—150 or 200 in number—have not been incorporated and they cannot be regarded as a legal person. It is not the defendants' case that any individual Chaube for over 12 years has been in adverse possession of the entire tila or of any portion of it if we except that portion which was the subject-matter of previous litigation. There is no evidence to show that any individual Chaube who is defendant to this action has been in adverse possession of the Tila for over 12 years again excepting the portion which was the subject-matter of the previous litigation. It is the pleading of the defendants and it is their evidence that a fluctuating and indefinite body of 150 or 200 persons of the Chaube caste who reside in Gali Bhar and Gali Tewari are the owners of the Kanska Tila and this body is in proprietary and adverse possession of the same. Does law allow a fluctuating and indefinite body like Chaube residents of two streets of Muttra to hold and own immovable property or to accept a transfer or grant of immovable property without incorporation or without the intervention of a trust? If law does not allow a fluctuating and indefinite body to hold property by virtue of a grant or a transfer, can it acquire and hold property under a title arising from prescription or limitation. There is an English case, (1882) 7 A C 633[1] at p. 648 in which Earl Cairns while dealing with a somewhat different question stated the law with regard to acquisition of rights by indefinite and fluctuating bodies as follows:

> There were several questions argued, both here and in the Court below; and I think it desirable to mention them for the purpose of explaining that I should be very far from attempting to call in question the law as applicable to those questions. In the first place, I agree with the view of the common place division that the free inhabitants of ancient messuages in saltash cannot be presumed to be incorporated so as to be capable of prescibing for a profit *a prendre in alieno sola*. In the next place I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a profit *a prendre in alieno sola*. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a *profit a prendre in alieno sola*, and indeed cannot be the grantee either of a several fishery or of any other kind of real property. Upon all those questions, therefore, nothing that I am

1. (1882) 7 A C 633 : 52 L J Q B 193 : 48 L T 239 : 31 W R 293 : 47 J P 276, Henry Goodman v. Mayor of Saltash.

going to say will raise or suggest any kind of doubt.

It will be noticed that in the view of Earl Cairns a fluctuating and indefinite body cannot be the grantee of any kind of real property "and that you cannot claim by prescription anything which could not have a lawful beginning" and if the possession of a fluctuating and indefinite body could not have a lawful beginning there can be no question of prescription or adverse possession. In (1881) 6 A C 740[2] at p. 795 Lord Chancellor Selborne stated the law as follows :

The rule as to prescription is thus stated in Sir Francis North's argument in *Potter* v. *North*[3] : 'The law allows prescriptions, but in supply of the loss of a grant. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that lie in grant but by showing of a grant; therefore upon usage *temps dont*, &c., the law presumes a grant and a lawful beginning, and allows such usage for a good title, but still it is but in supply of the loss of a grant; and, therefore, for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good'.

In India both in cities and villages property exists which is not vested in definite individuals, but is vested and enjoyed by large communities, that is fluctuating and indefinite bodies; some of this property is managed by the community at large, some by selected representatives of the communities. Property of this kind may partake of a sacred character like a bathing ghat or a tank or it may be of wholly secular nature like a village chaupal or a chowk in a mohalla and it is popularly called "panchaiti property." Very often, with regard to these properties, no regular constitution of panchait exists and the property is vested in the community at large and is managed by representatives of community in common interest and for common benefit but without any regular constitution. Whatever may have been the origin of this kind of property in times gone by, whether it arose in grant or in dedications or in trust, it is not possible in the present day to find with regard to good many of these properties any trust or dedication or incorporation and if strict English law about the tenure of real estate were to be applied to this kind of property, difficulties may arise in this country. Attempt has been made from time to time to find a legal basis for what may be conveniently called "panchaiti property" in this country. In 12 Mad 241[4] a village tank was assumed by the Privy Council as the property of all the villagers of a village. In 31 Cal 503[5] Lord Macnaghten emphasized the necessity of finding of a legal origin for ancient possession and warned against the danger of applying indiscriminately the English law of real estate to conditions prevailing in this country in these words:

It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately however both in Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured by copious references to English authorities, and by the application of principles or doctrines more or less refined founded on legal conceptions not altogether in harmony with eastern notions.

In 28 Bom 20[6] at p. 49 the question definitely arose whether a fluctuating and indefinite body can own property and though the point was not finally decided Sir Lawrence Jenkins in delivering the judgment of the Court observed as follows:

The first argument urged on this point for the defence is that the suit is based on ownership and that a fluctuating body of persons, such as the plaintiffs claim to represent in this suit, is incapable of property. We are not prepared to assent to the proposition that in this country a body such as we have represented before us is incapable of property, for even if we pass by the alleged ownership of property by a caste as not being definitely established, there can be no doubt that the village community is capable of property, and in Yajnavalkya we have a distinct recognition of ownership by a fluctuating body for in Chap. 2, v. 187, it is said 'whoever appropriates what belongs to the community . . . . shall be made to forfeit his property and be banished from the realm.' The commentary in the Mitakshara on this verse is, 'whoever appropriates what belongs to the community, i. e., anything which is the common property of all the villagers collectively and the like bodies.' We take this passage from the Mitakshara Vyavahara Adhyaya translated by Mr. Girish Chandra Tarkalankar. Moreover, that property may belong to a village is recognized in the judgment of the Privy Council in 12 Mad 241.[4] But it really is unnecessary to go into this question because it is a mistake to say that the suit is based on ownership alone; from the plaint it is clear that this is not so.

In 24 C W N 206[7] the point again arose and was left finally undecided with the following observations on page 210:

It appears however that the right of a fluctuating

2. (1881) 6 A C 740 : 50 L J Q B 689 : 44 L T 844 : 30 W R 191 : 46 J P 132, Dalton v. Angus.
3. (1668-88) 1 Vent 387.
4. ('89) 12 Mad 241 : 16 I A 48 : 5 Sar 331 (P C), Sivaraman Chetti v. Muthaya Chetti.
5. ('04) 31 Cal 503 : 31 I A 75 : 8 C W N 425 : 8 Sar 611 (P C), Bhola Nath Nundi v. Midnapore Zamindary Co.
6. ('04) 28 Bom 20 : 5 Bom L R 745, Navroji Manekji Wadia v. Kharshedji Mancherji.
7. ('20) 7 A I R 1920 Cal 245 : 54 I C 742 : 24 C W N 206, Probhat Chandra Sen v. Hari Mohan Dhupi.

body of persons such as the residents of a village to property or to right of pasturage has been recognized by the Privy Council, and although there is no case in which right of a particular caste or community to hold property (except in 33 Bom 499,[8] in which the right of the Parsi Anjuman to hold property was not disputed) has been decided, there are observations tending to show that such body of persons is capable of owning property : *See* the observations of Sir Lawrence Jenkins C. J. in the case in 28 Bom 20.[6]

There seems some difficulty in accepting the view that the community itself may in such cases be regarded as a juristic person owning and holding the property. No doubt in 27 Mad 435[9] at page 451 Sir Bhashyam Ayyangar expressed the view that in case of Hindu religious foundations the entire community for whose benefit the foundation existed may be regarded as a juristic person ; but this view has not received general assent and in the recent *Shahidganj mosque case*, 1940 A L J 522,[10] Sir George Rankin refused to apply juristic personality to a Muhammadan mosque and his Lordship deprecated the tendency of creating or recognizing new juristic personalities. We do not wish to cast any doubt on the validity of titles of "panchaiti property" or upon the validity of titles which arise by ancient possessions. Where possession of a fluctuating and indefinite body goes back to time immemorial or "so far as the memory of man runneth" a legal origin can always be found for such possession and it can be protected and maintained. But apart from ancient possession where legal origin may be presumed and apart from incorporation and trust and like cases we do not think that law allows in this country to a fluctuating and indefinite body to own and hold real property, nor do we think law allows in this country to a fluctuating and indefinite body to acquire property by mere prescription or adverse possession.

Now in this case before us the defendants, or in other words the Chaube community of Gali Bhar and Gali Tewari have been from time immemorial in possession of the Tila and from time immemorial Kans ka Tila has been associated with scenes of Hindu religion and mythology. Over a portion of this Tila stand certain temples and another portion of this Tila is reserved for an annual religious ceremony and the entire property has got to be preserved and maintained in its present condition for certain religious purposes. It is posssible that the property is a dedicated property, partially or entirely dedicated for the benefit of the Hindu public or for the Chaube community of Gali Bhar and Gali Tewari. It is also possible that the Chaube community of Gali Bhar and Gali Tewari are mere superintendents and managers on behalf of the Hindu public. It is also possible that the Chaubes of the said two streets are beneficiaries and that there is a charitable trust in their favour and in dim past in times of Hindu Rajas or Mahomedan Kings a trust was created in favour of the Chaubes or in favour of the Hindu public making the Chaubes trustees and as the zamindari passed from hand to hand and the ownership of the Tila came to be vested from time to time in the hands of the zamindars and proprietors it devolved burdened with a trust in favour of the public or of the Chaube community. It is also possible that there may be customary rights in favour of the Chaubes of Gali Bhar and Gali Tewari by virtue of which they are entitled to maintain Kans ka Tila in its present form and to remain in possession of it and to make certain religious and ceremonial use of it.

Unfortunately these questions were not raised and considered at the trial and the case there proceeded upon the common pleadings that the property in suit was to be regarded as an ordinary immovable property of secular nature which was susceptible of ownership on the part of the plaintiff and of adverse possession on the part of the defendants. It was further accepted by both sides in the trial Court that a fluctuating and indefinite body like the defendants could acquire and hold property by adverse possession. We are definitely of opinion that if the property had been of a secular nature or if defendants' possession had been only of recent origin of a little over 12 years, such a length of possession by a fluctuating and indefinite body like the defendants and such acts of possession as the defendants have exercised over the property and which we have mentioned above, would not give to such a body as defendants a right to own or hold such property or to acquire any title to it by prescription or adverse possession. But in a case like this where possession goes back to time immemorial and where the property on the face of it is not of a secular nature and is a subject of religious use, long posses-

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8. ('09) 33 Bom 499 : 3 I C 770 : 11 Bom L R 726, Jivanji Jumshedji v. Burjorji Naserwanji.
9. ('04) 27 Mad 435 : 14 M L J 105, Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami.
10. ('40) 27 A I R 1940 P C 116 : 189 I C 1 : I L R (1940) Lah 493 : I L R (1940) Kar P C 251 : 67 I A 251 : 1940 A L J 522 (P C), Masjid Shahidganj v. Shiromani Gurudwara Parbandhak Committee, Amritsar.

sion of the defendants cannot be lightly disregarded. In (1823-27) Turn & Russ 209[11] the Master of Rolls in giving his judgment in the case says:

Very high Judges have said they would presume anything in favour of a long enjoyment and uninterrupted possession. Suppose this case was now submitted to the consideration of the jury, and the parliamentary survey and the Court rolls of the manor were produced to shew that these lands belonged to the town, and no other evidence was produced to prove that fact, and on the part of the parish, the parish books were produced containing these different entries, and it was proved that the parish had been in the quiet enjoyment and uninterrupted possession of this property for 110 years, would not that be conclusive? Is not 60 years' possession a title against the Crown? Is not 110 years' possession sufficient to put an end to any claim as to this property? We must suppose that the persons who have a right to property will assert that right, and if they lay by 110 years, and suffer the property to be enjoyed by other persons, that enjoyment must constitute right. I cannot have the least hesitation in saying that whatever may have been the origin of the possession of these lands by the parish, that possession, coupled with the circumstance that the party who it is said is entitled has been standing by and making no objection to the property being enjoyed as the separate property of the parish, must decide the question; and that we must consider these lands as having been originally granted to trustees for the benefit of the parish, and to be enjoyed by them as their separate exclusive property.

In (1882) 7 A C 633[1] at p. 639 Lord Chancellor Selborne observed:

But an open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law.

We are therefore of opinion that the possession of the defendants which goes to time immemorial should be presumed to have a legal origin and must be respected though it is not possible having regard to the pleadings in this case to find the nature and the extent of this possession. The plaintiffs in the action ask for a declaration which consists of two parts: firstly that it may be declared that the plaintiffs are owners of the entire plot of land specified in the plaint within certain boundaries and secondly, that the defendants have got no interest whatsoever in the said plot derogatory to the proprietary rights of the plaintiffs. The second part of the declaration cannot be granted to the plaintiffs because it is manifest that the defendants have got rights in the property in suit which are derogatory to the proprietary rights of the plaintiffs. It is not claimed that the plaintiffs can exercise full proprietary rights over the Kans ka Tila. It is conceded that the Kans ka Tila has got to be maintained substantially in its present form and it cannot be levelled up and turned into a building site or diverted to any other use which would prevent its being used for religious purposes for which it has been used from time immemorial. It is also clear that from a long time past the defendants have been in possession of the Tila and have been managing land exercising various rights over it and there exist over the Tila their buildings and temples which cannot be removed. The first part of the declaration which seeks to establish the plaintiffs' ownership of the 'entire plot' may however be granted in a modified form. A portion of the Tila was the subject-matter of litigation in previous suits and it has gone out of the controversy and the plaintiffs admittedly can get no declaration about it. Over another portion of the Tila there exist buildings and structures and a staircase and temples and water pipes and arena; these buildings and constructions and so much of the land as is necessary for their enjoyment cannot be the subject of any declaration in favour of the plaintiffs. But with regard to the remaining portion of the Tila which remains after excluding that portion which was the subject-matter of the previous suits between the plaintiffs and the Chaubes and that portion which is covered by buildings and structures erected by the Chaubes and so much of the land as is necessary for the enjoyment of those buildings and constructions, the plaintiffs are entitled to a declaration of title but subject to the rights of the defendants to use and occupy the said plot and to manage it. In the result we allow both the appeals in part, discharge the decree of the trial Court and in lieu thereof grant a decree to the plaintiffs to the following effect:

It is declared that the plaintiffs are the owners of the plot of land No. 4364 situated in Khewat No. 1, mahal Garikhwahindgan, mouza Muttra bounded as below: East — Baghichi of Shrisma and Rameshwar temple; West—Pucca road; North—Dry nullah or Amba Khar; South—Way to Rangeshwar temple; save and except the land and buildings and constructions situated in the said Tila and marked on the plan prepared by the Commissioner, dated 19th September 1934 with the letters A, B, C, D, E, F, G, H, K and other buildings and constructions shown on the said plan and so much of the land as is necessary for their enjoyment, but subject to the rights of the defendants to use and

11. (1823-27) Turn & Russ 209 : 3 Russ 415 : 24 R R 21, Attorney-General v. Lord Hotham.

occupy and manage the said plot and to exercise such rights over it as they have been using, occupying and enjoying hitherto with which use, occupation, management and exercise of rights the plaintiffs shall have no power to interfere. In the circumstances of the case there will be no order as to costs in favour of the plaintiff or the defendants either here or in the Court below.

G.N./R.K. *Appeals partly allowed.*

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(29) A. I. R. 1942 Allahabad 11

GANGA NATH J.

Sumat Prasad — Applicant

v.

Emperor.

Criminal Revn. Application No. 565 of 1941, Decided on 25th September 1941, from order of Sessions Judge, Meerut, D/- 10th May 1941.

Criminal P. C. (1898), S. 476 — Proceedings ultra vires and illegal — Offences under S. 193 or S. 471, Penal Code, committed in proceedings — S. 476 does not apply.

If during the course of proceedings which were ultra vires and illegal, any offence under S. 193 or S. 471, Penal Code, was committed, it cannot be said that it was committed in or in relation to, or by a party to, any judicial proceedings so as to attract the provisions of S. 476, Criminal P. C.: 8 A L J 674, *Rel. on.* [P 11*f*]

B. S. Darbari — for Applicant.

Deputy Government-Advocate — for the Crown.

Order. — This is an application in revision by Sumat Prasad against the order of Mr. Gual Saran, Magistrate, first class, Meerut. One Damodar Prasad had a decree (No. 91 of 1931) for arrears of theka money against the applicant, which was put in execution by the decree-holder in the Court of the Sub-divisional Officer, Sardhana, by attachment and sale of a share of a mahal which belonged to the judgment-debtor. In the course of the execution proceedings, a receipt was filed and a statement was made by the applicant to show that the decree in execution had been satisfied. It was found by the Sub-divisional Officer that the statement made by the applicant was false and the receipt filed by him was forged. Thereon the present complaint was made by him under S. 195, Criminal P. C. An objection was taken before the learned trial Magistrate that there being no valid complaint before him he had no jurisdiction to take cognizance of the complaint. The learned Magistrate has rejected the objection, holding that "this Court has got the jurisdiction, to try this case." As already stated, execution of the decree was sought by attachment and sale of a share of a mahal of the judgment debtor. Under Sch. 2, list 2, Agra Tenancy Act, 3 of 1926, Serial No. 13, the decree should have been sent to the Collector for execution, as the property against which the execution was applied for was a share of a mahal. The Sub-divisional Officer, Sardhana, had no jurisdiction to entertain the execution proceedings. On 20th May 1939, when the matter was brought to the notice of Sh. Mohd. Azizullah, Assistant Collector first class, Meerut, he passed the following order :

> The execution proceedings were conducted in the Court of Mr. Usman Ali Khan (late) S. D. O. Sardhana, who had no powers to attach the property as he was not empowered to exercise the powers of a Collector under Serial No. 13, list II, of Sch. II, Tenancy Act. The execution proceedings were accordingly null and void. The execution proceedings shall start afresh in the proper Court. The proceedings shall be struck off the file.

If during the course of these proceedings, which were ultra vires and illegal, any offence under S. 193 or S. 471, Penal Code., was committed by the applicant, it cannot be said that it was committed in or in relation to, or by a party to, any judicial proceedings. This view is fully supported by 8 A L J 674.[1] There a suit had been dismissed ex parte as against the defendant whose application for rehearing was granted and the suit reheard, in the course of which re-hearing the plaintiff made a certain false statement and the Munsif ordered his prosecution under S. 476, Criminal P. C. It was held that the proceedings of the learned Munsif were ultra vires and illegal inasmuch as under O. 9, R. 13, Civil P. C., the Munsif could not set aside the decree and grant a re-hearing and, therefore, the conviction for perjury could not be sustained. It was observed there :

> The Munsif's proceedings, therefore, were ultra vires and illegal and, therefore, Babu Ram cannot be held to have committed perjury in the course of a judicial proceeding. It was not a proceeding in which evidence could be legally taken. This is the principle which was applied in the case in 1890 A W N 100[2] and also in 32 All 30.[3]

It is, therefore, ordered that the application be allowed and the complaint made by the Sub-divisional Officer be dismissed.

G.N./R.K. *Application allowed.*

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1. ('11) 8 A L J 674 : 11 I C 141, Babu Ram v. Emperor.
2. ('90) 1890 A W N 100, Empress v. Makhni.
3. ('10) 32 All 30 : 3 I C 952 : 6 A L J 963, Abdul Rahman v. Emperor.

(29) A. I. R. 1942 Allahabad 12

IQBAL AHMAD C. J. AND COLLISTER J.

Bindeshri Tewari and others —
Defendants — Appellants
v.
Ram Lakhan Tewari — Plaintiff and another — Defendant — Respondents.

Letters Patent Appeal No. 25 of 1940, Decided on 2nd September 1941, against judgment of Ismail J., in S. A. No. 1335 of 1937, D/- 20th December 1939.

(a) Hindu law — Family arrangement—All persons having present claim or claim in future parties to litigation—Dispute as to properties—Compromise by which shares are specified is family arrangement.

All the persons who could have a claim either in præsenti or in the future to the property in dispute were parties to the litigation which was compromised and the shares of the several branches were specified by the compromise :

Held that the compromise was a family arrangement and was binding on sons of the parties to the compromise : ('36) 23 A I R 1936 All 507 (FB), *Expl., and Disting.* [P 14*e*,*f*]

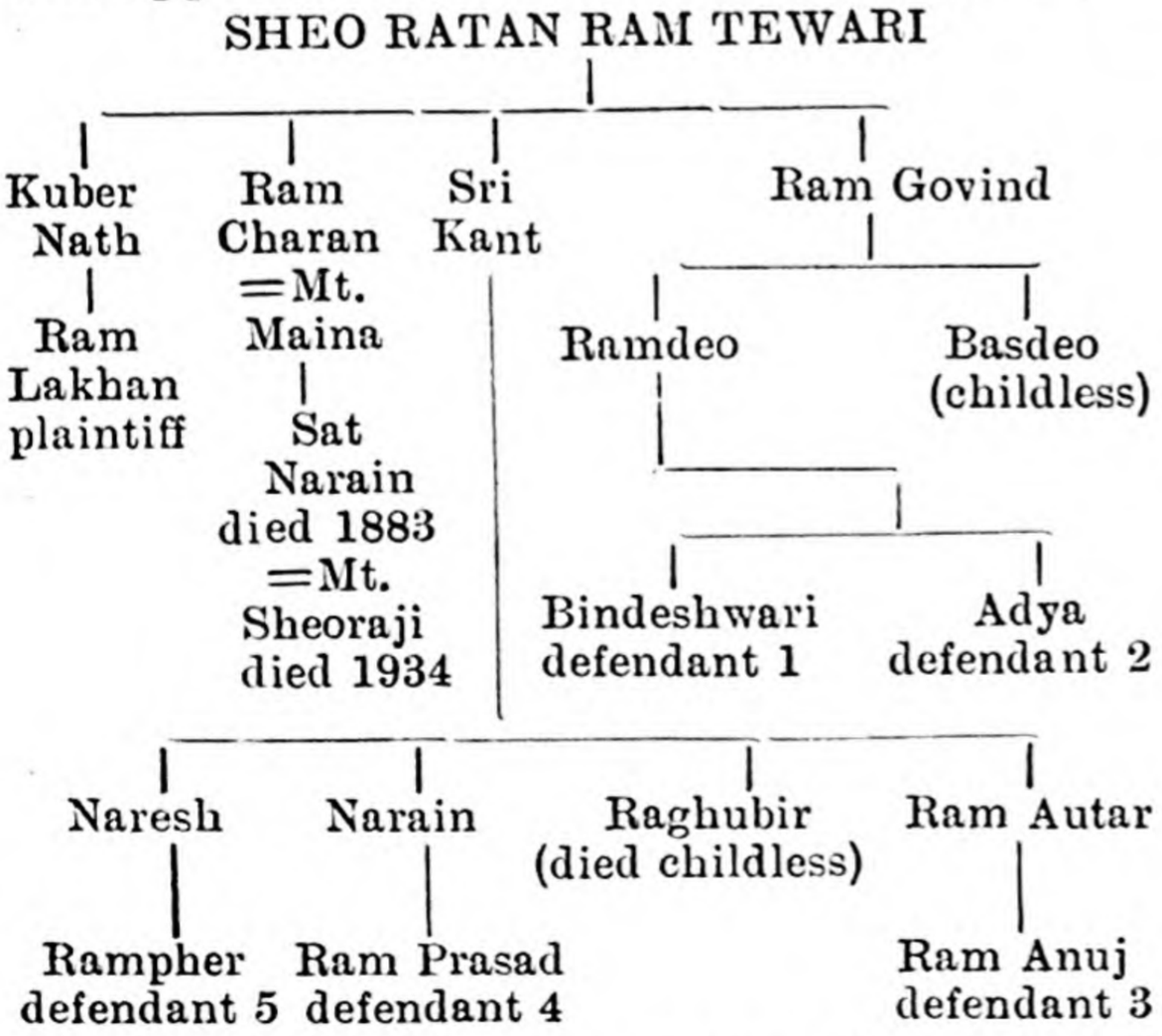
(b) Registration Act (1908), S. 17 (2) (vi) — Compromise in respect of property in suit embodied in decree does not require registration.

Where a compromise is with respect to the property in dispute in the suit and is embodied in the decree, it is exempt from registration. [P 14*g*]

Shiva Prasad Sinha — for Appellants.

S. B. L. Gour — for Respondents.

Iqbal Ahmad C. J.—This is an appeal by the defendants under S. 10, Letters Patent, against the judgment of a learned Judge of this Court. The suit giving rise to the present appeal was brought by Ram Lakhan Tewari, plaintiff-respondent, for possession of a certain zamindari share in village Jhakhai Chak Baldoha. The relationship of the parties to the present litigation will appear from the following pedigree :



The plaintiff's case was that the property in dispute belonged to Sat Narain, who admittedly died in the year 1883, leaving his widow Mt. Sheoraji, who died in the year 1934. The plaintiff alleged that Sat Narain died as a separated Hindu and that, on the death of Mt. Sheoraji in 1934, he (the plaintiff) as the sole reversioner, became entitled to the properties of Sat Narain. The names of defendants 1 to 5 were, after the death of Mt. Sheoraji, entered in the revenue papers as against a 2/3rd share of the zamindari that belonged to Sat Narain. The plaintiff alleged that the defendants had no right to the shares recorded in their names and that the plaintiff was entitled to a decree for possession with respect to the same. The defendants contested the suit mainly on two grounds. First, they pleaded that Sat Narain died as a member of a joint Hindu family with Kuber Nath, Sri Kant and the sons of Ram Govind and as such, the branches of each of the three sons of Sheo Ratan Tewari became entitled to the property of Sat Narain by right of survivorship, and that Mt. Sheoraji had no right to the property and was only entitled to maintenance. They therefore contended that their names were rightly entered by the revenue Court as against 2/3rds of the property that was recorded in the name of Mt. Sheoraji. The trial Court as well as the lower appellate Court gave effect to this contention of the defendants and held that Sat Narain died as a member of a joint Hindu family and not as a separated Hindu. Those Courts therefore held that the branches of each of the sons of Sheo Ratan were entitled to a 1/3rd share in the property that was recorded in the name of Sheoraji. On second appeal a learned Judge of this Court however disagreed with the finding of the Courts below on the point and held that Sat Narain died as a separated Hindu. The determination of the question as to whether Sat Narain was joint or separate at the time of his death depended on the interpretation of a number of documents, and we agree with the learned Judge of this Court in holding that those documents establish the contention of the plaintiff that Sat Narain was separate from the other descendants of Sheo Ratan at the time of his death. The plaintiff's case that Sat Narain was the last male holder of the property in dispute must therefore be accepted as correct.

The defendants however contested the plaintiff's suit on another ground. They pleaded that a compromise entered into on 5th March 1887, in circumstances to be presently mentioned, was in the nature of a

family settlement and was binding on the parties to the present litigation. They alleged that in accordance with that compromise they were in possession of a 2/3rds share in the properties that belonged to Sat Narain. The trial Court as well as the lower appellate Court agreed with this contention of the defendants also, and held that, in view of the compromise of 1887, the plaintiff had no right to possession of the properties in dispute. On appeal by the plaintiff, the learned Judge of this Court disagreed with the decision of the Courts below on the point and held that the compromise was not in the nature of a family settlement and that it was not binding on Ram Lakhan, the plaintiff. The learned Judge accordingly allowed the appeal of the plaintiff and decreed his suit.

It is now a matter of admission that Sat Narain survived his father, Ram Charan, and that at the time of Sat Narain's death his mother, Mt. Maina and his widow, Mt. Sheoraji, were alive. It appears that during the lifetime of Sat Narain Mt. Maina's name was recorded against the zamindari share in dispute. After the death of Sat Narain, Sheoraji instituted a suit against Maina for a declaration that she, as the widow of Sat Narain, was entitled to possession of the properties recorded in the name of Mt. Maina. Mt. Maina compromised that suit with Mt. Sheoraji and, acknowledging her title, relinquished all claims to the property. Kuber Nath, the father of the plaintiff-respondent, then brought a suit for a "declaration of his future right under the Hindu law, i. e., after the death of" Mt. Maina with respect to the zamindari share in dispute in the present litigation. The suit was numbered as 862 of 1886. Originally Kuber Nath had impleaded as defendants to the suit only Mt. Maina and Mt. Sheoraji, but during the pendency of the suit Sri Kant, Ramdeo and Basdeo, the brother and nephews of Kuber Nath, applied under S. 32, Civil P. C., then in force, for being impleaded as defendants, and their application was allowed. Sri Kant, Ramdeo, and Basdeo then filed written statements claiming to be equally entitled with Kubernath to a share in the properties recorded in the name of Mt. Maina. They alleged in their written statements that "just as the plaintiff claims the property in suit as an heir under the Hindu law so does the defendant also." They also asserted that the plaintiff and they had "equal shares in the estate of Ram Charan and Sat Narain Tewari." Paragraph 3 of the written statement filed by them ran as follows :

> In case as alleged by the plaintiff it be proved that the plaintiff is joint and a decree is passed in his favour, a decree may be passed in favour of the plaintiff subject to the rights and share "(of the defendant.)" The plaintiff is entitled only to a 4 pies share and the defendant also to that extent.

The parties to the suit of 1886 entered into a compromise that was embodied in the decree passed in that suit. The relevant portion of the compromise is as follows :

> A one anna share claimed shall remain in possession and occupation of me, Mt. Sheoraji Tewarin defendant. After the death of me, Mt. Sheoraji Tewarin defendant, out of the one anna share aforesaid, 4 pies share shall go to me, Kuber Tewari plaintiff, 4 pies share to me, Sri Kant Ram Tewari defendant, and 4 pies share to us, Basudeo Ram Tewari and Ram Deo Ram Tewari, defendants, under S. 32 who shall enter into possession thereof . . . . A decree for future right in respect of 4 pies share may be passed in favour of the plaintiff in terms of this compromise.

It is not disputed that the plaintiff in the present litigation, who is the son of Kuber Nath, is in possession of a 4 pies share out of the share of Sat Narain, and the present dispute is only with respect to 8 pies share that is recorded in the name of the defendants. In dealing with the question whether the compromise of 1887 was operative as a family settlement, the learned Judge of this Court made the following observation :

> I have already set out the exact nature of the dispute between the parties in the litigation of 1886. In that suit the widow's estate was never disputed by the plaintiffs and that they never set up any paramount title of their own in preference to that of the widow. All that they claimed was that the defendant may not be allowed to prejudice their future rights by transferring the property to her daughter-in-law. This they were entitled to do as expectant reversioners. That litigation in no way entitled the collaterals to partition the property then and there. That was not a matter arising out of the issues involved in the suit and was an independent matter affecting the collaterals inter se and in no way concerned the widow. In my opinion therefore the partition of the property cannot be accepted as binding on the reversioner who in fact succeeded to the property upon the death of the widow.

Observations to this effect were made by a Full Bench of this Court in 1936 A L J 659[1] and the learned Judge in holding that the compromise of 1887 did not amount to a family settlement followed that decision. We have considered the Full Bench case just referred to and consider that that case has no application to the case before us. In the Full Bench case a Hindu died before 1926, leaving two widows, a step mother, a sister,

1. ('36) 23 A I R 1936 All 507 : 163 I C 756 : 1936 A L J 659 : 58 All 1041 (F B), Mt. Rajpali Kunwar v. Surju Rai.

sister's son, and three male collaterals, the latter being, as the law stood at the time, then the nearest reversioners to the estate. There were some disputes in the family which were settled in 1927 by an agreement under which a portion of the estate was given to the reversioners absolutely, and the remainder was left in possession of the widows for life. The sister was no party to the agreement. After the passing of Act 2 of 1929, which entitled a sister to succession, the sister brought a suit for a declaration that the agreement would not be binding on the actual reversioners to the estate. It was held by the Full Bench that the plaintiff as sister had a reversionary right in the estate, and that as under the agreement the then presumptive reversioners had virtually partitioned the estate for their own benefit, they were not acting in a representative capacity and the agreement would not be binding on the actual reversioners.

It would be noted that, at the time the compromise that formed the subject of consideration by the Full Bench was entered into, the sister had not the shadow of a right to the property of the deceased. The sister's right came into existence by the passing of Act 2 of 1929. The sister was no party to the compromise and none of the parties to that compromise could be said to represent her. It was, therefore, obvious that she could not be held bound by the compromise. In the case before us the facts are essentially different. All the persons who could have a claim either in praesenti or in future to the property of Sat Narain were parties to the litigation of 1886. Kuber Nath claimed to be entitled to the entire property on the death of Mt. Maina. Mt. Sheoraji claimed to be entitled to the possession of the property in dispute for her lifetime on the allegation that Sat Narain was the last male holder of the property. Sri Kant and the sons of Ram Govind claimed to be equally entitled with Kuber Nath to the property in dispute on the allegation that Sat Narain died as a member of a joint Hindu family. The questions at issue between the parties in that litigation were, therefore: (1) whether Ram Charan or Sat Narain was the last male holder of the property in dispute, and (2) whether Ram Charan and Sat Narain died as members of a joint Hindu family with Kuber Nath, Sri Kant and others?

So far as the latter question was concerned, it was directly and substantially in issue between Kuber Nath on the one hand and Sri Kant, Ramdeo and Basdeo on the other, and on the determination of that question depended the answer to the question whether Kuber Nath alone, as alleged by him, would be solely entitled to the properties of Ram Charan or Sat Narain. It was in this state of controversy that the compromise was arrived at. All the adult male members of the family including the two widows were parties to that compromise. By the compromise an existing dispute that threatened the peace and harmony of the family was set at rest. By the compromise the shares of the branches of each of the three sons of Sheo Ratan were specified. In these circumstances there is no escape from the conclusion that the compromise of 1887 was in the nature of a family arrangement. Ram Lakhan, the plaintiff-respondent before us, is the son of Kuber Nath and Kuber Nath must, in the absence of evidence to the contrary, be presumed to have entered into the compromise as representing himself and his son Ram Lakhan. Ram Lakhan is therefore bound by the family settlement. It was contended on behalf of the plaintiff before the learned Judge that the compromise not having been registered, could not be admitted in evidence. This contention of the plaintiff was overruled by the learned Judge and in our judgment rightly. The compromise was with respect to the property in dispute in the suit and, as it was embodied in the decree, it was exempt from registration in view of the provisions of S. 17, sub-s. (2) (vi), Registration Act, which provides that

> any decree or order of Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit are exempt from the operation of cls. (b) and (c) of sub-s. (1).

For the reasons given above we allow this appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

K.S./R.K. *Appeal allowed.*

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(29) A. I. R. 1942 Allahabad 14

YORKE J.

Raja Ram and another—*Decree-holders* — *Appellants*

v.

Mohd. Taqi Khan and another — *Judgment-debtors* — *Respondents.*

Exn. Second Appeal No. 515 of 1940, Decided on 25th August 1941, from decision of Dist. Judge, Farrukhabad, D/- 5th January 1940.

(a) Civil P. C. (1908), Ss. 144 and 151—Court can grant restitution apart from S. 144 under section 151.

The provisions of S. 144 are not exhaustive and
a the Court can grant restitution under S. 151 read with S. 144. [P 16*d*]

(b) Civil P. C. (1908), S. 144 and O. 21, R. 89—Deposit under O. 21, R. 89—Refund of—S. 144 does not apply—Week before sale in execution of decree debtor objecting to execution as time barred and after sale making deposit under O. 21, R. 89 to set aside sale—Court considering question of limitation, dismissing objection and setting aside sale as necessary deposit under O. 21, R. 89 had been made — Debtor's objection on ground of limitation upheld in appeal—Application by debtor under S. 144 for refund of deposit made under O. 21, R. 89 — Money deposited under O. 21, R. 89 cannot be said to be deposited under decree which was affected by appellate order holding execution to
b **be barred—S. 144 does not apply.**

Payment made under O. 21, R. 89 is not an involuntary payment and cannot be treated as made under protest or compulsion: 12 M I A 65 (PC); 7 Cal 648 (PC) and 40 Cal 598 (PC), *Disting.*; ('21) 8 AIR 1921 Bom 169; ('33) 20 AIR 1933 Bom 239; ('30) 17 AIR 1930 Mad 921 and ('35) 22 AIR 1935 Mad 842 (FB), *Rel. on.* [P 18*g*]

An order for refund of money deposited under O. 21, R. 89 is not an order which can be made on an application in restitution. [P 19*b*]

A week before the sale in execution of the decree the debtor raised an objection that the execution was barred by limitation. After the sale, however, the debtor in order to have the sale set aside deposited under O. 21, R. 89 the total amount outstanding and the necessary 5 per cent. for payment
c to the auction purchaser. The Court considered the objection on the ground of limitation and dismissed it and also set aside the sale as the necessary deposit had been made. In appeal the debtor's objection that the execution was barred by limitation having been upheld the debtor applied under S. 144 for refund of the deposit made by him under O. 21, R. 89:

Held that the money deposited under O. 21, R. 89 could not be said to be money deposited under the decree affected by the appellate order holding the execution to be time barred and therefore S. 144 did not apply. [P 16*c*,*d*]

(c) Civil P. C. (1908), O. 21, R. 89—Deposit under O. 21, R. 89—Refund—Suit whether lies *(Quære)*.

Whether a suit lies to recover deposit made
d under O. 21, R. 89. [P 19*a*]

Babu Ram Avasthi — for Appellants.

K. C. Mital — for Respondents.

Judgment. — This is a second execution appeal arising out of an order for restitution under S. 144, Civil P. C. The matter has arisen in the following circumstances. On 28th February 1924 the father of the decree-holders appellants obtained a preliminary decree for sale on a mortgage against Muhammad Taqi Khan and his wife Mt. Rahmat Khatun and other defendants. On 15th November 1926, the sons of Mulchand got a final decree for sale for Rs. 5538-2-11. This decree was put into execution on 6th July 1928, but the application was dismissed the same day. The next application for execution was the one which has given rise to *e* the present appeal. This was made on 25th August 1931 at a date when the application was prima facie time barred, but an extension of limitation was claimed on the ground of certain payments and acknowledgments made by some of the judgment-debtors. At a late stage in the proceedings on 20th May 1932 Muhammad Taqi and some other judgment-debtors filed an objection that the application for execution was barred by limitation. This was made only seven days before the mortgaged property was sold on 27th May 1932. On 25th June 1932 Muham- *f* mad Taqi and his wife Mt. Rahmat Khatun deposited in Court Rs. 3138-10-0, the total amount outstanding with the necessary 5 per cent. for the auction purchaser, and prayed under O. 21, R. 89 that the sale be set aside. Assuming that the amount deposited was sufficient the Court to which this application was made had no option but to set aside the sale and in fact to dismiss the application for execution in full satisfaction of the decree. The execution Court however proceeded with the consideration of the objection on the question of limitation, and on 8th December 1932 it dismissed the *g* objection and it also set aside the sale as the necessary deposit under O. 21, R. 89 had been made. In due course on 23rd December 1932 the decree-holders withdrew from Court the amount deposited for their benefit on 25th June 1932. The judgment-debtors, respondents in the present appeal, appealed against the order dismissing the objection relating to limitation and this appeal was dismissed by the District Judge on 6th October 1933. A second appeal was filed in this Court and the matter came ultimately before a Full Bench which held that so far as the application for execution was made *h* against Md. Taqi Khan and Mt. Rahmat Khatun it was barred by limitation. The decision is reported in 1936 A L J 1140,[1] in which it was held that an acknowledgment by payment was good only against the persons who made the acknowledgment and not against other judgment-debtors.

On 11th August 1939 Md. Taqi and Mt. Rahmat Khatun made an application for restitution under S. 144, Civil P. C., in respect of the amount deposited by them under O. 21, R. 89. This application was opposed, but on 2nd September 1939 the executing

1.('36) 23 A I R 1936 All 820 :'166 I C 106 : 1936 A L J 1140 : I L R (1937) All 272 (F B), Mahomed Taqi Khan v. Raja Ram.

Court, that is the Civil Judge, made an order for restitution and for refund of Rs. 3138-10-0 plus Rs. 1341 interest. Against this decision the decree holders appealed to the District Judge of Farrukhabad who allowed the appeal in part only, ordering the refund to Md. Taqi and Mt. Rahmat Khatun not of the whole amount paid by them but only of their proportionate share with interest calculated on that proportion. Hence the present appeal. The first point which is taken by learned counsel for the appellants is that S. 144 has no application and therefore if this refund was ordered as it purports to have been ordered, under S. 144, the order must be set aside. Section 144, Civil P. C., provides that :

(1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-s. (1).

Now the position in the present case is clearly this. The decree which was reversed ultimately in appeal was the decree dismissing the objection that the application for execution was barred by limitation. The money deposited by the respondents Md. Taqi Khan and Mt. Rahmat Khatun was certainly not money deposited under the decree which was affected by the order ultimately holding the execution application to have been barred by limitation as against Md. Taqi Khan and Mt. Rahmat Khatun. The money was deposited in Court specifically under the provisions of O. 21, R. 89 long prior to the decision on the question of limitation. Prima facie, therefore this was not a case to which S. 144 was applicable. It is conceded that the provisions of S. 144 are not exhaustive and that a Court may make such an order under S. 151, Civil P. C., read with S. 144, but it is clear that that was not what was done in the present case. What the lower appellate Court has done is to make a kind of obiter dictum by saying :

The applicants clearly deposited the money in order to save their shares and as such S. 144, Civil P. C.,clearly relates to the facts of the case.

That is no answer whatever to the proposition that this was not a case in which the right to restitution arose out of a variation of the order under which or as a result of which the payment was made. It follows that prima facie this order of the lower appellate Court was a wrong order which must be set aside. Learned counsel for the appellants has further contended that even if this was a case to which S. 144 was applicable it was not a case in which the money was repayable, and he further pressed the point that in any case as the deposit was made under O. 21, R. 89 that deposit was unconditional and therefore also the money was not repayable. On his second point, his contention was that limitation barred the remedy but not the right. He contended that the debt was still in existence although as a result of the decision of the Full Bench it was no longer possible for the decree-holders to enforce it against the judgment-debtors Md. Taqi and Mt. Rahmat Khatun, his wife. His argument was that this money was paid into Court for the benefit of the decree-holders, and that having been paid into Court for their benefit and having been paid to them, they were entitled to appropriate it to the debt which still subsisted. The proposition of law that the creditor is entitled to appropriate monies received from his debtor towards any subsisting debt of that debtor is not contested. Learned counsel for the appellants has referred to a number of cases, but I do not think that it is necessary to reproduce them or discuss them. That proposition which is prima facie sound was met by the contention that this was an enforced payment and the money therefore was refundable. In this connexion I must refer to certain cases quoted by learned counsel for the respondents which deal with the right of recovery of monies paid under duress. Learned counsel for the respondents relied upon a decision of their Lordships of the Privy Council in 12 M I A 65.[2] In that case

in order to save a family estate about to be sold under a decree of Court made in a suit against one member of the family, other members interested in the property, being entitled to dower charged on the estate, paid the amount decreed into Court to be handed over to the decree-holder under protest of their respective rights in the estate, and subject to a suit to be brought by them to set aside a summary order rejecting a claim to their charge on the estate. The money so deposited was taken out of Court by the decree-holder. In an action to recover back the amount it appeared that the decree-holder had no right to proceed against such part of the estate as belonged to the parties paying

2. ('67-69) 12 M I A 65 : 10 W R 29 : 1 Beng L R 21 : 2 Suther 145 : 2 Sar 380 (PC), Fatima Khatoon v. Mahomed Jan.

the money into Court. Held, that an action would lie against the decree-holder to recover the amount so paid into Court and handed over to him as it was a deposit under protest to prevent an injurious sale.

This case has also been relied upon in connexion with the third point. Reliance was also placed upon another decision of their Lordships of the Privy Council in 7 Cal 648,[3] the headnote runs as follows :

A mortgagee of two separate properties became by purchase the owner of the equity of redemption of one of them, and of this property the value was so proportioned to his payments that the mortgage debt was in effect satisfied. This mortgagee, however, obtained a decree and order in execution for the sale of the other property on which his mortgage was the second. Of the latter property, the plaintiffs, who also represented the first mortgagee, had become purchasers, and they filed objections to the sale. These were disallowed and they thereupon paid into Court money sufficient to satisfy the decree in order to prevent the sale.

Held, that this was not a voluntary payment, nor a payment of money equitably due, but one made under compulsion of law, i. e., under pressure of the execution proceedings.

And held, that this might be recovered in a suit for a money decree, the remedy not being confined to the execution proceedings.

In this case there were two ratios, one was that the payment was not a voluntary payment, the other is not mentioned in the headnote but appears at p. 653 where it is said in reference to defendant 1.

He has therefore received it (the payment of the debt) twice over, and it is obvious that, in such a case, it is inequitable that he should hold the money paid to him, under compulsion, by the respondents.

Their Lordships remarked at the close of the judgment:

On the whole case, they agree with the Courts below though not altogether on the same grounds, that the plaintiffs are entitled to succeed in the action.

No doubt this also is a case of payment held to be payment under compulsion and the plaintiffs' debtors were held to be entitled to recover their money by means of a suit, but it is questionable whether the fact of compulsion was the main, much less the sole ratio. A third decision of their Lordships reported in 40 Cal 598,[4] has also been relied upon. This was a case in which the defendants had attached property belonging to a third party. The third party was compelled, in view of the loss to which he would be subjected by the continuance of the attachment and the long time which might elapse before he could obtain an order setting aside the attachment, to pay the amount due to the defendant under the decree into Court under protest. In a suit brought for the return of the money so paid, and damages for the alleged illegal acts of the defendant, the defence inter alia was that the suit as framed would not lie, and the case was argued on a preliminary issue, the proceedings being in the nature of a demurrer. It was held (reversing the decision of the Courts in India) that the plaintiff was entitled to recover the money so paid as being an involuntary payment produced by coercion, namely the wrongful interference of the defendant with his full and free enjoyment of his own property. It was further said in the headnote :

The greater or less probability of a sale taking place did not affect the ratio decidendi in that case (i. e., 7 Cal 648[3] referred to above) which is that the payment was made under the force of the execution proceedings, and that in India, as in England, such a payment is regarded by the law as being made under compulsion.

Their Lordships further remarked that the fact that another procedure was open to the plaintiff if he had chosen to adopt it, in no way interfered with his right to take any other lawful alternative. I think it would be difficult to say that the payments in any of these cases were payments made under O. 21, R. 89. It certainly does not appear from the reports that that was so. They were amounts certainly paid into Court under what was held to be legal compulsion in order to avert a sale, and doubtless in the present case the judgment-debtors Muhammad Taqi Khan and Mt. Rahamat Khatun might have made a payment into Court accompanied by an application for a stay of the sale or a stay of confirmation of the sale. They have however chosen in stead to wait till the last moment and to make their application under O. 21, R. 89. Learned counsel for the respondents treated all these cases as if they were cases of applications under O. 21, R. 89 and as if an application under that rule could be treated as an application made under compulsion. On the other hand, reliance has been placed for the appellants on a number of decisions in which it has been held that an application under O. 21, R. 89 is a matter which is at the option of the applicant, that such an application is and must be unconditional and that the money cannot be deposited under protest. It is an application of a very special kind leading, if it is sufficient to comply with the requirements of the decree, to the immediate setting aside of the sale. In this connexion

3. ('81) 7 Cal 648 : 8 I A 93 : 4 Sar 245 : 3 Suther 734 (PC), Dulichand v. Ramkishen Singh.
4. ('13) 40 Cal 598 : 18 I C 949 : 40 I A 56 : 17 C L J 478 : 17 C W N 541 (P C), Kanhaya Lal v. National Bank of India Ltd.

reference has been made to a number of cases. The first is 45 Bom 1094.[5] The headnote runs as follows :

In execution of a decree obtained by the defendant against a third party, the property was sold and purchased by the defendant. The plaintiff who claimed to be the owner of the property protested against the sale and ultimately got it set aside under O. 21, R. 89, Civil P. C., by paying into Court the decretal amount and five per cent. of the purchase money. The amount being given to the defendant decree-holder and auction purchaser the plaintiff sued to get it refunded as having been involuntarily paid :

Held, dismissing the suit, that under the terms of O. 21, R. 89, the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no b suit could lie for its recovery.

The headnote reproduced remarks of both the learned Judges who decided the case. It was held by MacLeod C. J. :

It seems to me that when it is expressly provided that the money (sc. paid into Court under O. 21, R. 89) should be paid in for a particular purpose, such money could not be treated as assets held by a Court.

Per Shah J. :

When an application to set aside the sale is made under O. 21, R. 89, and the amount required by the rule is deposited, it is obligatory upon the Court to set aside the sale, as provided by R. 92, sub-r. (2). The result of setting aside the sale is generally speaking in favour of the judgment-debtor. This result can be ensured by any person interested in c the property by satisfying the claims of the decree-holder and auction purchaser according to the provisions of the rule. I do not see how a person can be allowed to go back upon his own act and to claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside.

That is they took the view that an application made specifically under this rule must be taken to be a voluntary and an unconditional application and could give no right to a refund. This view was followed in 57 Bom 601[6] in which it was held with reference to a deposit made under O. 21, R. 89 that :

The plaintiffs were not entitled to recover the amount from defendant 1 since the amount must be taken to have been deposited for payment to d defendant 1 voluntarily and unconditionally and that the plaintiffs could not claim the amount back from the defendant after the plaintiffs had secured the benefit of having the sale set aside.

The same view has been taken by the Madras High Court in several cases. The first relied upon is a single Judge case 53 Mad 943.[7] The headnote runs as follows :

Where a person other than the judgment-debtor entitled to apply under O. 21, R. 89, Civil P. C., to set aside a sale in execution of a decree, applies and pays the amount specified in the rule, the Court has no jurisdiction to direct the decree-holder to execute a security bond for repayment of the amount to the applicant in the event of the latter succeeding in a suit instituted by him to establish his right to the property sold in execution.

The point was dealt with on p. 947 where the learned Judge discussed the object and scope of O. 21, R. 89. He remarked :

The Code in various sections lays down in what circumstances a judgment-debtor may contest the sale of his property. Similarly there are sections under which a person claiming adversely to a judgment-debtor may object to attachment and sale. But O. 21, R. 89 enacts a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property, the decree-holder's claim is satisfied and the auction purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Clause 2 of R. 89 enacts.

Where a person applies under R. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree debt.

It follows that such a payment which purports to be and is made under O. 21, R. 89 cannot be a payment which is made under protest or compulsion. This case was considered and approved in 58 Mad 972,[8] in which the learned Chief Justice discussed the Privy Council case in 40 Cal 598[4] and agreed that that case was a case of an owner of property in possession of it being dispossessed and making an involuntary payment to prevent h dispossession. He went on to discuss the difference between such cases and cases of deposit under O. 21, R. 89 and about these he remarked :

The deposit is made on the footing that there has been a valid sale and is made in satisfaction of the decree. In my view the reported cases where claimants made payments to avert sales of property and the payments were therefore payments made under coercion are of no real assistance in this case,

the case he was dealing with being one of a payment under O. 21, R. 89. He went on :

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5. ('21) 8 A I R 1921 Bom 169 : 62 I C 104 : 45 Bom 1094 : 23 Bom L R 455, Narayan Vasudevacharya v. Amgauda Malagauda.

6. ('33) 20 A I R 1933 Bom 239 : 148 I C 74 : 57 Bom 601 : 35 Bom L R 462, Shankarrao Keshavrao v. Vadhilal Mulchand.

7. ('30) 17 A I R 1930 Mad 921 : 128 I C 509 : 53 Mad 943 : 59 M L J 893, Kummakutty v. Neelakandan Nambudri.

8. ('35) 22 A I R 1935 Mad 842 : 158 I C 207 : 58 Mad 972 : 69 M L J 349 (F B), Krishna Ayyar v. Arunachalam Chettiar.

The judgment-debtor or a person interested in the property cannot attach any condition to his deposit under O. 21, R. 89, and the Court cannot accept the deposit subject to any condition or protest. Once the proper amount has been deposited in time by the person entitled to make the application, the Court has no option but at once to make the order setting aside the sale.

In my judgment there can be no question of an application for restitution of a deposit which is made under the provisions of O. 21, R. 89, and I accordingly doubt whether it will be found open to the present respondents to recover their money even if they should think fit to proceed by a suit, that is, assuming that a suit for the purpose is not time-barred. On all counts it appears to me that the order of the lower appellate Court is a wrong order. Such an order was not justified by the provisions of S. 144 and in any case an order for refund of money deposited under O. 21, R. 89 is not an order which can be made on an application in restitution and probably not one which can be made even in a suit. I accordingly allow this appeal with costs, set aside the order of the lower appellate Court and direct that the application for restitution be dismissed entirely. The appellants will be entitled to their costs in the two Courts below as well. Leave for Letters Patent appeal is granted.

G.N./R.K. *Appeal allowed.*

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(29) A. I. R. 1942 Allahabad 19
FULL BENCH

IQBAL AHMAD C. J., BRAUND AND DAR JJ.

Shri Nath — Applicant

v.

Puran Mal and another —

Opposite Party.

Civil Revn. Appln. No. 353 of 1938, Decided on 4th October 1941, against order of Civil Judge, Etawah, D/- 23rd April 1938.

(a) Interpretation of statutes — Particular word in Act—Meaning (Per *Iqbal Ahmad C. J.*).

The Legislature is to be deemed to have used a particular word in an enactment in one and the same sense unless the contrary intention appears from the context. [P 22*h*]

(b) U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (2) Proviso 1 and Expl. 2 — Proviso 1 and Expl. 2 to S. 2 (2) are independent and exclusive — Word "person" in S. 2 (2) Proviso 1 and Expl. 2 — Meaning of — Joint Hindu family — Family land entered in revenue papers in name of one or more members—Every member must be deemed to be agriculturist for purposes of sections and chapters mentioned in S. 2 (2) Proviso 1: I L R (1938) All 19=('38) 25 AIR 1938 All 12=172 I C 951, *OVERRULED (Per Full Bench).*

Proviso 1 and Expl. 2 to S. 2 (2) are independent and exclusive of each other. Explanation 2 to S. 2 (2) is merely explanatory of cls. (a) to (g) of S. 2 (2) and does not in any way control or abridge the scope of Proviso 1 to Sec. 2 (2). The word 'person' in S. 2 (2), Expl. 2 and Proviso 1 has the same meaning, namely an individual human being. Each male member of a joint Hindu family, though a competent part of that family, retains his individuality and is therefore a 'person' within the meaning of the proviso. The net result of Proviso 1 and Expl. 2 to S. 2 (2) is that every member of a joint Hindu family is to be deemed to be an agriculturist for the purposes of the sections and chapters mentioned in the proviso irrespective of the amount of the revenue, rent or local rate paid by him or the family or the area of land held by him or the family notwithstanding that the land of the family is entered in the revenue records only in the name or names of one or more of the other members of the family. Whereas for the purposes of the rest of the sections and chapters of the Act a member of a joint Hindu family is to be deemed to be an agriculturist within the meaning of the Act only if on apportionment and ascertainment of his individual share of the revenue, local rate, rent or land, the limit provided for by cls. (a) to (g) of S. 2 (2) is not exceeded : I L R (1938) All 19=('38) 25 AIR 1938 All 12=172 I C 951, *OVERRULED*; ('37) 24 A I R 1937 All 633; ('38) 25 A I R 1938 All 128; ('39) 26 A I R 1939 All 391 and ('41) 28 A I R 1941 Oudh 121, *Approved*. [P 22*h*; P 23*a*, *c*, *d*, *e*]

(c) Interpretation of statutes — Words used clear and unambiguous — Court should not abridge effect of words by considerations of inconvenience resulting from multiplicity of proceedings (Per *Iqbal Ahmad C. J.*).

Where the words used by the Legislature are clear and of unambiguous import, it is not permissible for a Court of law to attempt to abridge the effect of those words by considerations of inconvenience resulting from multiplicity of proceedings in Court. It is the duty of the Court to adhere to the literal meaning of the words used and to give decisions accordingly. [P 24*d*, *e*]

(d) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 5 (1) and 3—S. 5 (1) applies to decrees passed before as well as after Act — Failure to apply for instalments under S. 3 in suit itself does not bar right to claim instalments under S. 5 *(Per Full Bench).*

The words "at any time" and the sentence "whether before or after this Act comes into force" in S. 5 are decisive that the power given to the Court by S. 5 (1) is not controlled by any limit of time and is exercisable with respect to all decrees for money, etc., whether passed before or after the Act. The power given by the section to fix instalments, far from being controlled by any words in the section, is made unrestricted in its scope by the opening words in the section which are "notwithstanding anything contained in the Code of Civil Procedure, 1908." Consequently, the omission of an 'agriculturist' defendant to ask for instalments at the time of passing of decree in a suit brought after the commencement of the Act does not bar him from claiming the relief provided for by S. 5 (1) on the principle of res judicata. The Legislature in its discretion has given to an 'agriculturist' double opportunity of claiming instalments in the case of decrees passed after the Act came into force. [P 24*b*, *c*, *d*]

(e) U. P. Agriculturists' Relief Act (27 of 1934), S. 30 (2)—Word 'already' in S. 30 (2)—

Meaning — S. 30 (2) applies only to decrees passed before Act came into force (Per *Full Bench*) : I L R (1937) All 403=('37) 24 A I R 1937 All 96=167 I C 168 ; I L R (1937) All 943=('37) 24 A I R 1937 All 753=172 I C 224 and I L R (1938) All 305=('38) 25 A I R 1938 All 153=174 I C 659, *OVERRULED*.

In the absence of some compelling indication to the contrary, an adverb of time has reference to the present and, in relation to a statute, to the time from which the statute speaks. Where a statute says that if a thing has already been done or if a fact has already taken place and there is nothing to show in the Act as to the point of time to which "already" refers, the presumption should be that a thing should be done and the fact should come into existence before the Act came into force: (1906) 2 Ch D 270, *Rel. on.* [P 29*e*,*f* ; P 34*b*]

The word 'already' in S. 30 (2) refers to the date on which the Act came into force and not to the date on which the application of the judgment-debtor for reduction of interest is filed. Consequently, S. 30 (2) is confined in its operation only to decrees passed before the Act came into force. Section 30 (2) does not abrogate the doctrine of res judicata : ('40) 27 A I R 1940 Oudh 251 (FB), *Rel. on* ; I L R (1937) All 403=('37) 24 A I R 1937 All 96=167 I C 168 ; I L R (1937) All 943=('37) 24 A I R 1937 All 753=172 I C 224 and I L R (1938) All 305=('38) 25 A I R 1938 All 153=174 I C 659, *OVERRULED*. [P 25*d*,*g* ; P 26*a*]

(f) Interpretation of statutes—Marginal note (Per *Dar J.*).

The marginal note to a section cannot be taken into account in construing the section. [P 34*d*]

(g) U. P. Agriculturists' Relief Act (27 of 1934), S. 4 (1)—Principle under S. 11 and O. 20, R. 3, Civil P. C.—Applicability (Per *Dar J.*).

Principles of res judicata apply in civil litigation to cases where in terms S. 11 does not apply but the U. P. Agriculturists' Relief Act is a special Act dealing with a special jurisdiction enacted for the relief of agriculturists. Section 11 or O. 20, R. 3, Civil P. C., which forbids the alteration of a judgment after it is signed cannot be applied to proceedings under S. 4 (1) when the whole of the Civil Procedure Code is excluded by S. 4. Nor can the rule of res judicata and the rule about the amendment of judgment and decree on general principles be applied to their full extent in matters arising between a creditor and an agriculturist under the U. P. Agriculturists' Relief Act. [P 35*a*,*b*,*c*]

(h) U. P. Agriculturists' Relief Act (27 of 1934), S. 4 (1)—S. 4 (1) is mandatory—Ex parte decree after Act—Court inadvertently awarding future interest in excess of that permitted by S. 4 (1) — Court has inherent jurisdiction to rectify mistake and bring decree in conformity with S. 4 (1)—Decree after Act — Application under S. 5—Court can also set right excessive interest on agriculturist's application under S. 4 (1) (Per *Iqbal Ahmad C. J., and Dar J.*).

Section 4 (1) is mandatory and it is not permissible for the Court to award future interest as against an agriculturist in violation thereof. Where in an ex parte decree the Court inadvertently awards future interest in excess of that permitted by S. 4 (1) the Court has inherent jurisdiction to rectify the mistake and bring its decree in conformity with S. 4 (1). [P 26*b*]

Where an application is made by an agriculturist for converting a decree, passed after the Act came into force, under S. 5 into an instalment decree, if it appears to the Court that the interest awarded under the decree offends against S. 4, it is open to the Court at the application of an agriculturist to set right the excessive interest in the decree. [P 35*f*]

(i) U. P. Agriculturists' Relief Act (27 of 1934), S. 28—Applicability—Decree passed after Act when can be reopened—Res judicata (Per *Dar J.*).

In cases under S. 28, where the status of the debtor whether he is an agriculturist or not, itself may be in dispute, and where the proper rate of interest may also be in dispute the principle of res judicata should be applied and a decree once passed on a loan taken after the Act should not be reopened unless the bar of res judicata can be got rid of. [P 35*e*]

Baleshwari Prasad — for Applicant.

N. C. Vaish — for Opposite Party.

ORDER OF REFERENCE

Iqbal Ahmad and Verma JJ.—The facts which are material for our present purpose are these : The applicant, Shri Nath, is a member of a joint Hindu family with his father, Rustam Singh. The family has got ancestral zamindari property, but it is entered in the revenue records in the name of Rustam Singh alone. Shri Nath and his wife, Mt. Harbansi Kuar, borrowed money from Puran Mal on two different occasions and executed promissory notes in Puran Mal's favour on 7th July 1934 and 26th November 1934. On 9th April 1936, that is, after the U. P. Agriculturists' Relief Act (27 of 1934) had come into force, Puran Mal brought a suit against Shri Nath and Mt. Harbansi Kuar for the recovery of the money due under the promissory notes mentioned above. The defendants did not appear and an ex parte decree was passed in favour of Puran Mal on 8th July 1936. On 5th October 1936, an application was made on behalf of Mt. Harbansi Kuar and Shri Nath alleging that they were "agriculturists" and praying for reduction of interest in accordance with Ss. 4 and 30 and for the fixing of instalments in accordance with S. 5 of the Act. The application was opposed by the decree-holder Puran Mal. The judgment-debtors applicants did not appear on the date fixed for the hearing of their application and the Court dismissed it for want of prosecution on 17th July 1937. Thereupon a fresh application for the same reliefs, and couched almost in identical language, was filed by the judgment-debtors on 17th September 1937. This application was also opposed by the decree-holder Puran Mal. The Court below has dismissed that application by its order dated 23rd April 1938, and the present application for revision by Shri Nath is

directed against that order. The grounds on which the Court below has decided against the judgment-debtors are these. The Court has held that, as Shri Nath's name does not appear against any zamindari property or tenancy land in the revenue records, he cannot be deemed to be an "agriculturist" within the meaning of the Act. The Court did hold that Shri Nath's father Rustam Singh was an "agriculturist" within the meaning of that expression in the Act and that Shri Nath was a member of a joint Hindu family with his father, and the correctness of that finding has not been challenged on behalf of the respondent decree-holder before us. The Court, however, was of opinion that that could not entitle Shri Nath to the benefits conferred on "agriculturists" by the Act. The Court further referred to Expln. 2 to S. 2 (2) of the Act and held that S. 5 was "excluded" and that consequently Shri Nath could not claim instalments. On the question of reduction of interest, the Court appears to have held that Mt. Harbansi Kuar was an "agriculturist," but that, as she had joined her husband Shri Nath, a non-agriculturist, in the transaction of loan, she also was not entitled to claim any benefit under the Act. The fact that Mt. Harbansi Kuar is an "agriculturist" is also not denied before us on behalf of the respondent decree-holder.

The first question that arises for consideration is whether the view taken by the Court below, that Shri Nath, although he is a member of a joint Hindu family with his father, who is an "agriculturist," cannot be deemed to be an "agriculturist," is correct. Learned counsel for the applicant refers to the cases in 1937 A L J 1367[1] and 1939 A L J 233.[2] Neither of these two cases is exactly in point. Learned counsel for the respondent decree-holder refers to the case in 1937 A L J 970.[3] This case does support the view taken by the Court below. It seems to us, however, that the attention of the learned Judges who decided that case was apparently not drawn to proviso 1 to S. 2 (2) of the Act. In our opinion, the proviso just mentioned has an important bearing on the interpretation of the words "except Ss. 3, 4, 5 and 8" in Expln. 2. It may be noted that the respondent in the case in 1937 A L J 970[3] did not appear and the case was heard ex parte. The learned single Judge who has referred this case to a Bench has expressed the opinion that there appears to be a conflict between the decisions in 1937 A L J 1367[1] and 1937 A L J 970.[3]

The second question that has arisen is this. Learned counsel for the respondent decree-holder argues that, the suit having been brought after the Act had come into force, the defendants should have asked for instalments in the suit itself in accordance with the provisions of S. 3 of the Act, and that, as they did not do so, they were not entitled to present an application under S. 5. It is urged that S. 5 must be confined in its operation to two classes of decrees, viz., (1) decrees passed before the Act came into force, and (2) decrees passed after the Act came into force in suits which were pending on the date when the Act came into force. In other words, the argument is that a judgment-debtor has no right to present an application under S. 5 with respect to decrees passed in suits which were instituted after the Act had come into force.

The third point that has arisen is with regard to the prayer of the judgment-debtors for the reduction of interest under S. 30 of the Act. Learned counsel for the decree-holder respondent has argued that relief under sub-s. (2) of S. 30 cannot be claimed with respect to decrees passed after the Act had come into force. In support of this contention reliance has been placed on a Full Bench decision of the Chief Court at Lucknow in 187 I C 856.[4] Learned counsel for the applicant has, on the other hand, relied on the decisions of this Court in I L R (1937) ALL 403,[5] I L R (1937) ALL 943[6] and I L R (1938) ALL 305.[7] The view taken by the Full Bench of the Chief Court at Lucknow is diametrically opposed to the view taken in the decisions of this Court just referred to. The questions mentioned above are of considerable importance and are likely to arise frequently. There is also the conflict of judicial opinion indicated above. We consider it de-

1. ('38) 25 A I R 1938 All 128: 174 I C 66: 1937 A L J 1367, Kedar Prasad v. Suraj Narain Sinha.
2. ('39) 26 A I R 1939 All 391: 187 I C 249: I L R (1939) All 431: 1939 A L J 233, Bangali Mal v. Bansidhar.
3. ('38) 25 A I R 1938 All 12: 172 I C 951 : ILR (1938) All 19: 1937 A L J 970, Allahabad Bank Ltd., Meerut v. Prakash Nath.
4. ('40) 27 AIR 1940 Oudh 251 : 187 I C 856 : 15 Luck 477 : 1940 O W N 403 (F B), Kazim Husain v. Mt. Mangala Devi.
5. ('37) 24 A I R 1937 All 96 : 167 I C 168 : I L R (1937) All 403 : 1936 A L J 1309, Baryar Singh v. Ram Dularey.
6. ('37) 24 AIR 1937 All 753 : 172 I C 224 : I L R (1937) All 943 : 1937 A L J 842, Narain Singh v. Banke Behari Lal.
7. ('38) 25 AIR 1938 All 153 : 174 I C 659 : I L R (1938) All 305 : 1938 A L J 107, Abdul Noor v. Brijmohan Saran.

sirable, therefore, that the case should be heard and decided by a larger Bench. We accordingly direct that the papers be laid before the Honourable the Chief Justice for the constitution of a Full Bench.

Order of Full Bench

Iqbal Ahmad C. J.—The answers to the questions of law that arise for decision in the present application in revision depend on the interpretation of certain provisions of the U. P. Agriculturists' Relief Act (27 of 1934) and on two out of the three questions that fall to be decided there is divergence of judicial opinion. The facts that give rise to those questions are no longer in controversy and are as follows: Shri Nath, the applicant before us, is a member of joint Hindu family with his father Rustam Singh. The family is possessed of ancestral zamindari property which is entered in the revenue papers in the name of Rustam Singh alone. Shri Nath and his wife Mt. Harbansi borrowed money from Puran Mal, the opposite party in the present revision, on two promissory notes dated 7th July 1934 and 26th November 1934. After the U. P. Agriculturists' Relief Act had come into force, Puran Mal brought a suit against Shri Nath and Mt. Harbansi for recovery of the money due on the two promissory notes and obtained ex parte decree on 8th July 1936. Thereafter, on 5th October 1936, Shri Nath and Mt. Harbansi filed an application alleging that they were agriculturists and prayed for reduction of interest in accordance with Ss. 4 and 30 and for the fixing of instalments in accordance with S. 5 of the Act. Puran Mal contested the application and the same was dismissed for want of prosecution by the applicants on 17th July 1937.

Shri Nath and Mt. Harbansi then filed a second application for the same reliefs on 17th September 1937. This application was also opposed by Puran Mal. The Court below dismissed the application. It held that even though Rustam Singh was an "agriculturist" as defined by the Act and Shri Nath was a member of joint Hindu family with him, Shri Nath could not be deemed to be an "agriculturist" as his name was not recorded against any zamindari property or tenancy land in the revenue papers. It therefore concluded that Shri Nath was not entitled to the benefits conferred on "agriculturist" by the Act. It then referred to Explanation 2 of S. 2 (2) of the Act and held that as "S. 5 is excluded" Shri Nath could not claim instalments. It found that Mt. Harbansi was an 'agriculturist' but it held that as she had joined her husband Shri Nath, a non-agriculturist, in the transaction of loan, she also was not entitled to claim the benefits conferred by Ss. 4, 5 and 30 of the Act on 'agriculturists.'

The questions that have been argued before us and arise for decision are: (1) Whether the view of the Court below, that Shri Nath, although he is a member of a joint Hindu family with his father, who is an agriculturist cannot be deemed to be an 'agriculturist' is correct? (2) Whether the omission of Shri Nath and Mt. Harbansi to ask for the fixing of instalments in the suit itself, which was filed after the Agriculturists' Relief Act had come into force, in accordance with the provisions of S. 3 of the Act, disentitled them to present an application under S. 5 of the Act? (3) Whether relief by way of reduction of interest under sub-s. (2) of S. 30 can be allowed with respect to decrees passed after the Act had come into force? In the consideration of the questions formulated above the object of and the scheme underlying the Agriculturists' Relief Act must be kept in view. The Act was passed with the object of giving relief to agriculturists from indebtedness and it is divided into six chapters. Chapter 1 is "preliminary" and consists of interpretation clauses. Chapter 2 makes provision with respect to fixing of instalments, future interest, mode of execution and forum of suits. Chapter 3 deals with mortgages and their redemption. Chapter 4 makes provision about rates of interest and Chap. 5 enjoins about the maintenance of accounts by creditors. Chapter 6 incorporates miscellaneous. Now, so far as the first question is concerned, it does not, to my mind, present any difficulty. By cls. (a) to (g) of S. 2 (2) 'agriculturist' is defined as a person who "pays" land revenue, local rates or rent or "holds" land not exceeding a certain limit. Then follows the Proviso 1 which runs as follows:

> Provided that in Ss. 2 (10) (a), 3, 4, 5, 8 and Chaps. 4 and 5 an agriculturist means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section, if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted.

It is a well-recognized canon of interpretation of statutes that the Legislature is to be deemed to have used a particular word in an enactment in one and the same sense unless the contrary intention appears from the context. It cannot, I consider, be doubted that the word "person" in S. 2 (2) has been used to denote an individual human

being. The same meaning must therefore be attached to the word "person" used in the proviso quoted above. Each male member of a joint Hindu family, though a competent part of that family, retains his individuality and is therefore a "person" within the meaning of the proviso. It follows that for the purposes of sections and chapters mentioned in the proviso every individual member of a joint Hindu family is to be regarded as an 'agriculturist' within the meaning of the Act irrespective of the amount of land revenue, local rates, rent and area paid or held by the family. In other words, every member of a joint Hindu family is entitled to avail himself of the benefits conferred by the sections and chapters mentioned in the proviso provided that that member belongs "to a class of persons mentioned in" cls. (a) to (g) of S. 2 (2). It would however be noted that the proviso embraces only some of the sections and chapters of the Act and makes no provision about the rest of the sections and chapters. It was therefore necessary for the Legislature to elucidate the position of members of a joint Hindu family or joint owners or tenants with reference to the sections and chapters that do not fall within the purview of the proviso. This the Legislature did by enacting Expln. 2. The proviso and Expln. 2 in between themselves exhaust all the provisions contained in chaps. 2 to 6 of the Act. Explanation 2 is as follows :

> In the case of members of a joint Hindu family or joint owners or joint tenants, each member or owner or tenant shall be considered to be an agriculturist for the purposes of Chaps. 2 (except Ss. 3, 4, 5 and 8) 3 and 6, whose share or interest in revenue, local rate or rent or the rent-free land, as the case may be, does not respectively exceed the aforesaid limits.

The net result of the proviso and Expln. 2 is that every member of a joint Hindu family is to be deemed to be an agriculturist for the purposes of the sections and chapters mentioned in the proviso irrespective of the amount of the revenue, rent or local rate paid by him or the family or the area of land held by him or the family. Whereas for the purposes of the rest of the sections and chapters of the Act a member of a joint Hindu family is to be deemed to be an agriculturist within the meaning of the Act only if on apportionment and ascertainment of his individual share of the revenue, local rate, rent or land, the limit provided for by cls. (a) to (g) of S. 2 (2) is not exceeded. In short, the proviso and the explanation are independent and exclusive of each other. The explanation is merely explanatory of cls. (a) to (g) of S. 2 (2) and does not in any way control or abridge the scope of the proviso. The view that I take is in consonance with the decisions in 1937 A L J 680,[8] 1937 A L J 1367,[1] 1939 A L J 233[2] and A I R 1941 Oudh 121.[9]

In the case before us, we are concerned with the prayers contained in the application of Shri Nath for the fixing of instalments in accordance with S. 5 and reduction of interest in accordance with Ss. 4 and 30 (2) of the Act. These sections come within the purview of proviso 1 to S. 2 and, therefore, Shri Nath must for the purposes of these sections, be deemed to be an agriculturist irrespective of the amount of the revenue, etc., paid by his family or the land held by it. But, as stated before, the Court below, held that, as Shri Nath's name was not recorded in the revenue papers as against any of the zamindari property or the tenancy land belonging to the family, he could not be deemed to be an agriculturist. This view of the Court below is supported by the decision of this Court in 1937 A L J 970.[3] It was held in that case that for the purposes of applications under S. 5 or applications under Chap. 4, the person recorded as owner or the person paying revenue, etc., is the only person who can apply and that normally such a person in a joint Hindu family would be the karta. I regret I am unable to agree with that decision. I may point out with respect that the learned Judges based their conclusion on the wording of only Explanation 2 and completely overlooked proviso 1 quoted above. They appear to have held that, as S. 5 and Chap. 4 were "expressly excluded in this explanation," a member of a joint Hindu family could not claim the benefit of that section or that chapter. The party against whom the case was decided was not represented by counsel and it appears that the attention of the learned Judges was not drawn to proviso 1.

The Act nowhere provides that in order to be an agriculturist a person's name must be recorded in the revenue papers. On the other hand, a person must be deemed to be an agriculturist if he fulfils the requirements of any of the clauses of S. 2 (2). The name of Shri Nath is no doubt not recorded in the revenue papers, but he as a member of a joint Hindu family with his father, is en-

8. ('37) 24 AIR 1937 All 633 : 171 I C 573 : I L R (1937) All 759: 1937 A L J 680, Sheo Shanker Das v. Mohammad Hasan.
9. ('41) 28 A I R 1941 Oudh 121 : 191 I C 784 : 16 Luck 500 : 1940 O W N 1219, Raza Husain v. Shankery Saran.

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titled to a share in the family property. He is therefore a person who pays revenue or rent and holds land within the meaning of S. 2 (2) of the Act. I therefore hold that he is an "agriculturist." I now proceed to consider the second question formulated above. The answer to that question must, in my view, be in the negative. Section 3 of the Act provides for the fixing of instalments at the time of passing decrees mentioned in the section, whereas S. 5 (1) empowers the Court to fix instalments after the passing of such decrees. The relevant portion of S. 5 (1) is as follows :

Notwithstanding anything contained in the Civil Procedure Code, 1908, the Court shall, unless for reasons to be recorded it directs otherwise at any time, on the application of the judgment-debtor and after notice to the decree-holder, direct that any decree for money or preliminary decree for sale or foreclosure passed by it or by any Court whose business has been transferred to it against an agriculturist whether before or after this Act comes into force, shall be converted into a decree for payment by instalments drawn up in such terms as it thinks fit in accordance with the provisions of S. 3.

The words "at any time" and the sentence "whether before or after this Act comes into force" in the section are important and, in my judgment are decisive of the question under consideration. The power given to the Court by S. 5 (1) is not controlled by any limit of time and is exercisable with respect to all decrees for money, etc., whether passed before or after the Act. The power given by the section to fix instalments, far from being controlled by any words in the section, is made unrestricted in its scope by the opening words in the section which are "Notwithstanding anything contained in the Code of Civil Procedure, 1908." In view of those words, it is, to my mind, impossible to hold that the omission of an 'agriculturist' defendant to ask for instalments at the time of passing of decree bars him from claiming the relief provided for by S. 5 (1) on the principle of res judicata. The Legislature in its discretion thought fit to give to an 'agriculturist' double opportunity of claiming instalments in the case of decrees passed after the Act came into force. The first opportunity is at the time of the passing of decree under S. 3 and the second opportunity is afforded to the agriculturist by S. 5 after the decree has been passed. As the words used by the Legislature in S. 5 (1) are clear and of unambiguous import, it is not permissible for a Court of law to attempt to abridge the effect of those words by considerations of inconvenience resulting from multiplicity of proceedings in Court. It is the duty of the Court to adhere to the literal meaning of the words used and to give decisions accordingly. The conclusion is therefore irresistible that the omission of Shri Nath and Mt. Harbansi to ask for instalments in the suit itself did not disentitle them to pray for the conversion of the decree into an instalment decree in accordance with the provisions of S. 5 (1) of the Act.

It now remains to answer the third question at the inception of this judgment, viz., whether relief by way of reduction of interest under sub-cl. (2) of S. 30 can be allowed with respect to decrees passed after the Act had come into force? On this point, there is divergence of opinion between this Court and the Lucknow Chief Court. This Court in I L R (1937) ALL 403,[5] in I L R (1937) ALL 943[6] and in I L R (1938) ALL 305[7] held that the words "if a decree has already been passed" in S. 30 (2) refer to the date on which the debtor makes his application under S. 30 for reduction of interest and do not relate only to those cases in which decrees have been passed before the Act came into force. The first two cases are single Judge decisions and the last case is a decision by a Bench of two Judges. A Full Bench of the Lucknow Chief Court, on the other hand, in 15 Luck 477,[4] held that the words "if a decree has already been passed" in sub-cl. (2) of S. 30 refer only to decrees passed before that Act came into force.

Sub-clause (2) of S. 30 is not happily worded, but after considering the relevant sections of the Act, I prefer the view taken by the Lucknow Chief Court. Chapter 4 of the Act deals with the 'rates of interest' and consists of four sections, viz., Ss. 28, 29, 30 and 31. By S. 28 provision is made about the rate of interest on loans secured and unsecured taken after the passing of the Act. By S. 29 certain benefit is conferred on the debtor for prompt payment of an unsecured loan taken after the passing of the Act. Sub-clause (1) of S. 30 makes provisions about the rate of interest on "undecreed" loans secured and unsecured taken before the Act came into force. Sub-clause (2) of S. 30 then deals with a decree that "has already been passed" and remains unsatisfied in whole or in part. Lastly, S. 31 makes provisions about the rate of interest with respect to loans taken after the Act came into force when the aggregate of interest has reached 100 per cent. of the sum borrowed. It would thus appear that three of the four sections, viz., 28, 29 and 31, deal with interest on loans taken after the Act came into force and S. 30 relates to interest

on loans taken before the Act came into force. Section 30 is evidently a self-contained section dealing only with loans taken before the Act. Sub-clause (2) of section 30 runs as follows :

> If a decree has already been passed on the basis of a loan and remains unsatisfied in whole or in part, the Court which passed the decree shall on the application of the judgment-debtor amend it by reducing, in accordance with the provisions of sub-s. (1), the amount decreed on account of interest.

As this sub-clause is a part of S. 30 which deals with interest on loans taken before the passing of the Act it should, if possible, be so construed as to refer to only those decrees that were passed on the basis of loans taken before the Act came into force. If the view taken by this Court in the cases noted above, that the words "if a decree has already been passed" refer to the date on which the debtor makes his application under S. 30 for reduction of interest, is adopted, sub-cl. (2) would apply not only to decrees passed on the basis of loans incurred before the passing of the Act but will also govern decrees passed on the basis of loans taken after the Act came into force. In other words, in accordance with that view the scope of sub-cl. (2) would be so widened as to bring within its purview even decrees with respect to loans taken after the passing of the Act and this, in my view, would be inconsistent with the scheme of Chap. 4. As stated before, the Legislature by separate sections in the chapter dealt separately with loans taken before and after the Act. If the Legislature had intended the provisions of sub-cl. (2) to embrace decrees of both the descriptions, it would have enacted those provisions in a separate section instead of embodying the same in a sub-clause of S. 30. The scheme of Chap. 4 therefore strongly points to the conclusion that sub-cl. (2) of S. 30 is confined in its operation only to decrees passed on the basis of loans taken before the Act was put into force. In my judgment the word "already" in sub-cl. (2) refers to the date on which the Act came into force and not to the date on which the application of the judgment-debtor for reduction of interest is filed. I am supported in this conclusion by the decision in (1906) 2 Ch D 270.[10] In that case it was held that :

> The words in S. 9, Burial Act, 1855, 'no ground not already used as or appropriated for a cemetery' mean 'used as or appropriated' at the date of the passing of the Act.

Kekewich J. in his judgment observed as follows :

> We are not dealing with a technical word, but with a word in common use in the English language, and it is one which has no technical meaning whatever. The rule in such cases is to construe the word according to its popular and colloquial meaning. What is the meaning of the word 'already' in the popular or colloquial sense ? It seems 'at this time, or now' . . . . . That 'now' can only mean, it seems to me, at the date of the passing of the Act. There is no, 'now' with reference to an Act of Parliament except the date when it receives the royal assent.

By using the word "already" in sub-cl. (2) the Legislature, to my mind, was making provision about the decrees that had been passed on the date that the Act was put into force and did not contemplate decrees to be passed in future. To adopt the view taken by this Court in the cases mentioned above would be to hold that the Legislature, by enacting sub-cl. (2) completely abrogated the doctrine of res judicata and this, in my view, is not permissible in the absence of express words indicating such an intention. It would be noted in this connexion that S. 30 is conspicuous by absence of the words "notwithstanding anything contained in the Code of Civil Procedure, 1908," which find a place in the opening portion of S. 5 of the Act. By S. 28 and sub-cl. (1) of S. 30 provision is made for reduced rate of interest on loans taken by agriculturists and it is open to an agriculturist debtor to avail himself of that benefit in suits instituted after the passing of the Act by claiming reduction of interest in the suit itself. If he omits to avail himself of that benefit and allows a decree to be passed he cannot, in accordance with the provisions of S. 11, Civil P. C., be allowed to raise the question of interest over again after the passing of the decree. There is nothing in Chap. 4 which in any way abrogates the provision of S. 11 and this is an additional reason for confining the operation of cl. (2) of S. 30 only to decrees passed before the Act came into force. To put the matter in another way. The Legislature by S. 28 and sub-cl. (1) of S. 30 made provision for favourable rate of interest as regards loans for the recovery of which suits may be brought after the passing of the Act. But there may have been decrees passed against agriculturists before the Act came into force and relief was intended to be given to agriculturists with respect to such decrees. It was with a view to make provision for such decrees that clause (2) of S. 30 was enacted as but for that clause the agriculturist debtor would have been barred by the principle of res judicata from claiming reduction of interest. I, therefore, hold that sub-cl. (2) of S. 30

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10. (1906) 2 Ch D 270 : 75 L J Ch 595 : 95 L T 129 : 4 L G R 787 : 22 T L R 631, Godden v. Hythe Burial Board.

is applicable only to decrees passed on the date that the Act came into force and not to decrees passed thereafter. Shri Nath and Mt. Harbansi also claimed the benefit of S. 4 of the Act. Clause (1) of S. 4 runs as follows :

> Notwithstanding anything contained in the Code of Civil Procedure 1908, the rate at which future interest may be allowed in any decree for payment of money or for sale in default of payment of money or for foreclosure or in any order for grant of instalments passed against an agriculturist shall not exceed the rate notified by the Local Government in the Gazette under sub-s. (2) as in force at the time when the decree or order, as the case may be, is passed.

This clause is mandatory and it is not permissible for a Court to award future interest as against an agriculturist in violation of the provisions of that clause. In the case before us, the Court below had ample jurisdiction to bring its decree in the matter of furture interest in conformity with the provisions of that clause. This the Court below could do in exercise of its inherent jurisdiction to rectify the mistake committed by it at the time of passing the decree. For the reasons given above, I would allow this application in revision, set aside the order of the lower Court, convert the decree dated 8th July 1938, passed against Shri Nath and Harbansi into an instalment decree and modify the original decree only as regards future interest if it offends against the provisions of S. 4 of the Act. I would allow costs of this application to Shri Nath applicant.

Braund J.—The facts are sufficiently set out in the reference itself. The only material ones for the present purpose are that the borrowers in this case were father and son, were admittedly members of a joint Hindu family and the father's name alone was entered in the revenue records as the holder of the ancestral land of the family. On these facts the revision has been referred to us on three questions. I state them in my own language: "(1) Whether a member of a joint Hindu family can rank as an agriculturist within the meaning of S. 2 (2), United Provinces Agriculturists' Relief Act, 1934, (hereinafter called the Act), notwithstanding that the land of the family is entered in the revenue records only in the name or names of one or more of the other members of the family ; (2) whether an agriculturist debtor can ask for relief under S. 5 of the Act (i. e. for satisfaction by instalments of a decree passed on the debt) in a case in which the suit on the debt has been brought since the date of the coming into force of the Act, that is to say 30th April 1937 ; and (3) whether an agriculturist debtor can apply for relief under S. 30 (2) of the Act (i.e., for reduction of interest) in the case of a decree on the debt passed after the date of the coming into force of the Act."

The first of these questions is not altogether free from difficulty. We have no material before us from which we can tell what was the gross land revenue payable in respect of the family land, nor do we know the aliquot shares of the members of the family. But that, in the view I take, is not material. I begin by setting out the relevant sections of the Act itself. An "agriculturist" is defined by S. 2 (2) of the Act. Six categories are included in the definition and it has to be noticed that they are all described as "persons" who either "pay" certain maximum amounts of land revenue, rates or rent or who "hold" land of a particular description and of a particular value. The first class is the class of "persons who pay" land revenue :

> Agriculturist means, in all sections of the Act where the term is used—(a) a person who, in districts not subject to the Benares Permanent Settlement Regulation 1 of 1795, pays land revenue not exceeding Rs. 1000 per annum ; or .....

There then follow three provisos to the whole definition. The first proviso, in effect, says that in respect of certain provisions of the Act, among which are included the provisions for allowing payment by instalments (Ss. 3 and 5) and the provisions for reducing interest (Ss. 28 and 30 of Ch. 4), the limits of land revenue, rates, rent and area shall not apply; in short, that every one who pays land revenue, rates, rent, etc., of, or who holds the land shall be entitled to the benefit of those particular provisions of the Act. Proviso 2 is not material to our present purpose, but the third one is. It provides that :

> ...if a non-agriculturist joins with an agriculturist in any transaction of loan, save for the purpose of adding his name as security, the agriculturist shall not be considered as such for the purpose of that transaction.

Finally, there come a series of explanations the second of which is the relevant one :

> *Explanation 2.* — In the case of members of a joint Hindu family or joint owners or joint tenants each member or owner or tenant shall be considered to be an agriculturist for the purposes of Chapters 2 (except Ss. 3, 4, 5 and 8), 3 and 6, whose share or interest in revenue, local rate, or rent free land, as the case may be, does not respectively exceed the aforesaid limits.

The whole question, therefore, reduces itself to my mind to whether, having regard to Expln. 2, a joint Hindu family, which

owns land but all the members of which are not individually entered in the revenue records, can be said collectively to be a "person" who "pays" or "holds" as the case may be. At first sight, I was much inclined to take the view that the noticeable omission from Expln. 2 of Ss. 3 and 5 and Chap. 4 of the Act meant that, for the purposes of those omitted sections, individual members of a family and individual joint owners or tenants were not to be treated as "agriculturists," whereas for the purpose of those sections which were not omitted they were to be so treated. That I think was the view taken by a Bench of two Judges of this Court in 1937 A L J 970[3] at p. 971. The late Sir Shah Sulaiman C. J. and Harries J. there seem to express this view in these words :

> This explanation makes it clear that for certain purposes each member of a joint Hindu family or each joint owner or joint tenant may apply for certain benefits conferred by the Act. But on the other hand, this explanation makes it equally clear that each member of a joint family or joint owner or joint tenant cannot claim the benefits conferred by S. 5 of the Act or by S. 30 which is one of the sections in Chap. 4, because S. 5 and Chap. 4 are expressly excluded in this explanation. . . . .

On reflection, however, with respect, I do not think that this view is the right one on the true construction of S. 2 (2) of the Act. As I have already said, the whole question turns on whether in the circumstances predicated and in spite of Expln. 2, the whole family (i.e., in this case, both the father and the son) can be regarded collectively as a "person," who pays land revenue, or whether only the father whose name is entered in the revenue records be so regarded. If the former alternative is the true one, then no "non-agriculturist" joined in this loan and proviso 3 did not apply. Now, S. 2 (2) having defined the eight classes of "persons" who are agriculturists, enlarges that class, for the purposes of certain sections of Chap. 2 and of Chaps. 4 and 5 only, by proviso 1 by removing from them the limits of land revenue, rates, rent and area. At that stage, therefore, there are two classes of agriculturists : one, for the purpose of certain sections of Chap. 2 and Chaps. 4 and 5, an "unlimited class;" the other for the purpose of the remaining sections, a "limited class." But, in either case, they must still be "persons."

Now, it seems to me that so far as the "limited" class and the sections in respect of which they were limited are concerned, even if a collective joint Hindu family was included in the definition of an 'agriculturist,' it would be wholly immaterial what their divided interests were, because the divided interests must necessarily be less than the undivided estate on the principle that part is less than the whole. But, if a collective joint Hindu family is included in the definition of an 'agriculturist,' then so far as such a family is concerned in respect of those parts of Chap. 2 which are not included in proviso 1 and in respect of Chaps. 3 and 4 (which are also not included in that proviso) it became highly material to add something to the definition, because, if nothing is added, a case might arise in which a joint Hindu family collectively owned land exceeding the pecuniary limits, or the limits of area as the case may be, but in which the individual aliquot shares came within those limits. In that case it would be necessary to "explain" that the individual members of the family were to be entitled to the benefits of the excluded sections, notwithstanding that the interest of the whole family exceeded the limits. That is, of course, based on the assumption that the word "person" does include a joint Hindu family. And, that to my mind, is exactly what Expln. 2 does. It "explains" that for the purpose of the excluded sections (i. e., the sections excluded from proviso 1) the assessment of value or area as the case may be shall, in the case of a joint Hindu family, be upon the individual interests. That, I think, clearly shows that Expln. 2 does recognize in terms that the definition in S. 2 (2) includes a joint Hindu family. In the case of the non-excluded sections (i. e., the sections which are included in proviso 1) the question does not arise, because there is no limit either on the family or on anyone else. To put this shortly, I think that Expln. 2 has been introduced into S. 2 (2) for the purpose of explaining that individual members of a family who would qualify on their individual interests are not to be excluded from the benefit of the definition in relation to those sections where the limit still remains. And that can only be consistent with the word "person" in S. 2 (2), prima facie, including a joint Hindu family. I think that this is what Bennet J., meant when he said in 1937 A L J 1367[1] at p. 1368.

> . . . It is only in the case of a Hindu joint family where the rent paid by the joint family exceeds the Rs. 500 in this sub-s. (f) that recourse is necessary under Expl. 2, and if an individual member of a Hindu joint family does not exceed the limit of Rs. 500 for his share of the rent then he would be entitled to the benefit of the various sections of the Act other than those excepted by Expl. 2 . . .

I confess that I found it difficult at first to understand the reasoning of that passage.

But I think it becomes clear when it is remembered that Expl. 2 is only necessary (a) because of proviso 1 and in relation to the sections excluded from it and (b) on the footing that, ex hypothesi, a joint Hindu family is included in the definition. The construction in no way strains the word "person" indeed; it is more consistent with it than any other because, under the United Provinces General Clauses Act, a "person" includes an "association . . . of individuals." A joint Hindu family is an "association of individuals." I should perhaps add that I find no difficulty in treating the land revenue paid as being "paid" by all members of the family, once it is established that the family is a "person" within the definition and notwithstanding that the actual hand which pays it is that of one member only. For these reasons I agree in thinking that the first question before us should be answered in the affirmative. I have not referred in this judgment to the other authorities cited to us, 1939 A L J 233,[2] 1937 A L J 681[11] and A I R 1941 Oudh 121,[9] as they do not, I think, carry the matter any further.

The second question does not, I think, present any great difficulty. Sections 3 and 5 of the Act both deal with the power of the Court to order satisfaction of a decree by instalments. Section 3 deals in terms with what the Court may do "at the time of passing the decree." It may of its own motion order payment by instalments and, if the defendant agriculturist so applies, it must so order unless it records reasons to the contrary. Section 5 deals with what the Court is to do, "on the application of the judgment-debtor and after notice to the decree-holder." It must order payment by instalments, unless it records reasons to the contrary. It is, I think, plain that S. 5 is intended to catch, and does catch, an application in every case where that application is not made under S. 3 "at the time of passing a decree." It applies to every application in relation to a subsisting decree as opposed to one about to be passed. I can see no difference in this respect between an application to modify a decree passed in a suit brought before the passing of the Act and one passed in a suit brought after the passing of the Act. It is true, that in the latter case, a defendant might neglect to apply under S. 3 at the time of the passing of the decree and yet still be entitled to apply under S. 5 later. It is conceivable that in certain circumstances that might provide some "reason" against granting the application but the mere fact that this dual opportunity exists is, in my view, no reason for construing S. 5 otherwise than in accordance with the plain meaning of the words it uses. Nor do I think that any question of the principle of "res judicata" arises, as S. 5 is expressly prefaced by the words "notwithstanding anything contained in the Code of Civil Procedure 1908." In my view, this question should be answered in the affirmative.

The third and last question arises under S. 30 of the Act. Section 30 is a sequel to S. 28. Section 28 deals with rates of interest on a loan taken by an agriculturist after the Act came into force. Section 30 deals with rates of interest on a loan taken before the Act came into force. Sub-section (1) of each section says that no debtor on such classes of loans respectively shall pay more than the rate specified as apporpriate to it. If a loan is taken after the Act comes into force, there is no difficulty because, whatever the contract says when it comes to enforcing it, interests can only be given at the specified rate or less, and any decree on the loan must necessarily so provide; if, however, the loan was taken before the Act came into force, more than one set of cricumstances may apply. The rate of interest recoverable can only be the rate, or less than the rate, specified in S. 30 (1). If a suit was brought on the loan and a decree passed prior to 30th April 1935, no difficulty occurs, because that case is obviously provided for by sub-s. (2) of section 30 :

> (2) If a decree has already been passed on the basis of a loan and remains unsatisfied in whole or in part, the Court which passed the decree shall on the application of the judgment-debtor amend it by reducing, in accordance with the provisions of sub-s. (1), the amount decreed on account of interest.

That sub-section was plainly necessary to bring the case of a decree already passed when the Act came into force into line with the retrospective provisions of the Act. The next case is the one where a suit was started before the Act came into force, but the decree was passed afterwards. And the third case is when both the suit and the decree were started and passed respectively after the Act came into force. Logically I think there should be no difference between these two cases for, in both of them, the Court has an opportunity of giving effect to the retrospective provisions of the Act at the time of the passing of the decree, which ex hypothesi will have been after the Act has

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11. ('37) 24 A I R 1937 All 645 : 171 I C 520 : I L R (1937) All 771 : 1937 A L J 681, Nannoo Mal v. Hoti Lal.

come into force. It has to be observed in this connexion that a '*locus penitentiæ*' was provided by the Act itself between the date of the assent of the Governor-General and the date it came into force, such last mentioned date being fixed subsequently by notification. There was therefore no reason why effect should not be given to its provisions in every decree passed after the Act came into force. The question really turns on the words : "If a decree has already been passed . . ." in sub-s. (2), and, in particular, on the word "already." In this Court the view has been taken in several cases that the word "already" denotes any time before the actual application for reduction of interest is made, whether the decree was passed before or after the Act came into force and irrespective of when the suit was started: *see* ILR (1937) ALL 403,[5] ILR (1937) ALL 943[6] and ILR (1938) ALL 305.[7] If I may venture to make, with great respect, a comment on these three cases, it is that they all appear to me to proceed a good deal more on the supposed intention of the Legislature than on the language of the statute itself. To take the words of Bennet J. in the first of these cases :

> . . . Another reason which leads me to this view is that the Legislature intended to grant relief to agricultural tenants, and there is no reason why it should refuse relief to persons whose decrees were passed after the Act came into force . . . .

and, again, the late Sir John Thom in the second of these cases observes :

> It is clear, however, in my judgment that the policy of the Legislature was to give relief to all debtors against whom decrees were passed on the basis of loans either before or after the Act came into operation. . . .

And the same view is taken by Harries and Rachhpal Singh JJ. in I L R (1938) ALL 305[7] (*ubi supra*). With great respect to these learned Judges, I do not think that, on the opposite and in my opinion, more natural construction, the intention of the Legislature will by any means have been defeated or even obstructed for, as I have already pointed out, in every case in which a decree is passed after the Act came into force, the Court itself will have had both the duty and the opportunity to give effect to its provisions. I am not impressed by the argument that it is possible to conceive a case in which "*per incuriam*" the Court might have omitted to do so, through ignorance of the provisions of the Act: *see* ILR (1937) ALL 403[5] and 18 Pat 1.[12] In my view, the safer way of approaching the question is to take the words: "If a decree has already been passed . . ." and to ask oneself what in their grammatical sense they mean. Bennet J., in the same case, has answered this question in this way :

> According to the laws of grammar the interpretation of 'has already been passed' should refer to some point of time indicated in the sub-section itself.

I respectfully agree with that, but I find it difficult to go further and to agree that the only "point of time indicated by the sub-section" is the point of time at which the application is made. It seems to me that, in relation to an adverb of time such as 'already' or 'now' the obvious point of time prima facie indicated is the time from which the statute speaks. It is, I think, a proper principle of construction that, in the absence of some compelling indication to the contrary, an adverb of time has reference to the present and, in relation to a statute, to the time from which the statute speaks. In an English case in which an identical point arose as to the construction of the word "already" in a statute, Kekewich J. in a useful passage, took the same view: (1906) 2 Ch D 270[10] at p. 274. He says :

> We are not dealing with a 'technical' word but with a word in common use in the English language and it is one which has no technical meaning whatever. The rule in such cases is to construe the word according to its popular and colloquial meaning. What is the meaning of the word 'already' in the popular or colloquial sense? It means 'at this time,' or 'now.' Reading the Act through, it reads thus : 'No ground not now used as or appropriated for a cemetery.' That 'now' can only mean, it seems to me, at the date of the passing of the Act. There is no 'now' with reference to an Act of Parliament except the date when it receives the royal assent. There might possibly be an exception where the coming into operation of the Act is deferred: but, as at present advised, I do not think even that would alter it. 'Now' it seems to me, points to the date when the Act in which the word is used becomes an Act, that is, when it receives the royal assent. I see nothing in the authorities which have been cited to make me think that that is otherwise than perfectly correct. The point is not decided but the authorities, I think, point to that conclusion.

Adopting the same reasoning, I confess to starting with a strong prejudice in favour of construing the word "already" in S. 30 (2) of the Act as referring, in its ordinary grammatical sense, to the date when the Act came into force, and not to any date when an application might happen to be made. I appreciate that this construction might have to yield to any compelling context to the contrary. But, notwithstanding the cases in this Court to the contrary, I find none. I do not think that the intention of the Act is defeated by this construction, because as a practical matter, in every case in which a

12. ('39) 26 A I R 1939 Pat 122 : 180 I C 414 : 18 Pat 1 : 20 P L T 38, Reyasat Shaikh v. Gopi Nath Missir.

decree has been passed after the Act came into force, the opportunity, and the duty, were present for the Court to give the relief which the Act prescribes. That opportunity was not however present in a case in which the decree was passed prior to the coming into force of the Act. Moreover, the position of sub-s. (2) of S. 30 of the Act as a sub-section of S. 30 only and not as a separate provision applying to both Ss. 28 and 30 is, as the learned Chief Justice has pointed out, a strong indication in favour of the same view.

It is possible to suggest that this construction somewhat contradicts our own construction adopted in relation to the second question before us that, in respect of S. 5 of the Act, it is open to a judgment-debtor to apply under that section to reopen a decree whenever passed. But, when considered, there is no contradiction. Sections 3 and 5 of the Act, deal with the right of the Court to grant payment by instalments. Sections 28 and 30 of the Act, deal with the obligation of the Court to reduce interest. There is, to my mind, a world of difference between these two things. In the former case, the decree-holder is deprived of nothing, except that his right to take steps in execution is deferred. In the latter case, the decree-holder suffers a positive diminution of what is due to him under the decree and, it may be a very substantial loss. The former is a matter of procedure, the latter a matter of substance. And it is for this reason that the Legislature may very well, in a matter of actually depriving a decree-holder of what is due to him under his decree, have determined that that should be settled whenever possible by the Court which passed the decree and at the time of passing it, whereas, in a case of merely postponing payment, it might be dealt with at any time. Moreover, it has to be remembered that a judgment-debtor's circumstances may change from time to time and that it might well happen that he was compelled by circumstances to apply for payment by instalments long after the decree is passed. In the case of an application for reduction of interest, on the other hand, it is a matter which can be dealt with once and for all when the decree is passed and is not in any sense discretionary. It is regulated by the Act and the debtor's rights do not vary with his circumstances in the least degree.

For these reasons I agree with the decision of the Full Bench of the Chief Court in Oudh in 15 Luck 477[4] in preference to the authorities of our own Court, with which respectfully I find myself unable to concur. In my judgment, therefore, the answer to the third question propounded to us should be that an agriculturist debtor can apply for relief under S. 30 (2), U. P. Agriculturists' Relief Act, 1934, only in a case in which the decree was already passed at the date of the coming into force of that Act. I think, therefore, that this revision should be allowed and I concur in the order proposed to be passed by the Court.

Dar J.— This is a revision against a judgment dated 23rd April 1938, of the Civil Judge of Etawah by which he rejected an application under Ss. 5 and 30, Agriculturists' Relief Act, for reducing the interest awarded in a decree and for the payment of the said decree by instalments. On 7th July 1934, Shri Nath and his wife Mt. Harbansi Kuer executed a promissory note in favour of Puran Mal for Rs. 100 bearing interest at 2 per cent. per mensem. On 26th November 1934, the said two persons executed another promissory note in favour of the same creditor for Rs. 150 bearing again interest at 2 per cent. per mensem. On 30th April 1935, the U. P. Agriculturists' Relief Act (27 of 1934) came into force and after the Act came into force, on 9th April 1936 Puran Mal raised an action against Shri Nath and Mt. Harbansi Kuer for the recovery of Rs. 341-8-0 due on the said promissory notes and on 8th July 1936 an ex parte decree was passed in favour of Puran Mal against Shri Nath and Mt. Harbansi Kuer. On 5th October 1936 Shri Nath and Mt. Harbansi Kuer made an application under Ss. 5 and 30, U. P. Agriculturists' Relief Act for converting the ex parte decree of 8th July 1936 into an instalment decree and for reducing the amount of interest awarded in the said decree. It is not clear to me whether the future interest awarded in the ex parte decree is in accordance with the terms of Sec. 4, U. P. Agriculturists' Relief Act, or whether the future interest awarded by the decree is also excessive and open to objection under S. 4 of the Act. This application was opposed by the creditor and by a judgment dated 23rd September 1938, the learned Judge rejected this application. The learned Judge has found that Shri Nath one of the applicants before him, was a member of a joint Hindu family with his father Rustam Singh and the joint Hindu family owned zamindari property which paid Government revenue but the property was recorded in the name of Rustam Singh alone and Shri Nath's name did not appear in the khewat. The learned Judge therefore

held that Shri Nath although a coparcener in the property, could not be regarded as an "agriculturist" within the meaning of the Agriculturists' Relief Act. The learned Judge further found that Mt. Harbansi Kuer and Rustam Singh were both agriculturists within the meaning of the Act, and Mt. Harbansi Kuer alone as an agriculturist was entitled to make an application but inasmuch as in the loan transaction which took place in 1934 Mt. Harbansi Kuer's husband Shri Nath who could not be regarded as an agriculturist had joined in the transaction, Mt. Harbansi Kuer also was not entitled to make the application. He accordingly rejected the application of both the applicants and against this judgment this revision has been made and, on account of conflict of authority which exists over a portion of the case, the matter has been referred to this Bench.

Three questions arise for consideration in this case. The first is whether a Hindu coparcener who has an interest in a joint Hindu family but whose name is not recorded in the khewat can or cannot be regarded as an "agriculturist" within the meaning of the Agriculturists' Relief Act provided that joint family as a whole or its individual members satisfy the test laid down in the Agriculturists' Relief Act for being regarded as an agriculturist? The second question is whether in a decree passed in a loan taken after the Agriculturists' Relief Act had come into force, if at the time of the passing of the decree instalments were not asked for by the agriculturist, is it open to an agriculturist after the decree had been passed to apply for its being converted into an instalment decree? And the third question is whether in a loan taken after the Act had come into force if an agriculturist allows a decree to be passed against him without raising any question of excessive interest, can he ask after the decree had been passed, for amendment of decree and reduction of interest under S. 30, cl. (2) of the Act? The first matter which falls for consideration is whether Shri Nath can be regarded as an "agriculturist" within the meaning of the Agriculturists' Relief Act. It is admitted that Shri Nath and his father Rustam Singh both are members of a joint Hindu family and that the father and son both own joint family property as coparceners, but it is recorded in the name of Rustam Singh alone in the khewat and the revenue of the family property is also paid in the name of Rustam Singh alone. The question, therefore, arises, can a Hindu coparcener who has got an interest in the family property, though undefined and who pays a proportionate revenue to the Government for his unascertained share but in the name of the karta of the family be regarded as an agriculturist within the meaning of the Act or not? The term "agriculturist" for the purpose of the Agriculturists' Relief Act has been interpreted in S. 2, cl. (2) of the Act and the interpretation, so far as it is relevant for the purpose of this case, is as follows:

'Agriculturist' means, in all sections of the Act where the term is used .... (a) a person who, in districts not subject to the Benares Permantent Settlement Regulation 1 of 1795, pays land revenue not exceeding Rs. 1000 per annum or, (b) a person who, in district subject to the Benares Permanent Settlement Regulation 1 of 1795 pays a local rate under S. 109 of the District Boards Act, 10 of 1922, not exceeding Rs. 120 per annum or, (c) a person holding land free of revenue who pays a local rate under S. 109, District Boards Act, 10 of 1922, not exceeding Rs. 120 per annum or, (d) in Oudh an under-proprietor holding a sub-settlement of land the revenue of which does not exceed Rs. 1000 per annum or (e) a thekadar who holds a theka of land the revenue of which does not exceed Rs. 1000 per annum or, (f) a person other than a thekadar or an under-proprietor in Oudh holding a sub-settlement who pays rent for agricultural land not exceeding Rs. 500 per annum or (g) a person holding land free of rent, the area of which does not exceed 80 acres or (h) a person ordinarily living outside the limits of any municipality who belongs to any of the classes of persons mentioned in Sch. 1.

Provided that in Ss. 2 (10) (a), 3, 4, 5, 8 and Chaps. 4 and 5 an "agriculturist" means also a person who would belong to a class of persons mentioned in parts (a) to (g) of this sub-section, if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted :

* * * * *

Explanation 2. In the case of members of a joint Hindu family or joint owners or joint tenants each member or owner or tenant shall be considered to be an agriculturist for the purposes of Chapters 2 (except Ss. 3, 4, 5 and 8), 3 and 6, whose share or interest in revenue, local rate or rent or the rent-free land as the case may be, does not respectively exceed the aforesaid limits.

It will be noticed that for the purposes of the interpretation of the word 'agriculturists' the statute draws no distinction between coparcener of a joint Hindu family, or joint owners or joint tenants or even between tenants in common or holders of property whose revenue or rent collectively assessed and between tenants in common and individual owners or holders whose revenue or rent is assessed individually. If therefore all the members of a joint Hindu family happen to be recorded in the khewat or khatauni as owners or if all the joint owners, or joint tenants or tenants in common happen to be recorded in the khewat or in the khatauni the mere fact that revenue or rent is jointly assessed

against these coparceners, owners or tenants would not prevent each one of such recorded owner or tenant to be regarded as an agriculturist within the meaning of the Act. If therefore a coparcener or a joint owner or a joint tenant whose name happens to be recorded in the khewat or khatauni can be regarded as an agriculturist within the meaning of the Act, is there any reason for excluding a coparcener or joint owner or joint tenant whose name does not happen to be recorded in the khewat or khatauni, though in fact he has an interest in the property and with reference to his interest he pays rent or revenue, as the case may be, in the name of his cosharer? The statute, no doubt enjoins that "agriculturist" means a person who pays land revenue but in my opinion this condition is satisfied in the case of a joint Hindu family holding property with regard to each member, irrespective of the fact whether the property is recorded in the name of some or in the name of all the members of the family and irrespective of the fact whether it is recorded in the name of the karta alone and the Government revenue is paid in his name.

It is now contended that this interpretation of the section is opposed to Expl. 2 to S. 2, *c* cl. 2 of the Act. It becomes therefore necessary to examine the interpretation clause of the statute as I have set out above in its entirety. The primary object of the Agriculturists' Relief Act was to grant relief to small landholders and tenants and to certain class of village community who do not pay land revenue or rent exceeding a fixed limit. The Act therefore provides that this class of agriculturists will have the benefit of the entire Act and they are the persons who are described in S. 2 (2), cls. (a) to (h) of the Act. The second object of the statute was also to give relief to large landholders and tenants in certain specified matters, for *d* instance, in granting instalments for the payment of loan and in reducing interest on loans, and for this purpose proviso 1 was added to S. 2 (2) of the Act which enjoins that for Ss. 2 (10) (a), 3, 4, 5 and 8 and Chaps. 4 and 5 an "agriculturist" means a person who pays revenue or rent exceeding the limits specified in cls. (a) to (g). The result of this proviso was that large landholders also became entitled to the benefit of certain specified sections of Chap. 2 and of Chaps. 4 and 5, and coparceners of a joint Hindu family and joint owners also became entitled to the benefit of this proviso irrespective of the amount of revenue which was paid by the family and irrespective of the fact whether revenue was paid collectively or individually. But with regard to other reliefs granted by the Agriculturists' Relief Act, viz., those contained in Chap. 2, Ss. 6 and 7 and in Chaps. 3 and 6, the relief was confined to small landholders and tenants who are specified in cls. (a) to (h) of S. 2, sub-s. (2). *e*

Now, in a case of a joint Hindu family, or joint owners or joint tenants the collective revenue paid by the entire body may have exceeded the limit prescribed by cls. (a) to (g) but if the revenue or rent was to be apportioned upon coparceners or joint owners or joint tenants according to their *f* share, then the revenue or rent thus apportioned and falling to individual share may have been within the limit prescribed by cls. (a) to (g). In such a case the Legislature thought that the coparceners of a joint Hindu family or joint owners or joint tenants should be given an opportunity to apportion the revenue or rent to the respective share and if by such apportionment the limit provided in cls. (a) to (g) was not exceeded then the coparceners and the joint owners or joint tenants individually should be allowed to take benefit of sections 6 and 7 of Chap. 2 and of Chap. 3 and of Chap. 6 also of the Act like other small landholders or tenants. In *g* order to enable the coparceners or joint owners or joint tenants to apportion the collective revenue and rent into a separate revenue or rent so as to bring it within the limits of cls. (a) to (g) of S. 2 (2), Expl. 2 of the statute was enacted. In my opinion Expl. 2 only applies when a joint owner or a joint tenant or a Hindu coparcener wants to take proceedings under Chap. 2, Ss. 6 and 7 or Chap. 3 and Chap. 6 of the Act and it has no application whatever when a Hindu coparcener or a joint owner or joint tenant is taking proceedings under Chap. 2, Ss. 3, 4, 5 and 8 or under Chaps. 4 and 5 of *h* the Act. I am further of opinion that Expl. 2 should not be read as an independent proviso and it should not be read as in any way controlling or modifying proviso 1 of S. 2 (2), Agriculturists' Relief Act. In 1937 A L J 680[8] Sulaiman C. J. and Bennet J. in speaking of relation of explanation to provisos in S. 2 (2) of the Act observed :

> It follows that applications which are governed by Chaps. 4 and 5 are completely covered by the proviso and not affected by the explanation.

In my opinion this is a correct statement of law. If an application is covered by proviso 1 of S. 2 (2), Expln. 2 to S. 2 (2) has got no application. There has been undoubtedly

some conflict of authority as to the interpretation of Expl. 2 to S. 2 (2) of the Act. In 1937 A L J 970,[3] Sulaiman C. J. and Harries J. interpreted Expl. 2 to S. 2 (2) as laying down that members of a joint Hindu family were to be regarded as agriculturists for purposes of Chap. 2, Ss. 6 and 7 and Chaps. 3 and 6 alone and for other provisions in the Act junior members of a joint Hindu family were not to be regarded as agriculturists. In 1937 A L J 1367[1] Bennet J. held that a joint Hindu family was to be regarded as an agriculturist within the meaning of S. 2(f), Agriculturists' Relief Act. That was a case of an occupancy tenancy in which two out of three members of the family were recorded in khatauni as tenants and the question arose whether the third member whose name did not appear in the khatauni could also be regarded as an agriculturist and Bennet J. answered the question in favour of the third member. In A I R 1941 Oudh 121[9] a Hindu son whose name did not appear in the khewat but whose father's name did appear applied for benefit of Ss. 5 and 30, Agriculturists' Relief Act, and Yorke J. in deciding in his favour held :

Section 2 (2), Expl. 2 only restricts the benefit of Chap. 2 (except Ss. 3, 4, 5 and 8) and 3 and 6 to such members of a joint Hindu family as fulfil the conditions as to limit of rent, revenue and local rates laid down in cls. (a) to (g), but it does not lay down that such members, if their rent and revenue exceeds the limits so prescribed, have no right to avail the provisions of the other portion of the Act which right they have been expressly given by proviso 2 to S. 2 (2).

In 1939 A L J 233[2] a father and son had joined in a mortgage and later on both applied under S. 30, Agriculturists' Relief Act; the son's name did not appear in the khewat and it was contended that the son could not be regarded as an agriculturist and by the father joining the son in the loan transaction the entire application had become incompetent. Iqbal Ahmad and Bajpai JJ. did not regard the son as a non-agriculturist and held that father as karta was competent to make the application. On facts, some of these may be distinguished but no useful purpose will be served by discussing them at length. I have given my interpretation of the statute and if there is anything in the above cases which is inconsistent with what I have said above, then, with all respect, I cannot agree. In my opinion therefore Shri Nath has to be regarded as an agriculturist within the meaning of the Act. I now pass on to consider whether the ex parte decree which was passed on 8th July 1936, against Shri Nath and Mt. Harbansi Kuer, can be converted into an instalment decree in spite of the fact that Shri Nath and Mr. Harbansi Kuer had an opportunity to pray for instalments when the ex parte decree was passed but did not do so. Section 5, cl. (1), Agriculturists' Relief Act is as follows :

(1) Notwithstanding anything contained in the Code of Civil Procedure, 5 of 1908, the Court shall, unless for reasons to be recorded it directs otherwise at any time on the application of the judgment-debtor and after notice to the decree-holder, direct that any decree for money or preliminary decree for sale or foreclosure passed by it or by any Court whose business has been transferred to it against an agriculturist, whether before or after this Act comes into force shall be converted into a decree for payment by instalments drawn up in such terms as it thinks fit in accordance with the provisions of S. 3.

This section reads that :

Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Court shall .... direct that any decree for money ... passed by it ..... against an agriculturist, whether before or after this Act comes into force, shall be converted into a decree for payment by instalments drawn up in such terms as it thinks fit in accordance with the provisions of S. 3.

It will be noticed that the section makes no distinction between a decree passed before the Act and after the Act came into force, it applies to both cases alike. It further enjoins that notwithstanding anything contained in the Code of Civil Procedure (5 of 1908) the decree shall be converted into an instalment decree. In my opinion, there is no room for application of the rule of res judicata to a case and the section applies also to decrees passed after the Act came into force and to those cases also where the agriculturists had an opportunity to pray for instalments at the time of the passing of the decree but had neglected to do so. It remains now to consider whether under S. 30 it is open to the Court to amend a decree with regard to interest when the decree was passed after the Act came into force on a loan which was taken after the Act came into force and about which the agriculturist had an opportunity to claim reduction at the time of the passing of the decree but he failed or neglected to do so. Section 30, U. P. Agriculturists' Relief Act, is as follows :

(1) Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 3 for the period from 1st January 1933 till such date as may be fixed by the Local Government in the Gazette in this behalf.

(2) If a decree has already been passed on the basis of a loan and remains unsatisfied in whole or in part, the Court which passed the decree shall on the application of the judgment-debtor amend it

by reducing in accordance with the provisions of sub-s. (1) the amount decreed on account of interest.

(3) A decree amended in accordance with the provisions of sub-s. (2) shall be deemed to bear the date of the original decree, and notwithstanding any provision in any law to the contrary no appeal shall lie from any order amending a decree under that sub-section.

(4) Any amount already received by the creditor on account of interest in excess of that due under this section shall be credited towards the principal but nothing in this section shall be deemed to entitle a debtor to claim refund of any part of the interest already paid by him.

It is perfectly plain to me that, "if a decree has already been passed" in S. 30, cl. (2) means a decree which was passed before the Act came into force and this I would shortly put on three grounds. Firstly, as a matter of construction that if a statute says that if a thing has already been done or if a fact has already taken place and there is nothing to show in the Act as to the point of time to which "already" refers, the presumption should be that a thing should be done and the fact should come into existence before the Act came into force. In England the word "already" has been judicially interpreted in cases arising under debentures and wills and settlements. These cases are noted in Stroud's Judicial Dictionary and there is a judgment of a Court of appeal in England, (1906) 2 Ch D 270,[10] in which in interpreting the words in S. 9, Burial Act, 1855, it was held that the words "no ground not already used or appropriated for a cemetery" mean "used or appropriated" at the date of the passing of the Act. Secondly, cl. (2) of S. 30 directs to amend the decree "by reducing in accordance with the provisions of sub-s. (1) the amount decreed on account of interest." The amendment therefore under sub-s. (2) has to be in accordance with sub-s. (1), and sub-s. (1) deals with a loan taken before the Act came into force and therefore it follows that a decree which has to be amended also should be on a loan taken before the Act came into force. Thirdly, sub-s. (2) is one of the clauses of S. 30 and the marginal note of S. 30 is "rate of interest on undecreed loans taken before this Act came into force for the period after 1st January 1935." Now it is true the marginal note cannot be taken into account in construing this section, but the section taken as a whole indicates that it is dealing with loans and decrees which came into existence before the Act came into force and the position of cl. (2) in the midst of S. 30, the subject-matter of which is loans taken prior to the Act came into force, is an argument in favour of the view that it is confined to decrees passed before the Act came into force. It is therefore quite clear to me that under S. 30, sub-s. (2) a decree which has been passed on a loan subsequent to the passing of the Act cannot be amended. But this does not dispose of the difficulty in the case. Sections 4 (1) and 28 (1), U. P. Agriculturists' Relief Act, are as follows:

4 (1). Notwithstanding anything contained in the Code of Civil Procedure, 5 of 1908, the rate at which future interest may be allowed in any decree for payment of money or for sale in default of payment of money or for foreclosure or in any order for grant of instalments passed against an agriculturist shall not exceed the rate notified by the Local Government in the Gazette under sub-s. (2) as in force at the time when the decree or order, as the case may be, is passed.

28 (1). Notwithstanding anything in any contract no loan taken by an agriculturist after this Act came into force shall bear interest at a rate higher than that notified by the Local Government under sub-s. (2) as the prevailing rate of interest for the particular class of loan at the time the loan was taken.

It will be noticed that S. 4 enjoins that future interest in any decree for payment of money against an agriculturist shall not exceed the rate notified by the Local Government and the wording of the section suggests that a duty is cast upon the Court to see that this limit is not exceeded and this notwithstanding anything contained in the Code of Civil Procedure of 1908. Again S. 28 (1) provides that no loan taken by an agriculturist after this Act came into force shall bear interest at a higher rate than notified by the Government. The question, therefore, arises that if a decree of the Court contains future interest or past interest which offends against S. 4 or S. 28, Agriculturists' Relief Act, and the agriculturist comes before the Court, asking to amend the decree, so as to bring it in conformity with those sections on what principle you are going to bar the agriculturist? It is said on the principles of res judicata, the agriculturist's claim should be barred. In I L R (1937) ALL 403[5] Bennet J. and in I L R (1937) ALL 943[6] Sir John Thom C. J., and in I L R (1938) ALL 305[7] Harries and Rachhpal Singh JJ. held that the doctrine of res judicata could not apply to a claim of an agriculturist for reduction of interest even in cases when loan and decree came into existence after the passing of the Act. In 15 Luck 477[4] Hamilton, Yorke and Radha Krishna JJ. held that the principle of res judicata should apply to a claim of an agriculturist of this nature.

The question is not free from difficulty. The doctrine of res judicata is in this country

codified in S. 11, Civil P. C., (Act 5 of 1908); in terms that section cannot apply to proceedings under the Agriculturists' Relief Act. But there is, however, high authority for the view that principles of res judicata apply in civil litigation to cases where in terms S. 11 does not apply, but we are here dealing with a special jurisdiction under a Special Act enacted for the relief of agriculturists, very often an ignorant and illiterate class. The statute under S. 4, Agriculturists Relief Act, enjoins that notwithstanding anything contained in the Civil Procedure Code (5 of 1908) future interest against an agriculturist shall be at a specified rate and a duty is cast upon the Court impliedly to give future interest at a notified rate and the agriculturist has no reason to suppose that the Court will not do its duty. If the agriculturist has not appeared in Court to answer a claim of money and the Court by inadvertence passes a decree for a rate of interest exceeding that sanctioned by the statute is the agriculturist precluded from asking for rectification of the mistake in the decree ? You may say that a judgment and decree, having been signed, cannot be altered except by a review, but I do not see how S. 11 or O. 20, R. 3, Civil P. C., which forbids the alteration of a judgment after it is signed when the whole of the Civil Procedure Code is excluded by S. 4 can bar the agriculturist and I feel also some difficulty in applying the rule of res judicata and the rule about the amendment of judgment and decree on general principles to their full extent in matters arising between a creditor and an agriculturist under the Agriculturists' Relief Act.

At the same time it was not contended at the bar and it is not possible to hold that the principle of res judicata can in no case apply between a creditor and an agriculturist with regard to the question of reduction of interest. Suppose an agriculturist appears before the Court and raises the question of interest and the claim is decided against him wholly or partly, then it should not be possible for the agriculturist to have the same matter tried over again by a separate application after the passing of the decree. This much Mr. Baleshwari Prasad concedes, who has appeared for the agriculturist before us, but he submits that this rule should not be extended any further and should not be applied to ex parte decrees for reduction of past interest under S. 28 and should certainly not be applied to applications for reduction of future interest under S. 4 when the decree offends against S. 4. With some hesitation I have come to the conclusion that in cases under S. 28 where the status of the debtor, whether he is an agriculturist or not, itself may be in dispute and where the proper rate of interest may also be in dispute the principle of res judicata should be applied and a decree once passed on a loan taken after the Act should not be reopened unless the bar of res judicata can be got rid of. But different considerations may arise with regard to reduction of future interest under S. 4, Agriculturists' Relief Act, in a decree passed on a loan after the Act came into force where the future rate of interest awarded in a decree offends against S. 4, Agriculturists' Relief Act.

I am of opinion that where an application is made by an agriculturist for converting a decree passed after the Act came into force under S. 5 into an instalment decree, if it appears to the Court that the interest awarded under the decree offends against S. 4, it should be open to the Court at the application of an agriculturist to set right the excessive interest in the decree and in a case like this the doctrine of res judicata or the doctrine that once a judgment is signed it cannot be amended cannot and should not apply. I would, therefore, allow this revision, set aside the order of the lower Court, convert the decree dated 8th July 1938 into an instalment decree and correct the future rate of interest if it offends against S. 4 of the Act.

Order of the Court. — The revision is allowed, the decree of the Civil Judge of Etawah dated 23rd April 1938 is set aside and under O. 41, R. 23 of Sch. 1, Civil P. C., the case is remanded to the Civil Judge of Etawah to pass a decree in accordance with the law declared by this Court, modifying the decree dated 8th July 1938, by converting it into a decree payable by instalments in accordance with S. 5, U. P. Agriculturists' Relief Act, and by correcting the rate of interest, if and to the extent that such rate as decreed offends against S. 4 of the said Act. The applicant is to be entitled to his costs of the proceedings in the High Court.

G.N./R.K. *Revision allowed.*

(29) A. I. R. 1942 Allahabad 36

COLLISTER AND BAJPAI JJ.

Sagar Mal and another — *Defendants* — *Appellants*

v.

Parsotam Das and another, Plaintiffs and others, Defendants — *Respondents.*

First Appeal No. 294 of 1939, Decided on 29th October 1941, from decision of Addl. Civil Judge, Benares, D/- 21st April 1939.

(a) Award—Decree based on— Decree cannot be challenged on ground that award was not registered — Fact of plaintiff being minor at time of passing decree to which he was party cannot confer upon him any such right of suit.

There is no right of suit for the avoidance of a decree based on an award on the ground that the award which is the basis of the decree is unregistered; that is on the ground that the Court had committed an error of law in decreeing the suit upon a document which required registration. The mere fact of the plaintiff being a minor at the time the decree to which he was a party was passed cannot confer any such right of suit on him : ('37) 24 A I R 1937 All 65 (FB), *Disting.* [P 38 *b,c*]

(b) Practice—New plea—Appeal — Point that pending review no reference to arbitration could be made without Court's intervention and therefore leave under O. 32, R. 7, Civil P. C., was necessary though of law depends on facts —Facts neither disclosed in plaint nor in paper-book—Point cannot be entertained in appeal.

The point that since a review application was pending, it was not open to the parties to refer the matters in dispute to arbitration without the intervention of the Court and therefore the leave of the Court should have been obtained under O. 32, R. 7, Civil P. C., though a question of law depends on facts, and when those facts are not disclosed either in the plaint or anywhere in the paper-book, the point cannot be entertained in appeal. [P 38*e*]

(c) Civil P. C. (1908), Sch. 2, para. 1 — Words "at any time before judgment is pronounced" in para. 1 cannot apply to order on review—Review application pending — Parties can refer privately to arbitration matters in dispute after decision in suit.

Paragraph 1 contemplates a judgment in suit and predicates the pendency of a suit. The proceedings in review are not a suit and the mere filing of an application will not reopen a suit. Consequently the words "at any time before judgment is pronounced" in para. 1 cannot apply to an order upon an application for review. Hence the parties to a suit are at liberty to refer privately to arbitration the matters which were in dispute between them after the decision of the suit, notwithstanding the pendency of a review application. [P 38*g,h*]

C. B. Agarwala — for Appellants.

Harnandan Prasad — for Respondents.

Collister J. — This is an appeal by Sagar Mal and Brij Mohan Das, who were defendants 1 and 2 to the suit and who are the sons of one Jai Dayal. There is a pedigree at page 7 of our paper-book, which shows that a man named Prag Das had four sons. One of them is Harji Mal, who was defendant 3 to the suit. Defendant 4 is Rameshwar Das, who is the adopted son of Bakhshi Ram, a deceased brother of Harji Mal. Defendant 5 is Mt. Kamla Bahu, wife of Rameshwar Das. The plaintiffs are Parshotam Das and Narotam Das, who are the minor sons of Rameshwar Das. Narotam Das has been adopted by Bishnath Prasad, a deceased son of Harji Mal. Bishnath Prasad's widow is a lady named Mt. Kishuni Bahu.

The following facts are admitted by learned counsel : This family used to do business at Benares and other places as a firm under the name of Bakhshi Ram Rameshwar Das and they owned property, including a building at Benares known as the Rameshwar Theatre Hall. We will call them Firm No. 1. The family of the defendants-appellant also carried on business at Benares and elsewhere under the name of Jai Dayal Madan Gopal. We will call them Firm No. 2. These two firms also carried on a separate business in partnership with each other and we will call this Firm No. 3. In July 1923 Firm No. 1 sold one half of the Rameshwar Theatre Hall to Firm No. 2; and in 1928 Firm No. 1 executed a simple mortgage bond for Rs. 53,000 in favour of Firm No. 2 in respect to the other half of the Theatre Hall as well as other property. In 1936 Firm No. 2 was dissolved and then disputes arose between the parties, one of the disputes being as to whether the Krishna Mills at Benares were the exclusive property of the original firm Jai Dayal Madan Gopal, i. e. Firm No. 2, or whether they were the property of the partnership firm, i. e., Firm No. 3, which had now become disrupted. The appellants claimed that the assets of Firm No. 2 had vested in Jai Dayal, whom they now represented. As a result of these disputes a series of suits were instituted. Suit No. 66 of 1936 was instituted by Parshotam Das and Narotam Das, the two minor sons of Rameshwar Das, for a declaration that the mortgage bond of 26th September 1928 was not binding upon them. This suit was dismissed.

The appellants sued upon their mortgage and claimed a sum of Rs. 96,860. This was Suit No. 69 of 1936 and it was decreed. Then Parshotam Das and Narotam Das instituted Suit No. 77 of 1936 for a declaration that the sale deed of 23rd July 1923 in respect to one half of the Theatre Hall was not binding on them and they also claimed Rs. 70,000 as mesne profits. This suit was dismissed. Suit No. 85 of 1936 was instituted by the appellants against Harji Mal, Rameshwar Das, Parshotam Das and Narotam Das for re-

covery of Rs. 64,864 as being due to Firm No. 2 from Firm No. 1 and there was also a claim for rendition of accounts and for a declaration that Firm No. 1 had been a partner in the profits and losses only of Firm No. 3 and not in the capital. This suit was decreed in respect to the claim for Rs. 64,864, but was dismissed in respect to the other claims. Suit No. 6 of 1937 was instituted by Rameshwar Das alone against the appellants and others, including Harji Mal and the two minor sons of Rameshwar Das, for a declaration that the plaintiff to that suit and his two minor sons and Harji Mal were the owners in their partnership capacity of the Krishna Mills and their appurtenances to the extent of 4 as. 6 ps. This suit was decreed. We may mention that in each of the afore-mentioned suits, Parshotam Das was represented by Mt. Kamla Bahu as next friend or guardian ad litem as the case might be and Narotam Das was similarly represented by Mt. Kishuni Bahu. All these suits were disposed of on one and the same date, namely 1st June 1937.

Thereafter the parties began to contemplate the filing of appeals, and the appellants preferred an application for review in respect to Suit No. 6 of 1937; but meanwhile they decided that the better course would be to refer their disputes to arbitration. An agreement was accordingly drawn up and executed by the parties on 20th July 1937, under which the parties referred the various matters in dispute among them to the arbitration of a gentleman named B. Banarsi Das. In this agreement also, Mt. Kamla Bahu acted as guardian of Parshotam Das and Mt. Kishuni Bahu acted as guardian of Narotam Das. The arbitrator appears to have acted with unusual and commendable expedition, for he gave his award on 12th August 1937, and we may mention that the award also covered a matter which was under litigation at Calcutta (Suit No. 1511 of 1936). This award was signed by all the parties. So far as this appeal is concerned, it is only necessary to state the terms of the award in respect to Suit No. 6 of 1937. The arbitrator held that Firm No. 1 had no partnership title in respect to the Krishna Mills and that Sagar Mal and Brij Mohan Das, the appellants before us, owned the entire properties of these mills, including the "outstandings, title and good will." The award was filed in Court that very same day by Harji Mal, Rameshwar Das, Parshotam Das under the guardianship of Mt. Kamla Bahu and Narotam Das under the guardianship of Mt. Kishuni Bahu, and they prayed that the award be made a rule of Court. A separate application was made in respect to each suit, and the application in respect to Suit No. 6 of 1937 was numbered as Suit No. 46 of 1937. The appellants filed a written statement admitting the award and that same day, that is to say 12th August 1937, the learned Judge passed the following order:

> The award has been filed. The opposite party accepts the award and there is no contest in respect of it. The suit is decreed in terms of the award.

Thereafter on 16th and 17th August applications were preferred in respect to the various suits praying for amendment of the decrees according to the terms of the award. On 3rd January 1938 the two minor sons of Rameshwar Das, namely, Parshotam Das and Narotam Das, instituted the suit out of which this appeal has arisen, praying for a declaration that the award dated 12th August 1937 and the decree passed upon it in Suit No. 46 of 1937 is null and void and ineffectual as against the plaintiffs and also as against defendants 3 and 4, that is to say Harji Mal and Rameshwar Das, and that the decree which has been passed in Suit No. 6 of 1937 held good. A number of issues were framed, and the last issue—which is issue 8—was as follows:

> Are the plaintiffs entitled to the declaration sought? Is the award inadmissible and void, not being registered?

The learned Judge only tried the last-mentioned issue and he has held that having regard to S. 17 (1) (e), Registration Act, the award is invalid, being unregistered. He has accordingly decreed the suit. Learned counsel for the defendants-appellants challenges this decision on two grounds. In the first place he pleads that the suit has been decided on a ground which gave the minor plaintiffs no right of suit. In the second place he contends that the award did not require registration. As regards the first point, his contention is that the plaintiffs were not competent to base a suit for avoidance of the decree on the ground that the learned Judge had committed an error of law in passing a decree upon an award which had not been registered. Learned counsel for the plaintiffs-respondents contests this plea, contending that a decree passed upon an unregistered award in respect to immovable property is without jurisdiction; and he has called in aid a Full Bench decision of this Court in 1936 A L J 1333.[1]

1. ('37) 24 A I R 1937 All 65 : 167 I C 99 : I L R (1937) All 317:1936 A L J 1333 (F B), Mt. Mariam v. Mt. Amina.

In that case it was held that para. 1 of
a Sch. 2, Civil P. C., is subject to the provisions of O. 32, R. 7, Civil P. C., and that the omission on the part of the next friend or guardian ad litem to obtain leave of the Court renders an order of reference and the award and the decree based upon it voidable at the option of the minor as against all the parties; and such order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. That case is obviously distinguishable inasmuch as in the case which is now before us there is no statutory provision in favour of the minors. Their learned counsel concedes that,
t if the plaintiffs had been *sui juris*, they would have had no right of suit upon the ground which is the basis of the lower Court's decision, but he vaguely invokes the indulgence which the Courts extend towards minor litigants. We put the following proposition to him : Supposing a suit is decreed on the basis of a mortgage bond, would a minor defendant have a right to sue for avoidance of the decree on the ground that the mortgage bond had not been registered, as required by law ? Learned counsel had to concede that in such a case the minors would have no right of suit. We can see no
c difference in principle between a decree based on an unregistered mortgage bond and a decree based on an unregistered award. The plaintiffs could have appealed under S. 104 (f), Civil P. C., against the filing of the award, but they have no right of suit on the ground that the award which is the basis of the decree is unregistered; or, in other words, on the ground that the Court had committed an error of law in decreeing the suit upon a document which required registration.

Learned counsel for the plaintiffs then advanced another plea, and it is this : He says that on 5th July 1937 the defendants-
d appellants had filed a review application in respect to suit No. 6. The agreement to refer to arbitration was executed on 20th July 1937 and the award was made and was presented to the Court on 12th August 1937 and judgment was passed upon it. On 24th August 1937, says learned counsel, the review application was dismissed for want of prosecution. He accordingly pleads that since a review application was pending in the Court, a reference to arbitration could only be made through the intervention of the Court and that where a reference is so made the leave of the Court is necessary quoad the minors under O. 32, R. 7, Civil P. C.

This plea was not raised in the plaint of
e the suit. It is true that this is a question of law, and learned counsel for the plaintiffs therefore contends that he is entitled to raise it even in appeal. But though a question of law, it depends on facts, and these facts are admittedly not disclosed in the plaint or anywhere in our paper-book. In the circumstances we do not think that the plea is entertainable at this stage. Even if a contrary view be held, we are of opinion that there is no merit in the plea. Learned counsel's argument is that, since the review ap-
f plication was pending, it was not open to the parties to refer the matters in dispute to arbitration without the intervention of the Court and therefore the leave of the Court should have been obtained under O. 32, R. 7, Civil P. C., and this admittedly was not done. We are referred to para. 1 of Sch. 2 and to the definition of "judgment" in S. 2 (9), Civil P. C. Paragraph 1 (1) of Sch. 2 reads as follows :

> Where in any suit all the parties agree that any matter in difference between them shall be referred to arbitration, they may at any time before judgment is pronounced apply to the Court for an order of reference.

Section 2 (9) defines "judgment" as "the statement given by the Judge of the grounds of a decree or order." Learned counsel for
g the plaintiffs emphasises the word "order" and he argues that in para. 1 of Sch. 2 the words at any time before judgment is pronounced will apply to an order upon an application for review. But it is clear that the judgment contemplated is a judgment in a suit: and review proceedings are not a suit. Paragraph 1 predicates the pendency of a suit; but no suit was pending between the parties on 20th July 1937. The mere filing of an application for review will not re-open the suit; and it is not suggested that the application had been granted under O. 47, R. 8, Civil P. C. Moreover, the circumstances clearly indicate that on the date of
h the agreement it was the intention of the parties that the review application should be dropped. There is therefore no force in this contention and the parties were at liberty, notwithstanding the pendency of a review application, to refer privately to arbitration the matters which were in dispute between them after the decision of the suits. In the result we allow this appeal and set aside the decree of the Court below and we remand the suit to that Court for decision of the issues arising between the parties. Costs will abide the result.

G.N./R.K. *Appeal allowed.*

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COLLISTER AND BAJPAI JJ.

Raghubir Saran Das and others
— *Plaintiffs* — *Appellants*
v.
Kunj Behari Lal, Official Receiver
— *Defendant* — *Respondent.*

First Appeal No. 350 of 1935, Decided on 29th October 1941, from decision of Sub-Judge, Meerut, D/- 9th February 1935.

(a) Transfer of Property Act (1882), Ss. 54 and 55 (2) — Insolvency—Sale by Official Receiver is sale by act of parties — Provisions as to registration apply.

A sale in insolvency proceedings, whether it be a direct sale by the Official Receiver to a particular person or whether it be a sale at auction, is nothing more than a transfer by act of parties. Since the Official Receiver is an agent of the Court, it may be said that a sale effected by him is a sale under the Court, but it is certainly not a sale by the Court and therefore the provisions as to registration apply to such sale : ('27) 14 A I R 1927 Mad 1 (FB); ('35) 22 A I R 1935 Mad 55; ('19) 6 A I R 1919 Cal 193 and 16 C W N 394, *Rel. on.* [P 41*d*,*f*]

(b) Provincial Insolvency Act (1920), S. 28 (2) — Transfer by Hindu widow holding life estate without legal necessity—Death of widow — No title remains in transferee — Transferee adjudicated insolvent — Property does not vest in Official Receiver — No question of his holding same in fiduciary capacity under S. 55 (2) Proviso, T. P. Act, arises.

On the death of a Hindu widow holding a life estate the title of the transferee from her without legal necessity ceases and consequently the property transferred cannot vest in the Official Receiver under S. 28 (2) on the adjudication of the transferee as insolvent. Therefore, there can be no question of the Official Receiver holding the same in a fiduciary capacity under S. 55 (2) Proviso, T. P. Act.
[P 41*a*,*b*]

Panna Lal, S. N. Verma, M. N. Agarwala and Brij Lal Gupta — for Appellants.

P. L. Banerji and N. C. Vaish —
for Respondent.

Bajpai J. — This is a plaintiff's appeal. The plaintiff was Raghubir Saran Das, but he is now dead and his heirs and legal representatives have been brought on the record. The suit was for recovery of a sum of Rs. 6480 principal and interest; and the defendant to the suit was the Official Receiver of the property of two persons, Sri Ram and Tirlok Prasad, who have been adjudged insolvent. It appears that a man named Gur Baksh Singh died leaving considerable property, including two pakka shops and a pakka staircase in the town of Meerut. He died without issue, but he left a widow, by name Mt. Nehal Kunwar, who under the Hindu law acquired a life estate in the property of her deceased husband. On 4th August 1915, Mt. Nehal Kunwar executed a sale deed of the pakka shops and staircase in favour of Sri Ram and Tirlok Prasad for a consideration of Rs. 1420. The sale deed is at p. 37 of our paper book and it will be seen that she claimed to be the permanent owner in possession and stated that the property belonged exclusively to herself. Twelve years later, on 28th January 1927, Sri Ram and Tirlok Prasad who, we may mention are brothers, were adjudged insolvents and their property vested in the Official Receiver under S. 28, Provincial Insolvency Act. The Official Receiver took possession inter alia of the two buildings and the staircase. On 17th May 1931, Mt. Nehal Kunwar died and therefore her life estate was extinguished under the Hindu law. The Official Receiver, however, put up this property as well as other property for sale at auction on 25th August 1931. The plaintiff made the highest bid, namely Rs. 5500 for the two buildings and the staircase and these properties were knocked down to him for the aforesaid amount.

On 8th April 1932 Mt. Hardei who is a sister of Gur Buksh Singh, instituted a suit (Suit No. 39 of 1932) under the provisions of Act 3 of 1929, in which she impleaded no less than 47 defendants including Raghubir Saran Das, the plaintiff of the suit out of which this appeal has arisen. In that suit Mt. Hardei challenged the validity of an award which was said to have been made on 27th February 1915 and which purported to confer an absolute title upon Mt. Nehal Kunwar. She further assailed the sale deed of 4th August 1915 on the ground that the title of the vendees to that sale deed did not enure beyond the death of Mt. Nehal Kunwar — which as we have already seen, took place on 17th May 1931—and on the same grounds she attacked the auction purchase of 25th August 1931, alleging that no title had passed thereunder to the plaintiff-appellant. We may mention at this stage that after the auction sale of 25th August 1931 the plaintiff-appellant had paid the sum of Rs. 5500, which was the amount of his bid, to the Official Receiver.

Mt. Hardei's suit was decided on 19th April 1933 and it was held that "the award in question is not a family arrangement and is not bona fide or genuine and the plaintiff (that is to say Mt. Hardei) was not bound by it;" and so far as the two buildings and the staircase are concerned, it was held that the vendees under the sale deed of 4th August 1931 had no title beyond the death of Mt. Nehal Kunwar and that the auction sale of 25th August 1931 conferred no title on Raghubir Saran Das. Mt. Hardei's claim for

possession in respect to these properties was accordingly decreed and on 11th June 1933 she obtained delivery of possession. We may mention that the plaintiff to the present suit did not contest that suit and it was decreed against him ex parte. Nor did the Official Receiver ask to be impleaded in it, although he was aware of its institution. We know this because in a report dated 21st May 1932 he made a mention of Suit No. 39 of 1932. We must now go back again to the year 1932. On 2nd May 1932 the plaintiff to the present suit preferred an application in which he referred to Mt. Hardei's suit and went on to say :

> Under these circumstances, when the rights of ownership of the insolvents in respect of the shop sold are not clear and the petitioner-purchaser has to face unnecessary litigation, as regards the result of which nothing can be said with certainty, the petitioner is by no means ready to purchase the shop aforesaid. Hence it is respectfully prayed that the sale may not be confirmed in favour of the petitioner and an order may be passed for the refund of Rs. 5500 which the petitioner has deposited and the interest thereon.

The only result of this application was that on 24th June 1932 the Court passed the following order : "Let the objections be dismissed as prayed for and the sale confirmed." On 25th August 1934 the suit out of which this appeal has arisen was instituted by Raghubir Saran Das. It is unnecessary to set out the allegations in the plaint in any detail; it will suffice to say that the main plea in the suit was that the insolvents had no title in the property after the death of Mt. Nehal Kunwar on 17th May 1931 and that therefore no title passed to the plaintiff under the auction sale of 25th August 1931. The suit was contested by the defendant on various grounds and it has been dismissed by the Court below. The learned Judge after referring to the proviso to S. 55 (2), T. P. Act, and an authority of this Court, which it is unnecessary for us to mention, says :

> Therefore, in view of the aforesaid state of law and also of the fact that the property was purchased from a trustee with full knowledge that the owner prior to Sri Ram and Tilokchand was a Hindu widow, the plaintiff cannot be allowed to get back his purchase money. The plaintiff bid at the auction with his eyes open. He took all the risk which the sale by a trustee entails. He did not move his little finger to ward off the attack made on his title by Mt. Hardei. I therefore fail to discover any equity in his favour to entitle him to claim a refund of his purchase money.

This mention of a trustee and of the proviso to S. 55 (2), T. P. Act, predicates the title of the insolvents to the property in question, and the fact of this title is vehemently assailed. This is a matter which we shall shortly have to deal with. The learned Judge was of the opinion that the questions were all in favour of the defendant. He says:

> It is an admitted fact that no sale deed has so far been executed in favour of the plaintiff, who has also failed to get possession over the disputed shops because Mt. Hardei has obtained a decree against and also possession over them. But it cannot also be denied that the sale deed was not executed because the plaintiff himself committed a default in supplying the requisite stamp (*vide* defendant's statement on oath) and also because the plaintiff himself wanted to introduce certain amendments in the draft of the sale deed which are not acceptable to the defendant in his capacity as Official Receiver.

The learned Judge then goes on to say that the plaintiff alternately approbated and reprobated the sale and that even after confirmation of the sale by the Court on 24th June 1932, the plaintiff did nothing to have a formal conveyance executed in his favour or to obtain possession of the property. It certainly does appear that the plaintiff was vacillating as to whether to accept or repudiate the sale, and the reason for this vacillation was that he did not know what the result of Mt. Hardei's suit would be and was apprehensive as regards the validity of his title. The defendant says that within a year or six months of the sale he asked the plaintiff to supply him with the stamp for the sale deed; he made this request three or four times, but the plaintiff replied that there was no hurry about the matter. The defendant's own clerk, however, a man named Ram Saran Das, has stated in cross-examination that so far as he remembers the draft of the sale deed was first handed over to the plaintiff in 1934 and that previous to that there had been no talk of any sale deed at all. As we know, Mt. Har Dei's suit was decided on 19th April 1933, and therefore if the evidence of this witness is correct, the sale deed was not drafted by the defendant until long after the decision of the Court to the effect that the insolvents had no title to this property. As regards the stamp, moreover, it is an admitted fact that the defendant has all along been in possession of the property and has been realizing rents from it and he was therefore in a position to pay for the stamp out of these rents and to execute the sale deed.

So much for the equities. We now come to the pleas which have been specifically taken before us by learned counsel for the appellants. He pleads that although in the sale proclamation, *vide* page 45, the property was stated to belong to the insolvents it did not in fact belong to them and therefore it could not and did not vest in the defendant

as Official Receiver under S. 28, Provincial Insolvency Act. Learned counsel further pleads that if it be found that the insolvents had a title to this property there could be no conveyance without a registered sale deed as required by S. 54, T. P. Act, and S. 17, Registration Act. In our opinion these contentions are well founded. It is perfectly clear that after the death of Mt. Nehal Kunwar on 17th May 1931, no title remained in her transferees inasmuch as she had no higher interest in the property than a life estate as a Hindu widow. Of course it might have been otherwise if the transfer had been for legal necessity, but there is no suggestion of any such thing. If the property did not belong to the insolvents, it is clear that it could not vest in the receiver; and there was therefore no question of his holding it in a fiduciary capacity. This being so, the proviso to S. 55 (2), T. P. Act, has no application. It is the sub-section itself which is applicable and that sub-section provides:

> The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.

Section 2, T. P. Act, provides inter alia that nothing in the Act shall be deemed to affect "any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction." The Preamble shows that the Act contains the law relating to the transfer of property by act of parties and from S. 2 it is clear that a transfer which is other than a transfer by operation of law or in execution of a decree or order of a Court is governed by the provisions of this Act and therefore a deed of conveyance in respect to immovable property of the value of Rs. 100 and upwards can only be made by means of a registered instrument. The Provincial Insolvency Act does not provide for sales by the Court such as are provided for in the Code of Civil Procedure. There can, we think, be no doubt that a sale in insolvency proceedings, whether it be a direct sale by the Official Receiver to a particular person or whether it be a sale at auction, is nothing more than a transfer by act of parties. This view was held by four out of five learned Judges composing a Full Bench of the Madras High Court in A I R 1927 Mad 1.[1] Kumaraswami Sastri Ag. C. J. observes:

> I do not think that a sale by the Official Receiver acting under the provisions of the Provincial Insolvency Act is a transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction.

On the next page he says:

> Though property vests in the receiver by operation of law, the transfer by him is a transfer by one party to another and cannot be said to be transfer by operation of law in favour of his vendee.

The same view has been expressed by three of the other learned Judges composing the Bench, but we will content ourselves with citing the observations of Curgenven J. He says:

> No difficulty seems to be presented by the words 'transfer by operation of law' which however widely they may be construed, cannot cover a sale by a receiver of an insolvent's property. Such a sale is frequently a matter of discretion and so a voluntary act on the part of the receiver, as the purchase is on the part of the buyer, and although the receiver may be a public officer, the transaction is not the less an act of parties on that account. The ordinary rules relating to stamps and registration apply to such sales.

Similarly in A I R 1935 Mad 55,[2] a Bench of that Court held that transfer deed executed by an Official Receiver in pursuance of an auction sale held by him is not exempt from registration under S. 17 (2) (xii), Registration Act. In 46 Cal 887,[3] it was held by a Bench of the Calcutta High Court that there is nothing to exempt a conveyance by an Official Receiver in insolvency from the operation of S. 54, T. P. Act. In 16 C W N 394,[4] it was held that a sale by a receiver under the directions of the Court is not a sale by the Court, and as such the Court does not grant sale certificate nor does it confirm the sale.

Since the Official Receiver is an agent of the Court, it may be said that a sale effected by him is a sale under the Court, but it is certainly not a sale by the Court. This being so, even if the insolvents had any title to the property, no such title has passed to the plaintiff for the reason that such title could only pass by means of a registered instrument. In view of what we have already said and having regard to the fact that the property has now passed into the possession of Mt. Hardei and the appellants can receive no consideration for their money, we are of opinion that the appellants are entitled to the refund which they claim. We accordingly allow this appeal and set aside the decree of the Court below and we decree the suit with costs in both Courts.

G.N./R.K. *Appeal allowed.*

1. ('27) 14 AIR 1927 Mad 1 : 99 I C 8 : 50 Mad 135 : 51 M L J 529 (FB), Sankaram v. Garapati Narasimhulu.
2. ('35) 22 AIR 1935 Mad 55 : 152 I C 988 : 67 M L J 746, Narasappa v. Hussain Sab.
3. ('19) 6 AIR 1919 Cal 193 : 53 I C 121 : 46 Cal 887, Abdul Hashim v. Amar Krishna.
4. ('12) 16 C W N 394 : 6 I C 300, Golam Hossein v. Fatima Begum.

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BRAUND J.

Hon'ble Nawab Mohammad Yusuf and another — Defendants — Appellants

v.

Sarju Singh and others—Plaintiffs — Respondents.

First Appeal No. 174 of 1940, Decided on 18th September 1941, from order of Addl. Civil Judge, Jaunpur, D/- 16th May 1940.

(a) Limitation Act (1908), S. 28 — Adverse possession for 12 years not only deprives real owner of his right to property but transfers it to person in possession — Quality and extent of right acquired by adverse possessor depends upon intention with which he was in possession — Stranger in adverse possession without explanation—Possession prima facie must be presumed to be as full owner.

Under S. 28, 12 years' adverse possession of land by a wrong-doer, not only bars the remedy of the real owner and extinguishes his title, but confers a title on the person in possession. The title of the real owner who had been dispossessed cannot even revive if, at a later date, he re-acquires possession. The quality and extent of the right acquired by the person who has established his adverse possession depends upon the intention with which the person setting up the statute has been in possession whether with the intention of wholly ousting the real owner or with the intention of ousting him to some limited extent only. [P 43*f*, *g*, *h*]

Where a person goes into possession in a special capacity such as a Hindu widow or a mortgagee the possession must necessarily be attributed to that special capacity, unless there is the strongest evidence to the contrary : ('24) 11 A I R 1924 P C 121; 21 Bom 509 and ('29) 16 A I R 1929 All 875, *Rel. on.* [P 44*g*]

But when a stranger is in adverse possession to another without any explanation prima facie that possession must be presumed to be possession with an intention to claim the full rights of an owner. [P 45*a*]

(b) Adverse possession — Claim of person as grove-holder in revenue proceedings rejected—He is not precluded from establishing adverse possession as proprietor in civil Court—Estoppel.

A person who claimed to be a grove-holder in the revenue proceedings and whose claim was rejected is not precluded from proving in the civil Court that in fact he was in possession adversely in the fullest sense as a proprietor in the absence of evidence that he had ever been in possession otherwise than as a person purporting to enjoy the rights of a full owner. No question of estoppel against the adverse possessor can arise unless the true owner was induced to alter his position adversely by virtue of his assertion that he was a grove-holder. [P 45*b*, *c*, *d*, *e*]

Shiva Prasad Sinha — for Appellants.

G. S. Pathak — for Respondents.

Judgment. — This is an appeal from an order of the Additional Civil Judge of Jaunpur, remanding a case to the Additional Munsif of the same place. The facts are short. The plaintiffs brought the suit for the purpose of obtaining a declaration that they were the proprietors of a certain grove numbered 139. The defendants are the zamindars. The facts are scarcely in dispute. It is admitted that the defendants are the zamindars. It has been found by the Munsif and is not in issue before me that the plaintiffs or their predecessors, have been in actual possession of the grove without paying any rent and without giving any acknowledgment since, at the latest, the year 1899 which is the date of EX. 3. The only real issue has been whether the plaintiffs' possession has been adverse or not and whether it is open to the plaintiffs in the circumstances to set up a title by adverse possession. There were certain other defences taken before the Munsif, namely a defence as to jurisdiction, another as to joinder of parties and a third as to whether the proceedings were 'res judicata' in consequence of S. 11, Civil P. C. All these three issues were decided by the Munsif in favour of the plaintiffs. There is one further fact which I must at this point relate. In 1934 the plaintiffs' names, which up to that time had stood in the revenue records as tenants, were expunged, and in 1937 they made an application in the revenue Court to have their names restored to the record as "grove-holders." It must be conceded that in their pleadings before the revenue Court they alleged themselves to be grove-holders. That claim was resisted by the present defendants and was eventually determined by the revenue Court in the sense that the plaintiffs were not grove-holders of this grove.

Reverting now to what transpired before the Munsif, he, having found in favour of the plaintiffs on the three issues which I have already mentioned, went on to determine that the plaintiffs had established actual possession. But, on considering the question of whether their possession had been adverse, he came to the conclusion that it had not. He appears to have had two main reasons for this. The first was that in every year in which the names of the plaintiffs, or their predecessor in title, could be traced in the revenue records, there was also an entry of the defendants' title as zamindars. From this he drew the inference that there could have been no intentional assertion on the part of the plaintiffs of any title intended to oust the title of the zamindars. If I may comment on that, I doubt whether that really is the effect of the revenue record in that form. What one has to look at is not so

much the form of the record as the actual fact of continued possession over a number of years without any payment of rent and without any acknowledgment. Notwithstanding that the record was in that form, it appears to me to be possible to say that the mention of the zamindars in the revenue record is as much in favour of the plaintiffs as against them, because it may well tend to show that the plaintiffs' possession was an open challenge to the zamindars' title.

The other main ground on which the Munsif reached the conclusion that the plaintiffs had not established their adverse possession was because of their claim in the revenue proceedings in 1937 to be only grove-holders. The Munsif argued from this that they could not now be heard to set up a title as proprietors by adverse possession. He decided this, not on the ground of res judicata, but on the ground, presumably, that having claimed to be grove-holders in 1937 they could not now establish that they had been in possession for 12 years, not as grove-holders, but as proprietors. That, as I understand it, was the ground of his decision. In the result, he dismissed the suit. It then went before the Additional Civil Judge of Jaunpur. The learned Judge accepted the fact of possession and, indeed, there is no dispute about that. But he disagreed with the Munsif upon the question whether it was adverse or not. The learned Judge says:

> The plaintiffs have not been proved to be tenants of this land or holding any other permissive relation in it. They were quite strangers to that land and as such their possession over it would be deemed in the eye of law to be that of a rank trespasser.

He then considered the question of the effect of 1937 claim to be grove-holders and came to the conclusion that it did not prejudice the plaintiffs' present claim to be proprietors by adverse possession. The learned Judge, therefore, disagreed with the Munsif and remanded the case to him to hear the other issues. But, in doing so, he gave a direction to the Munsif that he need not reopen those preliminary points as to jurisdiction, non-joinder of parties and res judicata which he had already decided. The result is that the case was sent back to the Munsif to be tried upon the footing of the Civil Judge's decision that the plaintiffs had established their title by adverse possession and upon the footing of the decision of the other three issues already come to by the Munsif.

The point which has been taken before me is the same one as was considered in both the Courts below, namely, whether by claiming to have been grove-holders in 1937 in the revenue proceedings, the plaintiffs have either precluded themselves from establishing as a fact possession in any larger capacity or have estopped themselves from setting up a claim to be entitled by adverse possession to anything more than a mere interest as grove-holders. It has to be observed that there are really two ways of putting it, first that their claim as grove-holders in 1937 prevents them from proving as a fact that their possession was adverse at all and secondly—which is quite a different case—that by having claimed to be grove-holders in 1937, they are now estopped from raising any larger claim. Section 28, Limitation Act, 1908, sets out what the position is at the end of the period prescribed for limitation. It says:

> At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished.

Section 28 does not in terms say what is to happen to the extinguished right. It does not say where it is to go to. But it has always been held that 12 years' adverse possession of land by a wrong-doer, not only bars the remedy of the real owner and extinguishes his title, but confers a title on the person in possession. That goes to the length that the title of the real owner who had been dispossessed cannot even revive if, at a later date he re-acquires possession. We arrive, therefore, at the point at which S. 28 not only deprives the owner of his right in the property but transfers it to the person who has successfully set up his adverse possession under the statute.

There is, however, a further limitation to this. It has to be considered to what extent the right is transferred; in other words what is the quality and extent of the right acquired by the person who has established his adverse possession. The answer to that question appears to have been determined by a long line of authorities in India in the sense that it depends upon the claim which accompanied the adverse possession. It depends upon the intention of the person whose possession has ousted the true owner. In short, it appears to me to be little less than a species of prescription. One has to look and see with what intention the person setting up the statute has been in possession—whether with the intention of wholly ousting the real owner or with the intention of ousting him to some limited extent only. I have been referred to a number of cases. In the

case in 22 A L J 304[1] the Judicial Committee considered the position of a Hindu widow who was wrongly left in possession during her life time as against the rest of the family. Lord Dunedin, having first decided that the possession of the two widows in the particular circumstances of the case was wrongful in the sense that they had no legal title, went on to consider the effect of that in these words:

> It was then argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiff were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu widow as often pointed out, is not a life renter but has a widow's estate that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to any one as to certain parcels she does not acquire the parcels as stridhan but she makes them good to her husband's estate....

In effect that appears to me to say that, in the case of a Hindu widow who remains in possession of property without title, the only intention, or capacity, to prescribe for an interest by adverse possession which can be attributed to her is one to prescribe for a Hindu widow's interest and for nothing more. But it has always to be remembered that, in dealing with the case of a Hindu widow, one is dealing with a special and exceptional case. There is only one capacity in which a Hindu widow could possibly in the circumstances have had any interest in the property and that was in her capacity as a Hindu widow. It is unlike the case of a stranger who is found in possession of property, because in that case the whole range of the various interests which can exist in property are open to him. It is otherwise in the case of some special class of persons like a Hindu widow who only purports to take possession, in the first place, in that limited capacity. I venture to think that, broadly speaking, there is a great deal of difference between a case in which a stranger prescribes under the statute and one in which a person, having only particular rights, claims to have been in possession adversely to the true owner. The next case to which I have been referred is 21 Bom 509.[2] In that case in the Bombay High Court it was established that S. 28, Limitation Act, not only destroys the title of the real owner but creates a title by negation in the occupant which he can actively assert. It also establishes that, if there has, in fact, been prescription merely for a limited interest, then it is only to the extent of that limited interest that the statute creates a title by negation in the occupant. It takes the matter, I think, in principle no further.

I lastly come to a decision by the learned present Chief Justice of this Court in 1929 in the case in A I R 1929 ALL 875.[3] In that case certain mortgagees under a usufructuary mortgage applied in pursuance of their mortgage for mutation of names. By mistake they were entered as mortgagees not only in respect of the mortgaged land but in respect of a piece of land which was not mortgaged at all. Their names remained so entered for over 12 years and, to put the matter shortly, at the end of 12 years they claimed to be entitled by adverse possession, not merely to a mortgage interest in the piece of land which was not included in the mortgage, but to a full proprietary interest. It was held by the learned Judge that they had only prescribed for a mortgage interest and therefore S. 28, Limitation Act, could not possibly operate to give them more than they had prescribed for. If I may say so, that was obvious, because there never could have been the slightest doubt from the moment that they went into possession that their only excuse for being there must have been that they were mortgagees. It was obvious on the facts that they never pretended, and never could have pretended, to be any thing else but mortgagees from the very beginning. That, again, is a case of a person going into possession, in the first place, in a special capacity, as in the case with a Hindu widow. When there does exist such a special capacity the possession must necessarily be attributed to that special capacity, unless there is the strongest evidence to the contrary. I think that is the right principle to apply. Now I come back to the present case. Here the plaintiffs were first found in possession as strangers as early as 1899. From that date until 1934, a period of 35 years, they remained in uninterrupted and unexplained possession. There is not a trace of any indication of the capacity in which they were in such possession. It has to be remembered that, unlike the case of a mortgagee or of a Hindu widow the plaintiffs were strangers to the defendants and, in this case, I do not think that one can attribute to them any such special capacity as I have tried to describe above. It seems to me to be a simple case of

1. ('24) 11 A I R 1924 P C 121 : 80 I C 788: 51 I A 171 : 5 Lah 192 : 22 A L J 304 (P C), Lajwanti v. Safa Chand.
2. ('97) 21 Bom 509, Budesah v. Hanmanta.
3. ('29) 16 AIR 1929 All 875 : 119 I C 111, Mohammad Kamil v. Mohammad Salim.

a A being found in adverse possession against B. When a person is in adverse possession to another without any explanation it seems to me that, prima facie, that possession must be presumed to be possession with an intention to claim the full rights of a proprietor.

Then came the interlude in 1937. It is quite true that the plaintiffs then claimed to be grove-holders only and in that claim they failed. Now what I am asked to do is to say that, because on that occasion in 1937 the plaintiffs put forward a claim to be entitled to the property as ancestral grove property, it completely negatives the possibility that at any time since 1899 they could b have intended to hold as proprietors. My view is, although it is not altogether an easy question, that that goes altogether too far. Had there been any evidence at all which could support the view that the plaintiffs had ever been in possession otherwise than as persons purporting to enjoy the rights of full owners, then what they did in 1937 would, of course, have been strong evidence in support. But there is no such evidence. On the other hand there are a number of reasons why the plaintiffs might have put forward a claim in 1937 which was not correct. It might have been a mistaken claim. It might c have been a dishonest claim. They may have overstated their rights. It has to be remembered that in 1937 they were not claiming by adverse possession at all but were claiming an actual title to the property as ancestral property. On the dismissal of the claim, it seems to me that the question still remained to be ascertained what the true facts were. And I do not myself see how the plaintiffs can have prejudiced a search for the true facts by what they did in 1937. The effect of their claim may have been that they themselves believed they were groveholders. But even if it went as far as that, d I have great difficulty in seeing why it should now prevent them from proving that, in fact, they were in possession adversely in the fullest sense.

At the beginning of this judgment, I endeavoured to draw a distinction between the case by adverse possession and the case by estoppel. I have been considering it so far purely as a question of adverse possession. But a suggestion has been made throughout that the plaintiffs are also precluded by estoppel from raising the claim which they are now putting forward. I have great difficulty in seeing how this can succeed. When they claimed in 1937, to be grove-holders, that challenge was immediately accepted by the defendants. Indeed, it was successfully challenged. Nothing in the nature of fraud e on the part of the plaintiffs has been alleged and still less proved. Nor has it been alleged or proved that the defendants were induced to alter their positions adversely by virtue of the plaintiffs' assertion that they were grove-holders. On the contrary they successfully challenged and resisted it. As far as I can see, no question of estoppel arises. Had they acquiesced in it, the position might now be very different. For all these reasons, in my view, the learned Civil Judge was right in dismissing the appeal and I also feel obliged to dismiss this appeal with costs. I have only to add that I have not, in any f way, considered or been asked to consider the three issues which have already been decided by the Munsif and, if the decisions on those issues are challenged, they will remain open in the appeal which no doubt will eventually be filed against the Munsif's ultimate decision.

G.N./R.K. *Appeal dismissed.*

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(29) A. I. R. 1942 Allahabad 45

VERMA J.

Sardar Singh — Applicant

v.

Mt. Champa and others — g

Opposite Party.

Civil Revn. Appln. No. 340 of 1940, Decided on 1st September 1941, against decision of Dist. Judge, Agra, D/- 28th October 1939.

(a) Civil P. C. (1908), O. 44, R. 1, Proviso — Application to appeal as pauper—Judge stating in order sheet that he read lower Court's judgment but not mentioning that he perused application — Judge cannot be said to have omitted to read application.

Where the Judge in his order on an application to sue as a pauper says that he has read the judgment of the Court below, but does not say that he has perused the application also, it cannot be said that the Judge did not know or did not do, what, according to the law (that is, under O. 44, R. 1, Proviso), was his duty, namely to read the application. h

[P 46*b*,*c*]

(b) Court-fees Act (1870), S. 19 (xvii)—Plea of exemption under S. 19 (xvii) cannot be raised for first time in revision.

The plea as to exemption of court-fee under S. 19 (xvii) cannot be raised for the first time in revision as it involves a question of fact.

[P 46*e*]

(c) Court-fees Act (1870), S. 19 (xvii)—Court-fee on memo of appeal — Applicant seeking benefit of S. 19 (xvii) must be shown to have been in duress at time of filing memo.

An applicant who seeks the benefit of S. 19 (xvii) in respect of court-fee payable on the memo of appeal must show that he was in duress at the time of filing the memo and not on some prior date.

[P 46*e*]

(d) Court-fees Act (1870), S. 19 (xvii)—Application to sue as pauper rejected — Revision — Point that applicant is entitled to benefit of S. 19 (xvii) cannot be raised.

The point that the applicant is entitled to the benefit of S. 19 (xvii) cannot be raised in an application which is for the revision of an order refusing to allow the applicant to appeal as a pauper, and not of an order passed on an application praying benefit of the provisions of S. 19 (xvii). [P 46*f*]

(e) Court-fees Act (1870), S. 19 (xvii)—Applicability—Petition under S. 19 (xvii) must relate to matter in connection with which petitioner is in prison, duress or under restraint.

The petition mentioned in S. 19 (xvii) must be one in respect of, or connected with, or arising out of, the matter in connection with which the petitioner is in prison, in duress or under restraint. [P 46*g*]

Gopal Behari — for Applicant.

B. S. Darbari — for Opposite Party.

Order. — The first point raised by the learned counsel is that the order of the learned Judge, dated 28th October 1939, does not show that he perused the application for permission to appeal as a pauper as was his duty under the proviso to O. 44 R. 1, Civil P. C. The basis of this argument is that the learned Judge has said in the order in question that he has read the judgment of the Court below, but does not say that he has perused the application also. I cannot accept such an argument. I have no reason to believe that the learned Judge did not know or did not do, what, according to the law, was his duty. Learned counsel next raises a point which was not raised in the Court below. It is contained in ground No. 4 of the petition for revision. It is stated there that the applicant was in prison at the time of the filing of the memorandum of appeal in the Court of the District Judge and was therefore exempt from payment of any court-fee under S. 19, cl. (xvii), Court-fees Act. The only basis which learned counsel has for asserting that his client was in prison at the time when the memorandum of appeal was filed in the lower appellate Court is a statement in the mukhtarnama khas which his client executed on 25th October 1939, in favour of one Babu Singh authorizing the latter to present the memorandum of appeal on his behalf. The sentence on which reliance is placed may be thus translated "I have been arrested and am at this time in tehsil Fatehabad under arrest on account of non-payment of motor tax." It is also pointed out that the mukhtarnama khas purports to have been attested by a gentleman who is described in the attestation as the Tahsildar Magistrate of Fatehabad and it is urged that that establishes the fact that the applicant at the time of the execution of the mukhtarnama khas was in some sort of duress imposed upon him by the Tahsildar of Fatehabad.

In the first place, I am not prepared to allow such a ground to be raised in revision for the first time. The point obviously involves a question of fact, and this Court cannot arrive at any satisfactory conclusion without having findings of fact recorded by the Court below. In the second place, the memorandum of appeal was presented in the lower appellate Court on 27th October 1939, that is, two days after the execution of the mukhtarnama khas. There is absolutely no evidence to show that the applicant was in any sort of duress on 27th October 1939. In the third place, the application before me is one for the revision of an order refusing to allow the applicant to appeal as a pauper, and not of an order passed on an application praying that the provisions of S. 19, cl. (xvii), Court-fees Act, be applied to the memorandum of appeal filed by the applicant. In the fourth place, the provision of law relied upon namely, S. 19, cl. (xvii), Court-fees Act, does not in my opinion apply to a case like this. The petition mentioned in that clause must in my judgment be a petition in respect of, or connected with, or arising out of, the matter in connexion with which the petitioner is in prison, in duress or under restraint. If the argument of the learned counsel is accepted, the results will be startling. To mention only one aspect of the matter, all that a person, who is desirous of filing a suit—frivolous or otherwise—for which the maximum court-fee prescribed by the Court-fees Act is payable, need do to avoid the payment of the court-fee is to make default in the payment of a trifling amount out of some tax or other, which is recoverable as land revenue, and thus induce the authorities whose duty it is to collect the tax to arrest him and to detain him just long enough to enable him to have a special power of attorney attested by the officer detaining him and to have the plaint filed by the special attorney so appointed. Other similar consequences are easily conceivable. The Legislature could never have intended that the clause in question should have any such meaning. I dismiss the application in revision with costs.

G.N./R.K. *Application dismissed.*

(29) A. I. R. 1942 Allahabad 47

BRAUND J.

Ghura and others — Appellants

v.

Emperor.

Criminal Appeal No. 376 of 1941, Decided on 16th September 1941, from order of Second Addl. Sess. Judge, Gorakhpur, D/- 24th March 1941.

(a) Criminal trial — Confession — Confession by accused implicating several people also, none of whom has been mentioned in first information report or arrested or tried — Confession is worthless as against any but the maker.

An accused in his confession implicated several people also as having taken part in the dacoity; but none of them was mentioned in the first information report nor was any of them arrested or tried :

Held that the confession was worthless as against any but the accused who made the confession. [P 48*a*]

Held further that the absence from the confession of the names of the persons who had been denounced in the first information report was strong evidence that the confession was at any rate not secured by pressure from the police. [P 48*a*]

(b) Criminal trial — Duty of Court — Court must proceed on evidence given in case and not on ex cathedra assumptions.

The whole basis of the administration of justice is to try to arrive at the truth by a scientific investigation of the evidence given and not by a series of *ex cathedra* assumptions. [P 48*g*]

(c) Criminal trial — Accused — Silence of — No presumption ipso facto arises from it against accused.

The fact of silence of the accused may, with all the other circumstances of the case, be taken into account in a proper case ; but, even then, only if it is clearly borne in mind that an accused person always has a right to remain silent if he wishes. The silence of the accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption, against the accused, arises ipso facto from the silence of an accused person : ('37) 24 A I R 1937 Rang 83 (F B), *Rel. on.* [P50 *c,d*]

C. S. Saran — for Appellants.

Assist. Govt. Advocate — for the Crown.

Judgment. — This is an appeal by six appellants from their respective convictions by Mr. Ansari, the Second Additional Sessions Judge of Gorakhpur. They were charged before the learned Judge with committing a dacoity on the night of 11th June 1940 and were convicted by him. The scene of the dacoity was at the house of a Bania called Bishnath at a village Bara Makundpur. It appears that the Bania was sleeping outside his house with his father, Jaggi, and his nephew, Ram Brichh. The story is that in the middle of the night the house was attacked by a dozen or so dacoits who broke in and ransacked the place. Meanwhile, an alarm had been given and many of the villagers collected and put up a stout fight with their lathis. It is said that, in order that they might recognise the robbers, the villagers lit bundles of arhar sticks. The result of all this was that the dacoits were compelled to retreat, but on the way they, or some of them, broke into an adjoining house belonging to Sahdul Jolaha and took property from there also. That is a bare outline of what is said to have happened. The first information report reached the police station seven miles away on the next day at little after 11 o' clock in the morning. It was a written document dictated by Bishnath to a village writer called Sita Ram and, obviously, had been carefully prepared. It was written during the early hours of the morning and then given to the chaukidar, Govardhan Chamar, to take to the police station. In all the circumstances, I do not think that it can be said that there was any undue delay. In the first information report the facts were set out and all the present appellants, with the exception of the sixth, Basdhar, were named by Bishnath as persons whom he claimed to have recognized. He added, however, that there were others whom he would, or might, be able to recognize. He also gave a list of some of the villagers whom he said were among those that collected and would be able to give evidence. In addition, he provided a list of the stolen property, but again qualified it by saying that it was not complete as it had been done in a hurry. All that is very reasonable and candidly I think that the first information report in this case is quite impressive.

Late in the evening of 12th June the Sub-Inspector from the police station came out and on the 14th five men who were named in the first information report were all arrested. Nothing then happened for nearly a month, until, on 12th July the appellant, Ghura, took it into his head to confess. Why, no one knows. All the usual formalities were gone through before a Magistrate and his confession was duly made. It is a very curious document, if only for the reason that it names 17 or 18 people as having taken part in this dacoity and among them are not to be found the names of any of persons whom Bishnath had mentioned in the first information report. There was, however, included among them the name of the appellant, Basdhar. I may say at once that of these 17 or 18 people Basdhar alone was arrested and tried. That is a point which is very properly made use of by Mr. Saran to suggest that

the confession is worthless. I am inclined to agree that, as against any one but Ghura, the confession is absolutely worthless. It is a very fair inference to draw that, where a confessing accused has named 17 or 18 people of whom it was worthwhile for the police to arrest only one, there is something very wrong with the confession. At the same time, I think it right to point out that the absence from the confession of the names of the persons who had been denounced in the first information report is, in my view, strong evidence that the confession was at any rate not secured by pressure from the police. For, I can imagine no sane Sub-Inspector, who set out to extort a confession from a prisoner in his keeping and who was aware that the first information report had a month earlier denounced five named persons, omitting to insist upon the confession containing those five names also. If the police had enough influence over the accused to compel him to confess, they would surely have had enough influence over him to compel him to produce a confession which was consistent with the first information report. I have thought it right to say that in justice to the police in this case. The matter, however, is not very material because, except as against Ghura, who made it, I do not propose to pay the slightest attention to the confession. It was retracted by Ghura, but not before it had received substantial corroboration against himself by his having taken the police to his own village and discovered to them a place where there lay buried three items of property subsequently identified as coming from the burgled house.

The strength of this case rests on the actual evidence of those who say they saw what happened and identified the men engaged. I do not propose to go through the evidence in detail, because it is very long and is very consistent. It is given by the occupants of the house themselves, by the immediate neighbours and by those other villagers who live close by and had assembled when the alarm was given. It is sufficient to say that in the result nine witnesses claim to have recognized the appellant, Ghura, four witnesses recognized Balli, three witnesses have denounced Bhuar, five witnesses have named Parag and seven witnesses say they saw Ganga. It is fair to state that no actual witnesses have named the appellant, Basdhar, as apart from his having been subsequently identified. That is the effect of the evidence and, subject to the general observations which have been made in criticism of the evidence as a whole by Mr. Saran, it affords in my opinion, a very strong case against the first five appellants. As against appellant 6, Basdhar, the case is a little different, because, as I have already said, no actual witnesses have come into the witness-box to say that they knew him and saw him at the dacoity. But three witnesses did identify him subsequently at the police station. They are the witnesses, Ram Tapesar, Ramraj Lal and Gobri. In my view, subject again to the general comments that have been made, that evidence is amply sufficient to implicate the appellant, Basdhar. The identifications were, I think, in every way properly held by the Magistrate and there is no ground for any adverse comment in that respect.

But Mr. Saran, who, if I may say so, has said everything that can properly be said on behalf of the appellants, has made a number of quite reasonable comments upon the evidence as a whole with which in deference to him I ought to deal. He first attacks the evidence of the lighting of the arhar sticks. He says that this is a convenient, if not necessary, fiction which has been introduced into the case in order to overcome in the mind of the Court the darkness of the night. Of course, if we start with the assumption that the police have set themselves to concoct the case, that would be a possible theory. But the argument really begs the question, because it asks me to assume, before I start, that the case is a false one. As I so often point out in this Court, the whole basis of the administration of justice is to try to arrive at the truth by a scientific investigation of the evidence given and not by a series of *ex cathedra* assumptions. If I may venture to make the comment, we are sometimes too apt in India to try cases on pure presumption and not on the evidence given. Here there is a mass of very positive and very definite evidence that the villagers did light arhar sticks. Moreover, on the next day, the investigating officer found traces of it. I cannot discard the whole of this evidence in favour of a prejudice—even suppose I had one—against the honesty of the police. There is a great deal both in judicial and police administration of which I do not approve, but, so long as the law remains what it is, I cannot discard judicial methods. Then Mr. Saran said that no dacoits possessed of their senses would commit a dacoity in a village within a few hundred yards of their own village and at a place where obviously they were well known.

NOTE

We regret the mistake

Manager, L. I. R.

NOTE

We regret the mistake

Manager, L. I. R.

NOTE

We regret the mistake

Manager, L. I. R.

There is a good deal of commonsense in this observation. I confess that it does seem to me an extremely stupid thing to do. But, again, I cannot allow that to overcome the clear evidence that in this case they did commit the dacoity. There is no knowing what human beings will do. They will sometimes do the most stupid things and I can only suppose in this case that these men were either induced, or else were so foolish as to try, to commit this dacoity at a place where they must have been known. There is then a comment that in the lathi fight with the villagers, which admittedly took place, it is very curious that none of the b appellants received any injuries. I do not myself find much difficulty about that. I think the answer is to be found in the evidence of Ram Tapesar at p. 52 of the record. He says :

> There were 10 to 12 dacoits. They had lathis and lights and a spear. Some of the dacoits were looting the house and bringing out property as the fight was going on.

What obviously happened was that only some of the dacoits were engaged in the fight, while others went on looting. It so happened that the present appellants were among those that continued looting, because c it has to be borne in mind that the present appellants were not the only dacoits engaged. Nor do I find it very singular that in making their escape some one or more of the dacoits should have taken the opportunity of breaking open the next door house. That I think was a case of opportunism. Finally, I come to the explanation offered by the appellants themselves which is that the only reason that they have been implicated in this matter is because that they are at loggerheads with the zamindar. They say—or rather it is the merest suggestion—that the police have prosecuted them at the instance of the zamindar because they are on unsatisfactory terms with d him and that the witnesses against them have given evidence merely because they too are tenants of the zamindar and have been told to give it. There is not a syllable of evidence to support that and again I must point out that I am not free to act on mere suggestions where there is actually evidence available of quite a credible nature. The learned Judge in this case has written a good and well balanced judgment on which in all respects but one I have no comment to offer. There is however one respect in which I should desire to make some slight observation. The learned Judge at p. 85 of the record says :

> It is true that the law gives the accused a right to reserve his statement for the Court of Sessions, e but if an accused person refuses to make any statement concerning the charge against him on the very first opportunity offered to him before a Court of law, his silence does raise a presumption against him. The presumption is no doubt rebuttable presumption, and if the accused is able to put in a satisfactory reason for his silence the Court will not be justified in drawing any unfavourable inference from his silence. But, in this case, the accused have failed either to put in any satisfactory defence or to explain why they did not state anything before the lower Court concerning their enmity with their zamindar or with any of the prosecution witnesses.

With respect to the learned Judge I think that possibly goes too far and that it would be dangerous to allow it to pass. In 14 Rang 666[1] some years ago in which the question f arose as to the significance to be attached to the silence of a suspected person when present at the recording of a dying declaration by which he was implicated, I had occasion to say this :

> I desire to say at once that, speaking for myself, I do not regard it as permissible to take that into account as a circumstance discrediting the appellant's case, as subsequently put forward. I have the misfortune to take a somewhat different view to that of my learned brother upon the effect of the silence of the appellant when U. Wunthapala's dying deposition was made. The presence of a suspected person at the dying deposition is, as I concieve, a privilege accorded to him which does not impose upon him any obligation of challenging his g accuser. It is, I think, a fundamental priciple of the greatest value that a person detained upon a criminal charge is entitled to remain silent until he pleads in Court. And, if the law allows him, and recognizes the privilege of silence, then I do not think that his exercise of it can, in any circumstances be allowed to prejudice his defence when he ultimately puts it forward at his trial. And, indeed I have great difficulty, apart from the question of principle, in seeing that the silence of a person so situated as the appellant on such an occasion can be in any way legitimate evidence of his guilt. It is evidence of no more than the fact of silence itself and to attribute silence to guilt any more than (say) to hardness of hearing, mere stupidity or fright appears to me to be a speculation which, judicially speaking, is quite unwarranted.

Those observations of my own may perh haps go a little too far, but they were subject to the scrutiny of three learned Judges of the Rangoon High Court and, with some qualifications I think they were in principle approved. The learned Chief Justice said this at page 677 :

> The degree of weight to be attached to the silence of an accused person in such circumstances depends upon the nature of the case. Many factors must be taken into account in assessing it and no hard and fast rule can be laid down. Illustrations which may afford a guide can be found in the cases

1. ('37) 24 A I R 1937 Rang 83 : 168 I C 193 : 38 Cr L J 524 : 14 Rang 666 (FB), King-Emperor v. U Damapala.

Advocate High Court
Jammu & Kashmir

in (1919) 1 K B 431,[2] (1929) 1 K B 99[3] and (1908) 2 K B 680.[4] Care must be taken in all cases not to put too high a value on the absence of an immediate denial unless the surrounding facts point unequivocally to the conclusion that any accused person, whether educated or ignorant, cautious or impulsive, voluble or taciturn, would have felt bound to make a rejoinder in view of the particular charge against him and in the particular circumstances prevailing when he was made aware of it. It is not permissible to arrive at an adverse verdict on the strength of opinions formed as to the conduct of an accused person; or to allow the silence of an accused person to supplement a case for the prosecution which at the conclusion of the evidence heard on both sides is too weak to justify conviction : 41 C W N 65.[5] (Judgment of Lord Roche at page 78).

If however, the silence of the accused is to be regarded as an important point for the prosecution —and in the case under review the Sessions Judge apparently so regarded it—then at the sessions trial it is necessary by reason of S. 342, Criminal P. C., for the trial Court to put to the accused as part of the case for the Crown the fact that he remained silent, and to invite his explanation as to why he did so. The provisions of this section make it clear that this examination takes place for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him : 1 Rang 689.[6]

I have felt it right to digress to that extent because, in my view, the learned Judge, when he observes that the silence of an accused person raises a presumption against him until he rebuts it, goes much too far and I think that it is a dangerous idea to leave uncontradicted. I think the truth is that the fact of silence may, with all the other circumstances of the case, be taken into account in a proper case; but, even then, only if it is clearly borne in mind that an accused person always has a right to remain silent if he wishes. And I desire to accept what has been said by the Rangoon High Court, namely that the silence of the accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption, I think, arises ipso facto from the silence of an accused person, as the learned Judge seems to suppose.

For all these reasons, I think that this appeal must be dismissed. The sentences are six years. But, having regard to all the circumstances, I cannot take any other view than that this was a deliberate dacoity and it seems that a sentence of six years' rigorous imprisonment, though severe, is no more than is deserved.

K.S./R.K. *Appeal dismissed.*

2. (1919) 1 K B 431 : 88 L J K B 551 : 120 L T 572 : 83 J P 123 : 14 Cr App R 1 : 26 Cox C C 387, Rex v. Feigenbaun.
3. (1929) 1 K B 99 : 98 L J K B 67 : 139 L T 640 : 21 Cr App R 23 : 28 Cox C C 547 : 92 J P 197 : 27 L G R 1, Rex v. Whitehead.
4. (1908) 2 K B 680 : 77 L J K B 1043 : 99 L T 620 : 72 J P 391 : 21 Cox C C 693 : 52 S J 699, Rex v. Tate.
5. ('36) 23 A I R 1936 P C 289 : 164 I C 545 : 37 Cr L J 963 : 41 C W N 65 (P C), Stephen Senevirante v. The King.
6. ('24) 11 A I R 1924 Rang 172 : 77 I C 887 : 25 Cr L J 487 : 1 Rang 689, Maung Hman v. Emperor.

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* A. I. R. (29) 1942 Allahabad 50

FULL BENCH

IQBAL AHMAD C. J., BAJPAI, BRAUND, HAMILTON AND DAR JJ.

Pratap Singh and others — Applicants

v.

B. Gulzari Lal and others—

Opposite Party.

Civil Revn. Appln. No. 107 of 1939, Decided on 8th December 1941, against decree of Civil Judge, Aligarh, D/- 2nd October 1937.

(a) Interpretation of statutes — Definition — Meaning of words defined—Scope of interpretation clause explained.

Per *Iqbal Ahmad C. J.*—Where the Legislature defines particular words used in a particular statute those words must be given the meaning given to them by the Legislature unless, by doing so, any repugnancy is created in the subject or context. [P 54*e*]

Per *Dar J.*—It cannot be said that the interpretation clause must necessarily apply wherever the word interpreted is used in the statute and in spite of the fact that there are indications in the statute and in the section where it occurs to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause. [P 65*d*]

*** (b) U. P. Agriculturists' Relief Act (27 of 1934), S. 30 (1) — "Loan" means not principal sum lent but amount due on 31st December 1929 for principal and interest** (Per *Bajpai, Hamilton and Dar JJ.*; *Iqbal Ahmad C. J., and Braund J.*, contra).

Per *Bajpai, Hamilton and Dar JJ.*—The word 'loan' in S. 30 (1) means not the principal sum lent but the amount which is due on 31st December 1929 for principal and interest and it is on this amount that the statutory rate of interest is to be charged from 1st January 1930. Therefore where an earlier transaction of loan is renewed, the new transaction itself is a loan for purposes of the Act : ('37) 24 A.I.R. 1937 All. 598 (FB), *Expl.* [P 56*f*; P 63*e*; P 67*d*]

Per *Iqbal Ahmad C. J.* — The word 'loan' in S. 30 must refer to the amount that was actually advanced by the creditor and it cannot include the interest that accrued due on the sum "actually lent." Therefore where an earlier transaction of loan is renewed, the new transaction itself is not a loan for the purposes of the Act : ('37) 24 A. I. R. 1937 All. 598 (FB), *Rel. on.* [P 54*d*, *e*; P 55*a*]

Per *Braund J.*—Section 30 (1) speaks of "a loan taken before this Act comes into force," by which it can only, and on any ordinary use of the English language, mean any loan so taken. It is a mistake to regard it as confined to one loan, or to any particular loan. [P 57*f*]

A loan of Rs. 36,000 of 1904 was renewed in 1916 for Rs. 60,000 and again in 1928 it was renewed for Rs. 82,000 :

Held that the words "loan taken" in S. 30, subs. (1) included the sum of Rs. 82,000 which was the principal sum expressed to be secured by the mortgage of 1928, whether such sum is regarded as one single capitalized "loan taken" in the year 1928 or as compounded of three separate "loans taken" in the years 1904, 1916 and 1928 respectively, but that such words do not include interest, whether simple or compound, accrued between the date of the 1928 mortgage and 31st December 1929, which at such last mentioned date remained 'uncapitalized' by any 'renewal' transaction. The increment of Rs. 34,000 in the transaction of 1916 over the original loan of Rs. 36,000 was to be regarded as interest but that sum was capitalized by the renewed transaction of 1916 and in fact re-lent and in that sense it was a loan taken. Similarly, the increment in the transaction of 1928 was a loan taken. [P 58*b*,*d*,*e*,*f* ; P 60*d*,*e*]

(c) U. P. Agriculturists' Relief Act (27 of 1934)—Intention of Legislature should be seen from section of the Act (Per *Hamilton J.*).

It is stated in the Preamble that the Act was "to make provision for the relief of agriculturists from indebtedness," but to what extent provision was being made has to be seen from the various sections of the Act. If any section is obscure it cannot be presumed that an interpretation which gives greater relief than one which gives a lesser relief is the correct one. [P 63*d*,*e*]

(d) U. P. Agriculturists' Relief Act (27 of 1934), S. 30 and Sch. 3—These should be read together—It is not open to debtor or creditor to change liability of payment of simple or compound interest at his option from that settled in loan — Only rate of interest is fixed by statute (Per *Dar J.*).

Schedule 3 is a part of S. 30 and the section and schedule read together clearly indicate that after 1st January 1930 when the statutory rate is to come in operation in place of the contractual rate of interest, the statutory rate can be both simple and compound and it will be imposed simple or compound according as under the agreement interest agreed to was simple or compound and it will not be open to the debtor or to the creditor to change the liability of payment of simple or compound interest at his option from what was settled at the time of the loan. [P 66*b*,*c*]

It follows that under S. 30 (1) read with Sch. 3, though statutory rate of interest is to be imposed in lieu of the contractual rate of interest from 1st January 1930 onward, this statutory rate in cases where the agreed interest was compound interest would also be compound interest with this difference that it would be a lower rate of interest and the rest would be yearly. [P 66*d*]

(e) Interpretation of statutes — Court is not concerned with reason or policy of Act (Per *Dar J.*).

The Court is not concerned with the reason or policy of the Act and it has to give effect to the plain meaning of the section or to its expressed intention and it has no means of finding out its implied intention. [P 67*a*,*b*]

(f) Debtor and Creditor — Loan — Renewed loan is as good as original loan (Per *Dar J.*).

It may be a particular statute that insists or recognizes an actual payment and it may not recognize what may be conveniently described as notional payment or payment by fiction of law ; it may be that having regard to course of dealings between parties notional payment can be disregarded and parties can fall back upon original transaction but apart from such and like cases the doctrine of notional payment is too firmly established to be successfully challenged and in the eye of law renewed loan is as good a loan as the original loan and loan is an expression which might suitably and appropriately be applied to both original and renewed transactions. [P 69*f*,*g*]

(g) U. P. Agriculturists' Relief Act (27 of 1934), S. 2 (10)—Original loan renewed by fresh loan on settlement of accounts is loan (Per *Dar J.*).

An original loan, when accounts have been settled and on the basis of settlement of accounts it is renewed by a fresh mortgage bond, is in substance a loan within the meaning of the definition and there is no reason to interpret the words "which is in substance a loan" in any sense so as to destroy the validity of past transactions, and therefore where an earlier transaction of loan is renewed, the new transaction itself is a loan for purposes of section 2 (10). [P 70*h*]

(h) U. P. Agriculturists' Relief Act (27 of 1934), S. 30 (1) — Vested rights in respect of transactions closed and settled should not be taken away (Per *Dar J.*).

A statute should be so interpreted, if possible, as to respect vested rights and such a construction should never be adopted if the words are open to another construction. [P 70*c*]

There is nothing in S. 30 (1) to indicate that the expression 'loan' there is used in a sense so as to take away the pre-existing vested rights in favour of creditors on the basis of transactions which had been closed and settled and which were not subsisting when the Act came into force. [P 71*c*]

B. Malik, D. Sanyal and J. Swarup —
for Applicants.

G. S. Pathak and Shiv Charan Lal —
for Opposite Party.

ORDER OF REFERENCE

Iqbal Ahmad and Verma JJ. — As we have come to the conclusion that one of the questions arising in this case should be referred to a Full Bench for decision, we propose to state only those facts and arguments of counsel which are relevant to that question. In August 1904 Dharam Singh, the predecessor-in-title of the applicants in this revision, borrowed a sum of Rs. 36,000 from Kishori Lal, the predecessor-in-title of the decree-holders opposite parties, and executed a deed of simple mortgage. Certain payments were made and on 3rd May 1916, a fresh mortgage deed was executed for the amount which was found to be due at that date on the earlier mortgage, viz., Rs. 60,000. It is common ground that the entire considera-

tion of this deed consisted of the amount due under the mortgage of 1904 and that nothing was advanced in cash. Certain payments were again made and on 16th April 1928, it was found that the amount due under the mortgage deed dated 3rd May 1916, was Rs. 81,550. Dharam Singh borrowed a sum of Rs. 450 in cash from the mortgagees and executed on that date, i. e., 16th April 1928, a fresh mortgage deed for the total sum of Rs. 82,000.

The mortgagees brought Suit No. 46 of 1933 on the basis of the last mentioned deed of mortgage for the recovery of the amount due by sale of the mortgaged property and a preliminary decree was passed on 26th July 1934. On the expiry of the period fixed by the preliminary decree for the payment of the amount decreed, the mortgagees decree-holders, i. e., the opposite parties to this revision, applied for the preparation of a final decree. The judgment-debtors, i. e., the applicants in this revision, by an application dated 7th December 1935, opposed the application of the decree-holders and, in the alternative, prayed for reduction of interest in accordance with the provisions of S. 30, U. P. Agriculturists' Relief Act (27 of 1934) which had come into force by that time. The learned Judge disposed of both the applications by an order dated 13th February 1936. The only portions of this order with which we are concerned at present are those in which he held that interest in accordance with the provisions of S. 30 and Sch. 3 of the Act would run on the aggregate amount, viz., Rs. 91,689-12-6, which was due on 31st December 1929. Mr. Malik, who appears for the judgment-debtors-applicants, contends that the learned Judge should have ordered interest in accordance with the provisions of the Act to run, from 1st January 1930 onwards according to the rates prescribed in the Act, on the sum of Rs. 36,000 advanced in August 1904, and not on the sum of Rs. 91,689-12-6 which was found to be due on 31st December 1929. In support of this contention he relies on the decision of the Full Bench in 1937 A. L. J. 671.[1]

Mr. Pathak for the opposite parties, on the other hand, points out that in the case before the Full Bench no question as to a renewal of an earlier transaction arose, and contends that when an earlier transaction of loan is renewed the new transaction is in substance a fresh loan advanced to the debtor within the meaning of the Act. On behalf of the applicants reliance is placed on 1937 A. L. J. 882[2] and on 1939 A. L. J. 189,[3] in which the question of a renewal arose. The opposite parties, on the other hand, rely on the decision of a learned Single Judge in 1939 A. L. J. 798.[4] Reliance is also placed by the learned counsel for the opposite parties on the decisions in 5 I.C. 418[5] and 1929 A.L.J. 1279,[6] in support of the proposition that when there is a renewal, the creditor is deemed to have made a fresh advance to the debtor. These cases were, of course, decided before the U. P. Agriculturists' Relief Act came into existence. That portion of the definition of "loan" in the Agriculturists' Relief Act which says "and shall include any transaction which is in substance a loan," does not appear to have been considered in any of the cases relied upon by the learned counsel for the applicants. The question raised is not free from difficulty and is of far reaching importance. There is also the divergence of opinion in this Court as indicated above. We consider it desirable, therefore, that the question stated below be decided by a Full Bench: "Where an earlier transaction of loan is renewed, is the new transaction itself a "loan" for the purposes of the U. P. Agriculturists' Relief Act (27 of 1934)?" Let the papers be laid before the Hon'ble the the Chief Justice for the constitution of a Full Bench.

Opinion of the Full Bench

Iqbal Ahmad C. J. — The present reference to a Full Bench was occasioned by conflict of judicial opinion between this Court and the Oudh Chief Court as regards the interpretation of the word "loan" in S. 30(1), U. P. Agriculturists' Relief Act (27 of 1934) and the question referred for decision is:

> Where an earlier transaction of loan is renewed, is the new transaction itself a 'loan' for the purposes of the U. P. Agriculturists' Relief Act (27 of 1934)?

The question is of great general importance as it is bound frequently to arise in

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('37) 24 A. I. R. 1937 All. 598 : 170 I. C. 567 : I. L. R. (1937) All 805 : 1937 A. L. J. 671 (F.B.), Raghubir Singh v. Mulchand.

2. ('38) 25 A.I.R. 1938 All 1 : 173 I.C. 676 : I.L.R. (1938) All. 29 : 1937 A. L. J. 882, Dharam Singh v. Bishan Sarup.
3. ('39) 26 A.I.R. 1939 All 331:182 I C 339: I.L.R. (1939) All. 396:1939 A.L.J. 189, Ramanand Misir v. Ram Baran Chaube.
4. ('39) 26 A. I. R. 1939 All. 641 : 184 I. C. 847 : I.L.R. (1939) All. 817:1939 A.L. J 798, Bhim Sen v. Raghubir Saran.
5. ('10) 5 I.C. 418 (All.), Muhammad Abid Hussain Khan v. Lala Bhagwan Das.
6. ('29) 16 A.I.R. 1929 All. 980 : 121 I.C. 108 : 52 All. 169 : 1929 A. L. J. 1279, Govind Singh v. Bijay Bahadur Singh.

suits brought by debtors for account under S. 33 of the Act. It is, therefore, unfortunate to be faced with bewildering divergence of judicial opinion on the question. It is still more unfortunate that this Bench has not been able to arrive at an unanimous decision. Three of the Judges constituting this Bench (Bajpai, Dar and Hamilton JJ.) have put one interpretation on the word "loan," whereas the fourth Judge (Braund J.) has interpreted that word otherwise. I have had the advantage of reading the judgments of all my brother Judges and, much as I would have liked to adopt the view expressed either by the majority of the Judges or by Braund J. I find it wholly impossible to do so. The only solution of the difficulty that at present confronts the Courts in these provinces appears to be intervention by the Legislature by the addition of an explanation to S. 30 clearly indicating the import of the word "loan" used in that section and, such intervention, in my judgment, is imperatively called for to set at rest all doubts on the point.

As, apart from the principle of stare decisis, I am, if I may say so with respect, in complete agreement with a Full Bench and two Division Bench decisions of this Court to be presently referred to, I do not propose to encumber my judgment by an elaborate discussion of the question under consideration. It is, however, necessary to briefly indicate the varying interpretations put on the word "loan" in various decisions of this Court and of the Oudh Chief Court. In 12 Luck 175,[7] and in A.I.R. 1937 Oudh 469,[8] the Oudh Chief Court held that the word "loan" used in S. 30 (1) of the Act refers not only to principal amount, but to the whole amount, due under the terms of a contract upto 31st December 1929, and accordingly interest from 1st January 1930, should be calculated not only on the principal amount, but on the whole amount due for the principal and interest on 1st January 1930. This view has been adopted by the majority of the Judges constituting the present Full Bench. It is, however, diametrically opposed to the decision of a Full Bench of this Court consisting of Sir Shah Sulaiman C. J., Thom and Bennet JJ. in A.I.R. 1937 ALL 598.[1] It was held in that case that having regard to the definition of the words "loan" and "interest" as given in S. 2 of the Act it is clear that the word "loan" cannot include any interest on the principal sum that may accrue as a result of the contractual liability of the debtor after the advance had been made. To the same effect is the decision of a Division Bench of this Court consisting of Bennet and Verma JJ. in 1939 A.L.J. 189.[3] In accordance with these decisions, the word "loan" in S. 30 means only the principal amount advanced to the debtor and does not include interest that may have accrued due on the amount advanced in between the date of the loan and 1st January 1930.

The question under consideration directly arose for decision in 1937 A.L.J. 882.[2] In that case a usufructuary mortgage was executed in lieu of amounts due under previous hypothecation bonds and the mortgagor instituted a suit under S. 33. The mortgagor maintained that the interest from 1st January 1930, should be calculated only on the principal amounts advanced under the previous hypothecation bonds and not on the amounts that were due on those bonds on account of principal and interest on 31st December 1929. It was, on the other hand, urged on behalf of the mortgagee that when the previous hypothecation bonds were renewed and a usufructuary mortgage deed was executed in lieu of the amount due on the previous bonds, then although there was no fresh advance of money, it was a new transaction of loan and the previous transaction must be deemed to have been completely wiped out. In short, the contention of the mortgagee was that interest from 1st January 1930, should be calculated on the amount that was due on the previous hypothecation bonds both on account of the original advances made and on account of interest on those advances. In this connexion it was pointed out on behalf of the mortgagee that the renewal of the mortgage deed was itself a new loan or advance in kind. The contention of the mortgagee was overruled by Sulaiman C. J. and Harries J. who decided the case. They observed :

> Now both the words 'loan' and 'interest' which occur in S. 30 (1) are defined in S. 2, and we must, therefore, understand from those words in the subsection the meaning which have been given to them by their definitions . . . . In the present case the new transaction was one of a possessory mortgage under which possession was taken by the mortgagee and the income was to be set off against interest, but admittedly there was no fresh advance of any money to the mortgagor. We find it difficult to hold that this transaction can be regarded as a fresh advance in kind by the mortgagee to the mortgagor. The

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7. ('36) 23 A. I. R. 1936 Oudh 334: 162 I. C. 396: 1936 O. W. N. 471: 12 Luck 175, Kailash Kuar v. Amar Nath.

8. ('37) 24 A.I.R. 1937 Oudh 469: 171 I.C. 46: 1937 O.W.N. 875: 13 Luck 544, Kushal Chand v. Raja Pirthipal Singh.

use of the words 'actually lent' in the definition of the word 'interest' suggests that any such fiction of law should not be imported into the definition, and what the Court has to see is the actual amount advanced or lent and not what by some fiction might be imagined to have been indirectly advanced.

I am not unaware of the decisions in which it has been held that where the debtor and the creditor settle accounts in respect of a previous debt, and the debtor executes a fresh bond with respect to the amount found due in favour of the creditor, the fresh bond is in law to be regarded as a loan by itself, though cash actually did not pass between the parties by way of lending and repayment. But in my opinion, those cases have no bearing on the decision of the question before us. Here we have to deal with a provision in a statute which the Legislature in its discretion considered advisable to pass with a view to relieve agriculturists from indebtedness. It is clear that in its anxiety to relieve agriculturists from indebtedness the Legislature gave a go-by to the sanctity that ordinarily attaches to contracts and made drastic provisions to regulate interest on advances made by creditors. It defined the words "interest" and "loan" as follows :

2. In this Act, unless there is anything repugnant in the subject or context . . . .

(8) 'Interest' includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specially by way of interest or in the form of service or otherwise.

(10) (a) 'Loan' means an advance to an agriculturist, whether of money or in kind, and shall include any transaction which is in substance a loan .....

Both the words "interest" and "loan" have been used in S. 30 (1) which runs as follows :

Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 3 for the period from 1st January 1930, till such date as may be fixed by the Local Government in the Gazette in this behalf.

In view of the definitions of "interest" and "loan" quoted above there is no escape from the conclusion that for the purposes of the Act "loan" is exclusive of interest and "interest" is that amount which constitutes the return on the amount "actually lent." The word "loan" in S. 30, must, therefore, refer to the amount that was actually advanced by the creditor and it cannot include the interest that accrued due on the sum "actually lent." I cannot assent to the proposition that the words "loan" and "interest" in S. 30 have been used in a sense other than that defined by the Act. Where the Legislature defines particular words used in a particular statute those words must be given the meaning given to them by the Legislature unless, by doing so, any repugnancy is created in the subject or context. The interpretation of the words "loan" and "interest" in S. 30 in accordance with the definition contained in the Act does not, to my mind, lead to any repugnancy in the subject dealt with by S. 30 or in the context in which those words occur, and, as such, the word "loan" must mean the sum originally advanced.

Some of my brother Judges have, in the course of their judgments, made reference to Sch. 3 of the Act and have pointed out that if "loan" is interpreted in the light of the definition of that word contained in the Act, Sch. 3 cannot be applied. I am however unable to share their view. If the view that commended itself to the Full Bench and to the two Division Benches of this Court is adopted, there is, to my mind, no difficulty in the calculation of interest in accordance with Sch. 3. That this is so can be illustrated by reference to the facts that have given rise to the question that has been referred to the present Bench for decision.

In the case before us Dharam Singh in the year 1904 executed a mortgage deed in favour of Gulzari Lal, Murari Lal and Banwari Lal for a sum of Rs. 36,000. By the year 1916, the amount due to the mortgagees on the basis of the mortgage of 1904 on account of principal and interest amounted to Rs. 60,000. Dharam Singh then in the year 1916 executed a mortgage-deed for Rs. 60,000 in favour of the same mortgagees. And lastly in the year 1928 Dharam Singh renewed the mortgage of 1916 and executed a fresh mortgage-deed for Rs. 82,000. The interest on Rs. 82,000 must run at the contractual rate upto 31st December 1929, and the amount due to the mortgagees on that date must be ascertained. But in view of S. 30 interest from 1st January 1930 must be calculated on a sum "actually lent" by the mortgagees, viz. on Rs. 36,000. As we know that there was stipulation for payment of compound interest to the mortgagees and the amount lent by them was secured, the interest on Rs. 36,000 is to be calculated in accordance with col. 1 under the heading "secured loans" in Sch. 3. The interest so calculated should be added to the amount due to the mortgagees on 31st December 1929, and the total of the two amounts will represent the amount due to the mortgagees. To be brief I adopt the

view taken by the Full Bench of this Court in 1937 A. L. J. 671[1] and my answer to the question referred is in the negative.

Bajpai J. — The facts which have given rise to this civil revision and which have necessitated a reference to the Full Bench may be shortly stated. One Dharam Singh executed a simple mortgage on 31st August 1904, in favour of Gulzari Lal, Murari Lal and Banwari Lal for Rs. 36,000 with interest at seven annas per cent. per mensem compoundable every six months. On 3rd May 1916 Dharam Singh executed another mortgage in favour of the same mortgagees for Rs. 60,000 on the same rate of interest, and it appears that the second mortgage was a renewal of the first mortgage inasmuch as the sum of Rs. 36,000 and its interest after making allowance for some payments made from time to time swelled to Rs. 60,000. On 16th April 1928, a third mortgage was executed by Dharam Singh in favour of the same creditors for Rs. 82,000 and this sum was made up of the former sum of Rs. 60,000 with interest thereon and a fresh advance of Rs. 450 taken by Dharam Singh for stamp and registration expenses. The rate of interest in this mortgage was increased from seven annas to nine annas per cent. but the stipulation of compound interest with six monthly rests continued. In the mortgage deeds of 1916 and 1928 it was specifically mentioned that the rights arising under the earlier mortgages would remain with the mortgagees.

The mortgagees on 30th May 1933 brought a suit in the Court of the Civil Judge of Aligarh for recovery of Rs. 1,14,498-12-6 on the basis of the mortgage of 16th April 1928 and the defendants to the suit were Dharam Singh and his sons and grandsons. A preliminary decree was passed in favour of the plaintiffs mortgagees for Rs. 1,29,330-2-3 with interest at 6 per cent. per annum simple till realisation. The decree-holders applied for the preparation of a final decree and as the U. P. Agriculturists' Relief Act, (Local Act 27 of 1934), was passed in the meantime in 1935, the judgment-debtors applied for the reduction of interest and for grant of instalments. Under S. 30 of the Act, it is provided that the rate of interest for the period from 1st January 1930, will be calculated according to Sch. 3 of the Act till such date as may be fixed by the Local Government in the Gazette in this behalf. It was agreed between the parties that on 31st December 1929 the sum due to the decree-holders was Rs. 91,689-12-6, regard being had to the contractual rate of interest. The learned Civil Judge on the two applications, one for the preparation of the final decree and the other for the reduction of interest and for grant of instalments passed the following order on 13th February 1936:

> The sum due to the decree-holders on 31st December 1929 is Rs. 91,689-12-6. Interest on it shall run at the rate of 5-8-0 per cent. per annum with yearly rests up to 26th January 1935 and from 27th January 1935 the rate of interest shall be Rs. 5-8-0 per cent. up to 7th May 1935 on the aggregate amount including costs, thereafter at Rs. 3-8-0 per cent. per annum up to 14th January 1936 and thereafter at 3-4-0 per cent. per annum simple. The judgment-debtors shall pay Rs. 65,000 within six months from this day. They shall pay the remaining amount by half yearly instalments of Rs. 6000 from February 1937 and on default of paying any three instalments the whole amount shall fall due. A final decree shall be prepared accordingly.

The judgment-debtors in revision contend that the Court below erred in interpreting the provisions of S. 30, Agriculturists' Relief Act and the rate of interest fixed by the Court ought to be calculated not on the accumulated amount due under the loan, but upon the principal sum advanced and in argument it was submitted that the principal sum advanced was a sum of Rs. 36,000 and interest after 1st January 1930 ought to be under the schedule rate fixed in the U. P. Agriculturists' Relief Act on this sum of Rs. 36,000 and not on the sum of Rupees 91,689-12-6. When the matter came before a Division Bench in this Court the following question of law was referred to the Full Bench :

> Where an earlier transaction of loan is renewed, is the new transaction itself a "loan" for the purposes of U. P. Agriculturists' Relief Act (27 of 1934) ?

It would be clear from what I have said above that the earlier transaction of loan by the document of 1904 was of Rs. 36,000 and it was renewed in 1916 and the next transaction was for Rs. 60,000 and it was renewed again in 1928 when the fresh and final transaction was for Rs. 82,000. To my mind, every renewed transaction was a loan for the purposes of the U. P. Agriculturists' Relief Act, and I am further prepared to say that the amount on which interest ought to run according to Sch. 3 for the period from 1st January 1930, is Rs. 91,689-12-6 and not either Rs. 36,000 or Rs. 60,000 or Rs. 82,000. The question was referred to us because of some conflict of judicial authority. Now S. 30 occurs in Ch. 4 which is headed as "Rates of interest" and consists of four sections. Section 28 provides for rate of interest on loans taken after the passing of the Act; S. 29 confers a benefit in the shape of reduced

interest for prompt payment of loans taken after the passing of the Act; S. 30 provides for rate of interest on undecreed loans taken before the Act came into force for the period after 1st January 1930 and there is also a provision for the decree being amended if a decree has already been passed; S. 31 provides for rate of interest on loans taken after the Act came into force when the aggregate of interest has reached 100 per cent. of the sum borrowed. It is, therefore, obvious that this legislation, which was intended to make provision for the relief of agriculturists from indebtedness, in Ch. 4 provided for relief by reducing the contractual rate of interest and Sch. 2 was enacted in connexion with S. 28 and Sch. 3 was enacted in connexion with S. 30. Unless the intention is clearly expressed, it will not be proper to give greater relief to debtors at the expenses of the creditors than what is stated in the various provisions. In A.I.R. 1936 Oudh 334[7] it was held that

> loan in S. 30 refers not only to principal amount but also to principal with interest and there is nothing in the terms of S. 30 to suggest any intention on the part of the Legislature to interfere with amount found due under the terms on the contract or decree upto 31st December 1929.

It was also held that the words "'interest on a loan' referred to in S. 30 means 'interest in respect of a loan'." I am in agreement with this view, although I feel that in holding like this I am dissenting, which I most respectfully do, from the decision of a three Judge Full Bench of this Court in A. I. R. 1937 ALL. 598[1] where it was held that 'the rate of interest' to be fixed by the Court in an application under S. 30, U. P. Agriculturists' Relief Act, is to be calculated not on the accumulated amount due under the loan as at "31st December 1929, but upon the principal amount advanced as loan." There was no question of a renewal of transaction in the case before the Full Bench, and it is possible to say as Braund J., one of the Judges constituting the present Full Bench says that when interest has accumulated on any sum and the debtor in a fresh transaction capitalises the interest and promises to pay the entire sum (principal plus accumulated interest due till then) he has for all practical purposes taken as it were a fresh advance of the accumulated interest and the transaction must be construed as if by one hand the debtor paid the interest due till then and by the other hand took the same back from the creditor. In this view of the matter, for which there is abundant authority, there is really no conflict between my opinion and the opinion expressed by Sir Shah Sulaiman in 1937 A.L.J. 671.[1] In (1938) A.C. 341[9] the House of Lords took this view and the same view was taken in (1932) 1 K.B. 691.[10] In A.I.R. 1940 F.C. 20[11] a similar view was adopted, and I think there can be no difficulty in holding that the judgment-debtors have after 31st December 1929 to pay interest according to the rate provided in Sch. 3 Agriculturists' Relief Act, on a sum of Rs. 82,000 at least. It, of course, is to be understood that this implies that the sum of Rs. 91,689-12-6 stands intact, and the only thing that has got to be done is that thereafter interest is to be calculated not on Rs. 91,689-12-6 but on Rs. 82,000 according to the schedule rate and the interest thus calculated will have to be added to Rs. 91,689-12-6 in order to find out what is actually due to the decree-holders. But, as indicated earlier in my judgment, I am of the opinion that the schedule rate of interest from and after 1st January 1930 should be calculated not on Rs. 82,000 but on Rs. 91,689-12-6 as directed by the trial Court. I am in general agreement with the views expressed by Hamilton and Dar JJ. on this aspect of the case when they come to a similar conclusion. My answer to the question referred to us is in the affirmative.

Braund J. — I think that there is some danger in this case, owing to the subtlety of the argument to which we have listened, of losing sight of the real question involved. What we have to do is to construe S. 30, sub-s. (1), U. P. Agriculturists' Relief Act, 1934, with reference to the facts before us. As I understand it, the first loan, amounting to Rs. 36,000, was taken in 1904. It was "renewed" in 1916 when a fresh instrument of mortgage was executed in which the principal sum secured was stated to be Rs. 60,000 odd, consisting in fact of the original Rs. 36,000, together with the then outstanding balance of interest. The rate of interest was annas 7 per cent. per mensem, which was the same as in the original mortgage and there was a fresh covenant for payment.

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9. (1938) 1938 A.C. 341 : 107 L. J. K. B. 354 : 158 L. T. 426 : 82 S.J. 212 : 54 T. L. R. 504 : (1938) 1 All. E. R. 786, Paton v. Inland Revenue Commissioners.

10. (1932) 1 K. B. 691 : 101 L. J. K. B. 185 : 146 L. T. 236 : 48 T. L. R. 119, B. S. Lyle Ltd. v. Chappel.

11. ('40) 27 A. I. R. 1940 F. C. 20 : 187 I. C. 796: I.L.R. (1940) Kar. F. C. 33 : 1940 F.C.R. 61, Jai Govind Singh v. Lachhmi Narain.

The second "renewal" took place in 1928. There was again a fresh mortgage instrument in which the principal sum secured was entered as Rs. 82,000, consisting in fact of (1) of a fresh advance of Rs. 450 for the purpose of paying the necessary stamp duties incurred and (2) a sum of Rs. 81,550 which comprised the then outstanding principal from the 1916 mortgage together with the then unpaid accumulated interest. The rate of interest on this occasion was altered from As. 7 to As. 9 per cent. per mensem. Those appear to be the relevant facts. A suit was in due course brought by the mortgagees on the 1928 mortgage and on 26th July 1934 a preliminary decree was passed. In pursuance of that preliminary decree, a final decree was ultimately pronounced on 13th February 1936 by which it was held, in effect, that interest at the statutory rate should be calculated from 31st December 1929 on the sum of Rs. 91,689-12-6, being the amount then outstanding in respect of the principal secured by the 1928 mortgage (Rs. 82,000) together, I assume, with interest on that sum accrued and unpaid on 31st December 1929. The question which has been propounded to the Full Bench is in the form of an abstract question :

> Where an earlier transaction of loan is renewed, is the transaction itself a 'loan' for the purposes of the U. P. Agriculturists' Relief Act (27 of 1934)?

I venture to think that some of the difficulty of this case has arisen from putting the question in this abstract form. As I read the body of the reference to us, the only alternative offered by it to the view that the principal sum expressed to be secured by the "renewed" mortgage of 1928 (in this case the sum of Rs. 82,000) is itself to be treated as the "loan taken before" the Act came into force, is that the original sum "actually taken" in 1904 (that is, the sum of Rs. 36,000) ought alone to be so treated, and hence that "interest" from 1st January 1930 ought to be allowed to the creditor against the debtor on the latter sum only. In my view, that is not the only alternative. If the question which has engaged our attention in this Full Bench is considered by reference to the actual facts, and not merely in the abstract, it will be found, I think, to be susceptible of a solution which is not in any way inconsistent either with the principles of the judgment of the late Sir Shah Sulaiman in the Full Bench case of this Court, or to the later Bench case, to both of which I shall refer presently. But I regard it as of importance for its proper solution to consider the question, not in the abstract only, but by reference to the actual facts before us and in the light of the exact language of S. 30, sub-s. (1), U. P. Agriculturists' Relief Act, 1934. The section of the Act which we have to construe is in these terms :

> Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 3 for the period from 1st January 1930, till such date as may be fixed by the Local Government. . . . . .

I desire at this stage to draw attention to only two things about the section itself. The first is that all it does is to affect the rate of interest as from a particular date. It does not deal in any way with interest prior to the prescribed date, and still less does it, on its face, purport to regulate any transaction which occurred prior to that date. And, secondly, and I regard this as of the utmost importance, it speaks of "a loan taken before this Act comes into force," by which it can only, in my opinion and on any ordinary use of the English language, mean any loan so taken. It is, I think, a mistake to regard it as confined to one loan, or to any particular loan. Now, as it seems to me, there are, ex hypothesi, only two ways of looking at this problem. Either the construction to be adopted must be one which treats the only "loan taken before" the Act came into force as being, for the purposes of S. 30, sub-s. (1), the consolidated sum of Rs. 82,000 referred to in the 1928 mortgage, or it must be one which treats some other "loan" or "loans" as fulfilling that definition. If the former construction is the right one, then "*cædit quæstio*" and interest, as from 1st January 1930, will be calculated, at any rate, on Rs. 82,000. The problem may, therefore, be stated by asking, on the assumption that that construction is not the right one, what else words "a loan taken" in this section can mean and where any other solution leads us to. I am for this purpose assuming (but not deciding) that the word "loan" in S. 30 (1) of the Act does not refer to the sum of Rs. 82,000 only, because, as I hope to show, precisely the same result is arrived at by adopting the only possible alternative view. The question, therefore, will, in the result, become merely academic.

The only alternative suggested in the reference to us is that the words "loan taken" mean the Rs. 36,000 originally and actually taken. That is where, in my respectful opinion, the mistake has been made, because it assumes that there is no other alternative. In my view, for the reasons

I propose to try to explain, that alternative is neither the correct, nor the only alternative, and that, in so concluding, no violence will be done to the Full Bench case of the Court referred to later, nor, in my view, necessarily to the Bench case which immediately followed it. I am assuming, therefore—but not deciding—for this purpose that the construction which speaks of the full renewed sum of Rs. 82,000 as the "loan" upon which the calculation of interest from 1st January 1930 is to be made is wrong. If that is so, then according to the plain language of S. 30, sub-s. (1), it remains to be ascertained what, with reference to the particular facts of our case, the "loan taken before the Act came into force" was. It is necessary, therefore, to direct one's mind first to the very simple question whether any, and if so what, loans were taken by this debtor before the Act came into force, for, as I have pointed out, S. 30, sub-s. (1) does not confine us to a single loan, nor to any particular loan. Viewed in that way, it cannot be denied that the sum of Rs. 36,000 "taken" in 1904 was a "loan taken before" the Act came into force. It undeniably was. It was "taken"; and it was "taken" before the Act came into force. Therefore, on this line of reasoning it is necessary, in accordance with S. 30, sub-section (1), to allow the debtor interest on that sum of Rs. 36,000 at the statutory rate only. So be it.

But that does not by any means conclude the matter. I have already pointed out that, on the plain construction of S. 30, sub-s. (1) we are not confined to a single loan nor to a particular loan, provided the loan was taken before the Act came into force. The next question, therefore, is whether there was any other loan "taken" before the Act came into force. The next transaction took place in 1916 and on that occasion we find that the principal sum expressed to be secured by the "renewed" mortgage was Rs. 60,000. I desire, with respect, to accept in its entirety the reasoning adopted by the late Sir Shah Sulaiman in the Full Bench case in 1937 A.L.J. 671[1] that, for the reasons he has fully explained, it is necessary to regard the increment of Rs. 34,000 over and above the original Rs. 36,000 as "interest" within the definition of that term contained in S. 2 (8) of the Act. I do not desire to repeat the argument he has used except to say that, with great respect, I entirely agree with it. The position therefore in 1916, as we must view it for the purpose of construing S. 30, sub-s. (1) of the Act, is that that sum of Rs. 34,000 was "capitalized" by the "renewed" mortgage of that year. As I pointed out earlier, a fresh covenant for payment was taken. And on the principles of the English cases to which our attention has been drawn, (1881) 6 Q.B.D. 295,[12] (1932) 1 K.B. 691[10] and 1938 A.C. 341[9] and upon the ordinary principles of contract and of novation, there can be no possible doubt to my mind but that this constituted in law a "loan" of that sum of Rs. 34,000 by the mortgagee to the mortgagor. It is quite true that that money was not actually handed by the mortgagor to the mortgagee in cash in satisfaction of the outstanding interest and again "taken" back as money "lent." But it is the substance of the transaction to which we have to look.

It is the commonest form of commercial operation that outstanding sums are "capitalized," and in fact re-lent in that way. I am unable to take any other view than that in the case before us the sum of Rs. 34,000 was "lent" by the mortgagee to the mortgagor in 1916 and was, in that sense, also a "loan taken before this Act came into force" within the meaning of S. 30, sub-s. (1). It has to be observed that this is quite irrespective of any question of whether a fresh consolidated loan of an aggregate sum of Rs. 60,000 was constituted by the mortgage of 1916. That therefore was the second "loan taken" within the meaning of the section of the U. P. Agriculturists' Relief Act with which we are dealing. In precisely the same way as in the case of the loan of Rs. 36,000 "taken" in 1904, the debtor, upon the plain language of the Act, can be given, as from 1st January 1930, interest on that sum also only at the statutory rate. Finally, we come to the transaction of 1928. There was a further increment of Rs. 21,550, representing the accumulated interest. The only additional factor to be observed is that, on this occasion there was not only a fresh covenant to pay it as capital, but the rate of interest it was to carry was not even the same as on the former occasion. By parity of reasoning, I entertain no doubt but that this sum also was a loan and that it also was a "loan taken before" the Act came into force.

The Full Bench case in 1937 A.L.J. 671,[1] to which I have already referred and in which the late Sir Shah Sulaiman delivered the leading judgment, was not a case in any way on all fours with the present one. The question in that case arose with reference to a

12. (1881) 6 Q.B.D.295 : 50 L.J.Q.B. 106 : 44 L.T. 506 : 29 W.R. 326, Credit Company v. Pott.

simple case in which money had been lent in 1923 and was outstanding with the accumulated interest in 1934. It was not, therefore, complicated by any question of "renewal." It has no relation to the case we are considering in the abstract form in which the question is put to us. But, as I have already pointed out, the reasoning of it, based on the definitions of 'loan' and 'interest' contained in S. 2 of the Act, point to the sum 'actually' taken as fulfilling the definition of the words 'loan taken' in S. 30, sub-s. (1). It is, on that reasoning, sums 'actually' taken that one has to look for. In the conclusion which I have reached above that the Rs. 82,000 which found its way into the mortgage of 1928 was, for the purpose of the construction of S. 30, sub-s. (1), nothing less than three separate loans "taken" in 1904, 1916 and 1928, respectively. I have followed to the fullest extent the reasoning of that Full Bench judgment with which, with the greatest respect, I entirely agree.

Now, to revert to the facts before us, the position becomes, as I think, very clear. I started by discarding, for the purpose of argument only, the construction that the "renewed" sum of Rs. 82,000 expressed to be secured by the 1928 mortgage was itself the only sum which fulfilled the definition of a "loan taken" in S. 30, sub-s. (1) of the Act. I am not prepared to decide that that was so, but I assume it for the purposes of the argument, because, if it was not so, then I am satisfied that the only possible alternative, once it has been appreciated that we are not confined to a single loan, is to look (as the Act tells us to do) for the various sums which were actually "taken" before it came into force. And, doing that, we find that the three sums mentioned above were "actually taken." Now, if we add up those three sums, we arrive at precisely the same result as before, namely that the aggregate sum at which interest at the statutory rate has to be allowed as from 1st January 1930 is Rs. 81,550. It is obvious that the additional sum of Rs. 450 advanced in 1928 was a "loan taken." I have put it in that way because, as I think, we have been somewhat misled by ignoring the practical result of the conclusions at which we have been asked to arrive and by considering only the abstract meaning of the word "loan." And I confess to thinking that that difficulty has arisen from the abstract form in which the question has been put to this Full Bench. I think that a good deal of confusion arises from attempting to answer abstract questions with reference to particular facts, and that, when given, such answers tend to confuse, rather than to assist, posterity. If I may venture, with respect, to re-frame the question in the form in which, in my view, it arises on the facts before us, it would be this: "Whether in the events which have happened, and on the true construction of S. 30, sub-s. (1), U. P. Agriculturists' Relief Act, interest as from 1st January 1930 at the rate therein provided ought to be calculated on the sum of Rs. 36,000 only or on the sum of Rs. 82,000 or on any other, and what, sum?"

If the question is put in that way, then I think there can be only one possible answer, namely that, whichever way you look at it, whether you treat the "renewal" of 1928 as the only outstanding loan or whether you treat the other sums also which were taken earlier as still outstanding—you arrive at precisely the same result. But upon neither view, can I reconcile myself to thinking that the only alternative presented to us by the actual order of reference in this case, that the only sum upon which interest can be allowed as from 1st January 1930 is the sum of Rs. 36,000, is the right one, because it was not the only "loan taken" before the Act came into force. There is only one other matter with which I desire to deal. It is the Bench case to which I have referred earlier (1937 A.L.J. 882[2]) which followed immediately upon the Full Bench case. If that case decided that, when you find interest "capitalized" in the sense of being included in the principal sum secured when a "renewal" of a mortgage is entered into, then, with great respect, I should feel bound to disagree with it for reasons which I have already shortly stated and which are more fully stated in the judgment of my learned brother Dar J. But I am not satisfied that in reality there is any conflict at all. The Bench case was one under Sec. 33, U. P. Agriculturists' Relief Act, and arose out of an application by an agriculturist debtor for a declaration as to how much he owed on a mortgage as at some date after 1933. That, of course, involved a calculation as to how much interest was due to him, and that, in turn involved ascertaining what was owing to him by way of interest from 1st January 1930. By S. 33, sub-s. (2) of the Act the provisions of S. 30, sub-s. (1) are made applicable to that calculation and the question that arose was, accordingly, whether a "loan" was outstanding at all on 31st December 1929 upon which interest could be given after 1st January, or whether the effect of the

"renewal" which took place in 1933 was to extinguish the old "loan" not merely as between the mortgagor and the mortgagee, but for all purposes. As I understand it, that was the real bone of contention and I think it becomes clear from the following passage of the judgment :

> The contention urged on behalf of the respondent is that when the mortgage deed was renewed and a usufructuary mortgage deed was executed, then although there was no fresh advance of money, it was a new transaction of loan and the previous transaction must be deemed to have been completely wiped out with the result that no reduction can be ordered prior to August 1933.

That, in my view, is the clue to the whole judgment. It did not decide that a "capitalized" sum of interest could not itself be a "loan" for the purpose of S. 30, sub-s. (1). It decided that the effect of a "renewal" transaction was not completely to extinguish the old loan for the purpose of the calculation of interest under S. 30. And, when viewed in that way, it is, in fact, an authority for and not against, the view I have expressed above, because it recognizes that, notwithstanding the "renewal," the old loan can exist as a "loan taken" within the meaning of S. 30. Perhaps I may be permitted to say with respect that the words subsequently used in the judgment : "We find it difficult to hold that this transaction can be regarded as a fresh advance in kind by the mortgagee to the mortgagor" are a trifle misleading. But I am satisfied that they were not intended to lay down a broad proposition that no transaction such as those in question could constitute a loan. In fact, the question never arose in that case, at least as it has been reported. So far as current interest, whether simple or compound, accruing between 1928 and 31st December 1929 is concerned, it was affected by no "renewal" or "capitalization" transaction and, in my judgment, it never lost its character as 'interest' and assumed the character of "capital." In short, it never became a "loan taken before the Act came into force." That, as between mortgagee and mortgagor, it carried by contract compounded, and not simple interest, does not appear to me to constitute any sufficient reason for saying that it had lost its character as 'interest.' I would answer the question before the Bench by saying that the words "loan taken" in S. 30, sub-s. (1), U. P. Agriculturists' Relief Act, 1934, in my opinion, include, in the case before us, the sum of Rs. 82,000 which was the principal sum expressed to be secured by the mortgage of 1928, whether such sum is regarded as one single capitalized "loan taken" in the year 1928 or as compounded of three separate "loans taken" in the years 1904, 1916 and 1928 respectively, but that such words do not include interest, whether simple or compound, accrued between the date of the 1928 mortgage and 31st December 1929, which at such last mentioned date remained 'uncapitalized' by any 'renewal' transaction.

Hamilton J. — The following question has been referred by a Divisional Bench for decision :

> Where an earlier transaction of loan is renewed, is the new transaction itself a 'loan' for the purposes of the U. P. Agriculturists' Relief Act (27 of 1934)?

Certain decisions on the interpretation of S. 30, Agriculturists' Relief Act, have been referred to in the reference order of the Divisional Bench and they have also been cited and discussed by counsel before us and I understand that I am to express an opinion on this point too. The facts of the case in which this reference order has been made, as given in the reference, are as follows. On 31st August 1904 Dharam Singh borrowed Rs. 36,000 from Gulzari, Banwari and Murari Lal and executed a mortgage of certain property. On 3rd May 1916 he executed a new mortgage for Rs. 60,000 to pay off what was due on the previous mortgage. On 16th April 1928 he executed a mortgage, again in favour of the same persons, for Rs. 82,000 of which Rs. 81,550 was to pay off what was still due on the mortgage of 1916. The trial Court decided that interest under S. 30 of Sch. 3 would run on Rs. 91,689-12-6, the amount due on 31st December 1929 owing to the mortgage transaction of 1928. Learned counsel for the judgment-debtors argued that the rate of interest fixed by the schedule which is to be read with S. 30 was to be on Rs. 36,000, the principal of the first mortgage deed of 1904 and not as decided by the learned Judge. I will first consider the second point, namely the interpretation of S. 30. In A.I.R. 1936 Oudh 334,[7] it was held that interest would be calculated on the total amount found due on 31st December 1929 at the rate of $5\frac{1}{2}$ per cent. compoundable with yearly rests from 1st January 1930 to 7th May 1935 and at $4\frac{1}{2}$ per cent. from 8th May 1935 till realisation. On the other hand, a Full Bench of this Court in 1937 A.L.J. 671[1] decided that the rate of interest under the schedule which has to be read with S. 30, U. P. Agriculturists' Relief Act, was to be calculated not on the accumulated amount due under the loan as at 31st December 1929, but upon the principal

amount advanced as loan. The decision of the Oudh Chief Court in 12 Luck. 175[7] was referred to and dissented from. I agree with the result arrived at by the Oudh Chief Court though my reasoning is different. The Full Bench of this Court referred to the definitions of 'loan' and 'interest' and held that 'loan' was the principal amount advanced and not the amount due as on 31st December 1929, in view of the definition of 'loan' in the Act. Section 30 (1) reads as follows :

(1) Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 3 for the period from 1st January 1930 till such date as may be fixed by the Local Government in the Gazette in this behalf.

Schedule 3 which has to be read with this section divides loans into secured and unsecured, into loans of Rs. 500 and under, loans of Rs. 501 to Rs. 5000, loans of Rs. 5001 to Rs. 20,000 and loans over Rs. 20,000. It divides interest into compound per cent. per annum with yearly rests and simple per cent. per annum. It is obvious that the rates of compound interest in the schedule are to be applied to loans bearing compound interest and simple interest to loans bearing simple interest and I can find nothing in the section which justifies in any year fixing a simple interest rate in the case of a loan bearing compound interest. The object of the section, therefore, appears to be merely to reduce the rate of compound interest and the heading of Chap. 4 in which S. 30 occurs namely "rates of interest" bears out this view. Section 30 (1) read with Sch. 3, in my opinion, bears the same meaning as if the words were "notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest, simple or compound as the case may be, on a loan . . . . ." The question for decision then would be : What is the compound interest on the principal in the first, second, third or whatever the year of the loan might be in which falls the date, 31st December 1929 and in the next year ? For the next year the rate of compound interest would be reduced under S. 30.

Let us consider a loan of Rs. 100 taken on 1st January 1928, at 10 per cent. with yearly rests when no part of the principal has at any time been repaid. At the expiry of the year 1928, the compound interest would be Rs. 10. This figure is arrived at by multiplying the principal by 10 and dividing by 100, the same operation as in the case of simple interest. In my opinion, however, this sum would be compound interest because the loan bears compound interest and not simple interest. As the loan does not bear simple interest, in the following year the (compound) interest would be Rs. 11. It is true that this sum is arrived at by a calculation which consists of multiplying the principal by 10 and dividing by 100 and multiplying the interest of the previous year by 10 and dividing by 100. In the third year of the loan the compound interest would be Rs. 12 and 1/10th. This sum can be arrived at either by multiplying 121 by 10 and dividing by 100 or by multiplying 100 by 10 and dividing by 100, by multiplying 10 by 10 and dividing by 100, and by multiplying 11 by 10 and dividing by 100 and adding the three results together. It can thus be said that the compound interest is arrived at by taking 10 per cent. of the capital plus 10 per cent. of the simple interest of preceding years. Yet, in my opinion, the compound interest at 10 per cent. in the third year of a loan of Rs. 100 is Rs. 12 and 1/10, whatever may be the calculations involved in order to ascertain the amount. On the loan of Rs. 100 taken on 1st January 1928, the compound interest for the year 1930 will be the compound interest of the third year and whatever be the calculations which are required to ascertain the amount on the application of the schedule rate the interest at the schedule rate must be the compound interest which is due on the loan in the third year of the loan. The simplest way to reach this result is to take the aggregate amount due on 31st December 1929 and to apply to it the rate fixed by the schedule. This arithmetical operation does involve multiplying past simple interest by a certain figure and dividing it by 100 but, in my opinion, the result will be the correct compound interest for the third year of the loan.

Let us suppose that the compound interest according to the rate fixed by Sch. 3 would be 5 per cent. According to the decision of the Full Bench of this Court the interest for the year 1930 on a loan of Rs. 100, bearing compound interest, taken on 1st January 1928, would be Rs. 5. With all respect to the decision of the learned Judges composing the Full Bench I do not see how in 1930 Rs. 5 can be compound interest at 5 per cent. on the principal of Rs. 100 when this sum was lent at 5 or more per cent. compound interest on 1st January 1928. A sum of Rs. 5 would be compound interest at 5 per cent. on a loan of Rs. 100 dated 1st January 1930, or simple interest at 5 per cent. on a loan of

Rs. 100. That decision of the Full Bench does not specifically state how the interest is to be calculated in the year 1931. It must be remembered that the definitions of 'loan' and of 'interest' and S. 30 with Sch. 3 apply in 1931 and subsequent years just as in 1930 and subsequent years. If again in the year 1931 and in subsequent years the interest is Rs. 5, then there is no compound interest on the loan. If in 1931 the compound interest is to be calculated on the principal of Rs. 100 plus the interest of Rs. 5 then I do not see why in the year 1930 the interest should not be similarly calculated on the principal plus the interest of the preceding years. On my reasoning there is no necessity to say as the Oudh Chief Court have done that the words in S. 30 "on a loan" mean no more than "in respect of a loan" or to hold that the word 'loan' means the principal plus interest up to 31st December 1929. I thus agree with the Full Bench of this Court that interest on the loan means interest on the sum that was advanced on the date that the loan was taken, but when the loan bears compound interest multiplying that principal by five or whatever the rate may be under the schedule and dividing by 100 does not produce the correct result after the first year. The simplest way to obtain this result is to take all the amount due, to multiply it by five or whatever the figure may be according to the schedule and to divide by 100. I will now consider the question which has been directly referred to the Full Bench. The first decision to which I must refer is one of a Divisional Bench of this Court reported in 1937 A.L.J. 882,[2] where the section to be interpreted was 33 (2), Agriculturists' Relief Act, but S. 30 had also to be considered. This was a case where in lieu of the amounts due under two hypothecation bonds a fresh mortgage deed was executed in August 1933. It was then held that there was no fresh advance of money to the mortgagor and that it was difficult to hold that this transaction of renewal could be regarded as a fresh advance in kind by the mortgagee to the mortgagor. The following words appear in that decision:

> The use of the words 'actually lent' in the definition of the word 'interest' suggests that any such fiction of law should not be imported into the definition, and what the Court has to see is the actual amount advanced or lent and not what by some fiction might be imagined to have been indirectly advanced.

I think that the meaning of the words 'actually lent' becomes clear if one refers to S. 35 of the Act. Under S. 32 a creditor has regularly to record and maintain a correct account for each agriculturist debtor of all transactions relating to each loan advanced to that debtor in such a manner as the local Government may prescribe and to supply that debtor every year with a full and correct statement of account. This section applies after the date on which this Act comes into force. I have quoted only that part of the section which I consider relevant. Under S. 35 a creditor who does not comply with the requirements of S. 32 is punished with fine. Section 35 (1) reads as follows:

> (1) Any creditor who, after the commencement of this Act, records in his book of accounts or in the statement of account submitted to the debtor as lent to an agriculturist a sum larger than that actually lent, whether by way of charges for expenses, inquiries, fines, bonuses, premia, renewals, or otherwise, shall be punished for the first offence with fine which may extend to one hundred rupees, and for a second or subsequent offence with regard to the same or any other agriculturist, with fine which may extend to five hundred rupees.

A distinction is drawn between the sum 'actually lent' and a larger sum, the difference being charges for expenses, inquiries, fines, bonuses, premia, renewals, or otherwise. If, therefore, at the time of the renewal the sum due was Rs. 200 and the renewal was for, say, Rs. 250, the Rs. 50 representing a sum for the privilege of having a renewal, something in fact in the nature of a nazrana, that amount will not be considered to have been 'actually lent.' It is, however, only this charge for renewal and not the renewal itself which is considered to be a sum not actually lent. In my opinion, therefore, the use of the words 'actually lent' is not, as has been suggested in 1937 A. L. J. 882,[2] to distinguish between a loan in which there is an actual advance in money or in kind and a transaction such as a renewal. 1939 A. L. J. 189[3] is a case where on 29th June 1926 a simple mortgage of Rs. 2200 was executed and on 25th March 1933 a pronote was executed for Rs. 500, a sum still due under the simple mortgage. It was held that the only loan was that of 1926. No reasons for the decision were given save that otherwise in the opinion of the learned Judges the provisions of S. 30 would be easily circumvented and the intention of the Legislature would be frustrated in a large number of cases. Contrary to these decisions is the decision of a learned single Judge of this Court in 1939 A.L.J. 798.[4] In this case the learned Judge quoted S. 2, cl. 10 (a) which is as follows:

> Loan means an advance to an agriculturist, whether of money or in kind, and shall include any transaction which is in substance a loan . . . .

The learned Judge was of opinion that the words "in substance" were important and meant "in effect." In that case a promissory note had been executed before the Agriculturists' Relief Act came into force, and on 16th May 1935 a fresh promissory note in satisfaction of the debt due from the first promissory note was executed. I agree with the view expressed by the learned Judge of this Court. The words "in substance" imply the words "but not in form," that is to say, something which is not exactly an advance to an agriculturist, whether of money or in kind. In A.I.R. 1940 F.C. 10,[13] the following words occur in the judgment of Sulaiman J.

> The third category of any "transaction which, in substance, is a loan" may for instance possibly include a promise to pay unpaid purchase money or promise to pay a sum of money for some other good consideration, but not a mere acknowledgment of interest due, unless it also amounts to a renewal of a bond.

It is true that the Act which was to be construed was the Bihar Money-lenders' Act, but the words "any transaction which, in substance, is a loan" are the same words as are to be found in the definition of 'loan' in the U. P. Agriculturists' Relief Act. In A.I.R. 1940 F. C. 20,[11] another case in which the Bihar Money-lenders' Act had to be interpreted, the following words appear in the judgment of Varadachariar J.:

> Where, however, as in the present case, the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, it seems to me that the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment: *See* observations of Greer L. J., as he then was, in (1932) 1 K.B. 691,[10] referred to with approval by the Judicial Committee in (1940) 1 M.L.J. 68[14] at page 72.

I base no argument, either as regards the question of interpretation of S. 30 or the question whether a renewal is a loan, on what the intention of the U. P. Legislature may have been when this Act was passed in so far as that intention is not made clear by the Act itself. It is stated in the preamble that the Act was "to make provision for the relief of agriculturists from indebtedness," but to what extent provision was being made has to be seen from the various sections of the Act. If any section is obscure I cannot presume that an interpretation which gives greater relief than one which gives a lesser relief is the correct one. I answer in the affirmative the question—"Where an earlier transaction of loan is renewed, is the new transaction itself a 'loan' for the purposes of the U. P. Agriculturists' Relief Act (27 of 1934) ?"

Dar J. — This is a reference to a Full Bench of this Court of a question of law which has arisen upon interpretation of certain sections of the U. P. Agriculturists' Relief Act (27 of 1934). On 31st August 1904, Dharam Singh a Hindu resident of village Kuarsi in Aligarh district, executed a simple mortgage in favour of Gulzari Lal, Murari Lal and Banwari Lal, three Hindu brothers, for a sum of Rs. 36,000, carrying interest at 7 annas per cent. per mensem compoundable with six-monthly rest. Under this mortgage the property mortgaged was village Kuarsi and two groves and an indigo factory in the said village. Only a small sum of money due under this mortgage was paid by Dharam Singh and, almost on the expiration of 12 years, on 3rd May 1916, Dharam Singh executed a fresh mortgage in favour of the same creditors for a sum of Rs. 60,000 bearing the same rate of interest and mortgaging the same property. In this mortgage it is stated that after making allowance for the payments received, a sum of Rs. 60,000 was due on the previous mortgage of 1904 for which the mortgage of 1916 was being executed. Again, by far the bulk of the debt due under the mortgage of 1916 remained unsatisfied and almost at the expiration of a second period of 12 years on 16th April 1928, Dharam Singh executed a fresh simple mortgage in favour of the same creditors for Rs. 82,000. In this mortgage the interest payable was raised from 7 annas per cent. per mensem to 9 annas per cent. per mensem compoundable six-monthly, and in addition to the property mortgaged in the previous mortgages, one more grove and a share in one more village Hasanpur Qaem was mortgaged.

In the mortgage deed it is further stated that out of the consideration of Rs. 82,000, Rs. 81,550, was due on the previous mortgage of 1916 and a sum of Rs. 450 was a fresh advance taken by the debtor from the creditors for purchasing stamp and for registration expenses of the document. It may also be stated here that even prior to 1904 Dharam Singh had borrowed money by making a

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13. ('40) 27 A.I.R. 1940 F.C. 10 : 187 I.C. 612 : 1940 F. C. R. 39 : I. L. R. (1940) Kar F. C. 14, Surendra Pd. Narain Singh v. Sri Gajadhar Pd. Sahu Trust Estate.

14. ('40) 27 A.I.R. 1940 P.C. 60 : 187 I.C. 445 : (1940) 1 M.L.J. 68 (P.C.), Chethambaram Chettiar v. Loo Than Poo.

mortgage of village Kuarsi and the successive mortgages of 1904, 1916 and 1928 set out that the rights arising under the earlier mortgages shall subsist in favour of the creditors. On 30th May 1933, the creditors Gulzari Lal and his brothers raised an action in the Court of the Civil Judge of Aligarh for recovery of a sum of Rs. 1,14,498-12-6 due on the mortgage of 16th April 1928, against Dharam Singh and his four sons and four grandsons. On 26th July 1934, the Civil Judge of Aligarh passed a preliminary decree under O. 34, R. 4, Civil P. C., in favour of the creditors for a sum of Rupees 1,29,330-2-3 which sum was to carry interest at 6 per cent. per annum, simple, until realization. On 30th April 1935, the U. P. Agriculturists' Relief Act (27 of 1934) came into force and after this Act had come into force, one application was made by the creditors for the preparation of a final decree and another application was made by the debtors Dharam Singh and others for converting the mortgage decree into an instalment decree and for varying and reducing the interest granted by the decree.

In this proceeding before the Civil Judge, it was a matter of agreement that a sum of Rs. 91,689-12-6 was due to the creditors on 31st December 1929, for principal and interest on the mortgage bond dated 16th April 1928, mentioned above and the main controversy in the case was whether the interest, which admittedly was to be varied and reduced from 1st January 1930, was to be varied and reduced on the sum of Rs. 91,689, odd which was the amount due on 31st December 1929 or it was to be varied and reduced on the sum of Rs. 82,000 odd which was the principal amount due on the mortgage of 1928, or it was to be varied and reduced on Rs. 36,000 which was the original amount borrowed by the debtors on the mortgage of 1904. One other matter of contention was whether instalments should or should not be granted to the judgment-debtors. By an order dated 13th February 1936, the Civil Judge of Aligarh decided that the debtors were entitled to variation and reduction of interest from 1st January 1930 upon the aggregate sum of Rs. 91,689-12-6. With regard to instalments claimed by the debtors the learned Judge directed them

> to pay Rs. 65,000 within six months and the remaining amount by half-yearly instalments of Rs. 6000 from February 1937 and in default of payment of any three instalments the whole amount shall fall due.

He also directed a final decree to be drawn up in terms of the above order. Some mistake crept in the final decree which was prepared under O. 34, R. 5, Civil P. C., on 13th February 1936, and an amendment was allowed by the Civil Judge of the said decree on 9th October 1937, but which is not necessary to particularise for the purposes of this judgment. Against the two orders of the Civil Judge of Aligarh, dated 13th February 1936, and 9th October 1937, two revisions were filed by the debtors in this Court which came up for hearing before a Bench of this Court when the following question of law which arose in the case was referred to a larger Bench and in due course it has now come before us for our consideration and answer :

> Where an earlier transaction of loan is renewed, is the new transaction itself a 'loan' for the purposes of U. P. Agriculturists' Relief Act (27 of 1934)?

Chapter 4, U. P. Agriculturists' Relief Act, which is headed as 'rates of interest' and which consists of four sections, Ss. 28 to 31 provides a statutory rate of interest in lieu of contractual rate of interest on loans taken by agriculturists both before and after the Act came into force. Sections 28, 29 and 31 deal with loan taken after the Act and S. 30, cl. (1) deals with loans taken prior to Act and in the same section cl. (2) deals with loan taken prior to Act which have merged in decrees. We are dealing here in this case with a loan taken before the Act to which S. 30 alone applies and the main questions which arise in the case are whether the loan referred to in S. 30 refers to 'original' loan taken by agriculturists or it also refers to 'renewed' loan and further whether the phrase 'interest on loan' as used in that section means interest on principal sum or on sum actually lent, or it means interest on the loan which is actually due. The question which has been referred to us is wider than the mere interpretation of section 30 and it embraces an interpretation of other sections of the Act, particularly of Ss. 28, 29 and 31 in so far as a renewed loan is concerned and it is narrower in the sense that it does not specifically include an enquiry whether loan in S. 30 refers to sum actually lent or to sum actually due. But both these matters whether loan includes a renewed loan and whether loan also includes sum actually due were debated before us and they are so intimately connected that it is necessary to consider both of them and to express an opinion about them. On the question whether 'loan' in S. 30 means the sum actually lent or it means the sum actually

due, there is a conflict of judicial authority. In A. I. R. 1936 Oudh 334,[7] Srivastava and Nanavutty JJ. held

that loan in S. 30 refers not only to principal amount but also to principal with interest and there is nothing in the terms of S. 30 to suggest any intention on the part of the Legislature to interfere with amount found due under the terms of the contract or decree upto 31st December 1929, and the words 'interest on a loan' referred to in S. 30 means 'interest in respect of a loan'.

This view was followed by the Oudh Chief Court in A. I. R. 1937 Oudh 469.[8] In I. L. R. (1937) ALL. 805[1] a Full Bench of this Court dissenting from 12 Luck. 175[7] held

that the 'rate of interest' to be fixed by the Court in an application under S. 30, U. P. Agriculturists' Relief Act, is to be calculated not on the accumulated amount due under the loan as at 31st December 1929, but upon the principal amount advanced as loan.

It was further held that

loan in S. 30 must mean the principal sum advanced which remains outstanding at the time when the application was made.

This view was followed in 1939 A.L.J. 1048[15] at p. 1050 and in several other cases in this Court. In S. 2, U. P. Agriculturists' Relief Act, there are interpretation clauses in which at No. 8 and 10 interest and loan are defined and their definitions in so far as they are material for the purpose are as follows:

(8) 'Interest' includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or in the form of service or otherwise.

(10) (a) 'Loan' means an advance to an agriculturist whether of money or in kind, and shall include any transaction which is in substance a loan.

I have no doubt that the interpretation clause which defines the loan is prima facie restrictive and the one which defines the interest is prima facie extensive and on the face of it if these two definitions are read together, loan as defined in the above interpretation clause must mean the principal sum lent and it should not include any interest which might fall due upon it subsequent to loan under the terms of the above loan. But I do not understand it to be the law that interpretation clause must necessarily apply wherever the word interpreted is used in the statute and in spite of the fact that there are indications in the statute and in the section where it occurs to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause. In (1875) L.R. 7 H.L. 481[16] at p. 493, Lord Selborne said:

It appears to me that the interpretation clause does no more than say that, where you find those words in the Act, they shall, unless there be something repugnant in the context or in the sense, include fixtures.

And Craies on Statute Law, 4th Edition, (1936) at p. 195 has stated the law with regard to the application of interpretation clauses in these words:

Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended.

I take it that the interpretation clause in the U. P. Agriculturists' Relief Act serves the purpose of a definition and it was not intended under the "guise of definition to enact." The practice of defining terms used in varying sense in a statute by an interpretation clause has been the subject of severe judicial criticism in England and only the other day in (1940) 2 ALL. E. R. 401[17] in House of Lords Viscount Maugham added his protest in these words:

We are dealing with an Act in which the word 'debenture' is used in numerous sections, and it must be admitted in more than one sense. The practice of inserting a definition in such a case has often been criticized. It was described by Blackburn J. in (1876) 1 Q. B. D. 348[18] at p. 358, as a modern innovation which frequently does a great deal of harm, and by Lord St. Leonards L. C. in (1852) 2 De. G. M. & G. 459,[19] as an attempt to put a general construction on words which in the different sense in which they are introduced in the various clauses of an Act do not admit of such. It is probably too late to add to these and other complaints.

In an earlier portion of the judgment in the same case at p. 621 Viscount Maugham also observed:

It is perhaps worth pointing out that the words "unless the context otherwise requires," which we find in the consolidating Act of 1929, are not to be found in the amending Act of 1928. I attribute little weight to this fact, for in my opinion some such words are to be implied in all statutes where the expressions which are interpreted by a definition clause are used in a number of sections with meanings sometimes of a wide and sometimes of an obviously limited character.

Now, the controversy on this part of the case does not centre upon the interpretation clause because, so far as I am aware, it has not been seriously disputed that loan as defined in the interpretation clause means only a principal sum and it does not include the interest which falls due subsequent to

15. ('40) 27 A. I. R. 1940 All. 22 : 187 I. C. 345 : 1939 A.L.J. 1048, Mukat Lal v. Raghuraj Singh.
16. (1875) L. R. 7 H. L. 481 : 44 L.J.Ch. 481 : 32 L.T. 171 : 23 W.R. 526, Meux v. Jacobs,
17. (1940) 2 All. E. R. 401, Knightsbridge Estates Trust Ltd. v. Byrne.
18. (1876) 1 Q. B. D. 348, Lindsay v. Cundy.
19. (1852) 2 De. G. M. & G. 459, Ely (Dean and Chapter) v. Bliss.

the loan. The controversy centres round the question whether having regard to the language of S. 30 and the context, the phrase 'interest on a loan' occurring in S. 30 means interest on the principal sum of the loan or it means interest in respect of a loan or in other words interest on the loan which is due and not interest on the amount which was actually lent. I have already stated that the heading of Chap. 4 is 'rate of interest'. The marginal note of S. 30 (1) is : "Rate of interest on undecreed loans taken before this Act came into force for the period after 1st January 1935." And the section itself is worded as follows :

> Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. III for the period from 1st January 1930, till such date as may be fixed by the Local Government in the Gazette in this behalf.

In Sch. 3 which is part of S. 30, four rates of interest are specified, and these relate separately to secured and unsecured loans and to simple and compound interest. But rate of compound interest set out in the schedule is with yearly rest. Schedule 3 is a part of S. 30 and the section and schedule read together clearly indicate that after 1st January 1930 when the statutory rate is to come in operation in place of the contractual rate of interest, the statutory rate can be both simple and compound and it will be imposed simple or compound according as under the agreement interest agreed to was simple or compound and it will not be open to the debtor or to the creditor to change the liability of payment of simple or compound interest at his option from what was settled at the time of the loan : *see* 1937 A. L. J. 125,[20] 1937 A. L. J. 177[21] and 1939 A. L. J. 1048.[15]

It follows that under S. 30 (1) read with Sch. 3, though statutory rate of interest is to be imposed in lieu of the contractual rate of interest from 1st January 1930 onward, this statutory rate in cases where the agreed interest was compound interest would also be compound interest with this difference that it would be a lower rate of interest and the rest would be yearly. If, therefore, covenant to pay compound interest on a loan remained in operation upto 31st December 1929 as it is common ground that it must so remain in operation and if it is also agreed by all judicial authority that a covenant with regard to the payment of compound interest is to remain in operation even after 1st January 1930 subject to this modification that compound interest will run on schedule rates with yearly rest, is there any reason to hold that compound interest should not run on the loan for 12 months only between January 30 and December 1930? and we must start with the principal sum alone on January 1930 and go on charging compound interest over it and leave the accumulated interest which had fallen due upto 31st December 1929 at a standstill? In every loan taken on a promise to pay compound interest two covenants are implicit. One gives a right to the creditor to capitalize the interest with the principal after an agreed period if interest is not paid and to charge interest upon the capitalized sum. And the other covenant is to pay interest at a particular rate and at certain periods.

It seems to me that what was intended by S. 30 was not to interfere with the first covenant at all and in lieu of the second covenant to substitute a statutory rate and statutory period of payment. It is true that S. 30 opens with the clause 'notwithstanding anything in any contract to the contrary' which in a way negatives covenants between the debtor and a creditor. It is also true that if the expression loan and interest as used in the section is interpreted according to definition in the interpretation clause, loan must mean the principal sum and not the interest which had fallen due upon it since the loan. But the section also says that the statutory rate shall be charged according to Sch. 3 and Sch. 3 enacts that if compound interest was agreed at the time of the loan then the debtor shall be liable to pay compound interest though at a lower rate and with yearly rests. Does it not reasonably follow from this that the covenant by which the creditor was given the right to capitalize the interest, if not paid on due date, with the principal and charge interest upon the whole was preserved to the creditor and if so, does it not follow that the creditor had a right to capitalize the interest which had accrued due on 31st December 1929 and charge interest on the capitalized sum on 1st January 1930, according to schedule rate? In my opinion, the reasonable interpretation of S. 30 read with Sch. 3 is that in the clause 'no debtor shall be liable to pay interest on a loan taken before this Act; the expression' 'on a loan' means 'in respect of a loan' or it means 'amount due on a loan' and it does

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20. ('37) 24 A. I. R. 1937 All. 207 : 167 I. C. 853 : 1937 A. L. J. 125, Bisesar Ram v. Parasnath.

21. ('37) 24 A. I. R. 1937 All. 395 : 169 I. C. 227 : I. L. R. (1937) All. 500 : 1937 A. L. J. 177, Kunj Behari Lal v. Mt. Ketki Kunwar.

not mean merely the principal sum of the loan. And I put this interpretation mainly upon the ground that the right of the creditor to capitalize interest and charge interest on the capitalized sum is preserved by Sch. 3 and there seems to be no reason to hold that the Legislature intended that this right to capitalize on a loan shall exist in favour of the creditor, on a loan taken on compound interest throughout except for one date, namely on 1st January 1930. It is true this Court is not concerned with the reason or policy of the Act, and it has to give effect to the plain meaning of the section or to its expressed intention and it has no means of finding out its implied intention. But S. 30 read with Sch. 3 if paraphrased might run as follows:

"Notwithtstanding anything in any contract to the contrary no debtor shall be liable to pay interest on a loan taken before this Act comes into force at a rate higher than that specified in Sch. 3 for the period from 1st January 1930, till such date as may be fixed by the Local Government in the Gazette in this behalf, but which rate in case of a loan bearing compound interest shall be compound interest and in case of loan bearing simple interest shall be simple interest."

It may be noted that the proviso which I have added in paraphrasing is only the judicial interpretation of the section and the schedule. It is thus clear that loan on January 1930 and afterwards will carry interest on interest. It is also clear that the loan upto 31st December 1929 will carry interest on interest and in both these cases the expression 'loan' is used in a sense so as to include interest and not to confine it to principal sum alone. Why should not then the expression 'loan' be used in the same sense for the date 1st January 1930 also as including both principal and interest and why should it be used in the restrictive sense of principal sum only? It seems to me that the same meaning should be given to the word loan for all these periods, upto 31st December 1929, for the period after 1st January 1931 and for the date 1st January 1930 and the context and wording of S. 30 modifies the meaning of the word 'loan' as given in the interpretation clause. Section 2 (10) of the Act and loan in S. 30 (1) means not the principal sum lent but the amount which is due on 31st December 1929 for principal and interest and it is on this amount that the statutory rate of interest is to be charged from 1st January 1930. I now pass on to the question whether loan includes a 'renewed' loan within the meaning of the Act. In A.I.R. 1938 ALL. 1[2] which was an action by an agriculturist under S. 33, U. P. Agriculturists' Relief Act, for account against a usufructuary mortgagee who held the property under a usufructuary mortgage of 1933 executed in satisfaction of two simple mortgages of 1926 and 1927 in favour of the same creditor, it was held

that as there was no fresh advance of any money under the usufructuary mortgage, the transaction could not be regarded as a fresh advance and the agriculturist was entitled under S. 30 of Agriculturists' Relief Act to have the interest reduced for the period 1st January 1930 to August 1933 when the new mortgage was executed.

In the course of their judgment Sir Shah Sulaiman C. J. and Harries J. observed:

In the present case the new transaction was one of a possessory mortgage under which possession was taken by the mortgagee and the income was to be set off against interest, but admittedly there was no fresh advance of any money to the mortgagor. We find it difficult to hold that this transaction can be regarded as a fresh advance in kind by the mortgagee to the mortgagor. The use of the words "actually lent" in the definition of the word 'interest' suggests that any such fiction of law should not be imported into the definition, and what the Court has to see is the actual amount advanced or lent and not what by some fiction might be imagined to have been indirectly advanced.

It is urged before us that the parties having entered into a fresh contract, they must be deemed to have closed the previous transaction and therefore the new contract should not be reopened. It cannot however be doubted that a loan was in existence between 1st January 1930 and August 1933, and it was carrying some interest. The applicant wants an account of the principal and interest which was due, and a reduction of interest during that period. It is impossible to say that there was no loan at all. We further find that in S. 30 (2) the Court is bound to reopen even a decree which has been passed inter partes settling the account between them and creating a new judgment debt. Under that sub-section if a decree has already been passed on the basis of a loan and remains unsatisfied in whole or in part, the Court which passed the decree shall on the application of the judgment-debtor amend it by reducing in accordance with the provision of sub-s. (1) the amount decreed on account of interest. If this is to be done in the case of a decree, it would follow that there should be no bar to such a reopening in the case of a renewal of a previous mortgage deed. Such reopening was expressly allowed in the Usurious Loans Act, but a decree could not be re-opened under that Act. The additional feature of this new Act is that even the amount adjudged by a Court under a decree has to be re-opened. The applicant is entitled under S. 30 (1) to have the interest reduced for the period from 1st January 1930 till August 1933 when the new mortgage was executed.

In 1939 A. L. J. 189,[3] the debtor who had made a simple mortgage in 1926 for Rs. 2000 discharged the liability under the mortgage of 1926 in 1933 by executing a sale for Rs. 5000 and a promissory note for Rs. 500.

In an action brought to recover money on the promissory note the debtor pleaded that in taking account under S. 33, the settlement of 1933 should be opened up and interest should be calculated on the original advance of 1926 and Bennet and Verma JJ. held that under the circumstances defendant was entitled to take benefit under S. 33 of the Act because the Court was justified in looking behind the promissory note and taking into consideration the real transaction of the loan which was the one in lieu of which the deed of mortgage was executed.

In A. I. R. 1938 Oudh 208,[22] Thomas C. J. and Ziaul Hasan J. held in the Oudh Chief Court :

> Where a creditor has not been actually paid but he takes a renewed bill or promissory note for his debt in order to give time to the debtor and receives some consideration by way of increased interest or otherwise for his forbearance, it could hardly be said that the old debt had been paid off by the acceptance of the renewed bill. Section 30 is wide enough to cover the case of old debt renewed subsequently. Sub-section (1) of S. 30 authorises to reopen an old debt which comes under that section.

On the other hand, in 1939 A. L. J. 798,[4] where a promissory note was executed prior to the coming into force of the Agriculturists' Relief Act and thereafter after the Act had come into force, a promissory note was executed in satisfaction of the debt due on the earlier note, Rachhpal Singh J. held that

> the transaction evidenced by the second promissory note was in substance a loan within the meaning of S. 2 (10) (a) of the Act, and the definition of 'loan' in S. 2 (10) (a), Agriculturists' Relief Act, is not confined only to those transactions in which 'an advance in cash or in kind' is made, but also includes a transaction which is in substance a loan. The words 'in substance' mean 'in effect.'

The true nature of a 'renewed loan' has often been subject of judicial consideration both in England and in India and it has recently been stated by Lord Fairfield in A.I.R. 1940 P.C. 60[14] at p. 62 in these words :

> Their Lordships are of opinion, where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties, which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. As one member of this board, when sitting in the Court of appeal, pointed out in (1932) 1 K B 691[10] at p. 706 it ought not to make any difference to the validity of a transaction by way of a renewal of a loan, whether parties go through the form of payment by the borrower of the whole amount due and a re-lending of the same amount by the moneylender, or the transaction is carried out without any such payment by treating the amount of principal and interest still due as a debt acknowledged by the borrower together with an undertaking by the borrower to pay the amount of agreed debt. That this view is right in principle is confirmed by the following passage in the speech of Lord Atkin in (1938) A.C. 341[9] at p. 348 where his Lordship used these words in relation to a case involving six monthly settlements :

> If you settle that is agree the balance at the end of six months there is nothing to prevent your making a fresh start with the total debt which no doubt includes interest and agreeing to forbear from suing for the whole debt at a rate of interest meantime.

In A. I. R. 1940 F. C. 20[11] at page 24 Sir Srinivas Varadachariar reiterated the same statement of law in these words :

> Where however as in the present case, the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, it seems to me that the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment: *See* observations of Greer L. J., as he then was, in (1932) 1 K.B. 691[10] referred to with approval by the Judicial Committee in (1940) 1 M.L.J. 68[14] at page 72.

It was contended at the bar that where a creditor has not been actually paid up but he takes a renewed bill or promissory note or bond for his debt in order to give time to the debtor and receive some consideration by way of increased interest or otherwise for his forbearance, it cannot be said that the old debt has been paid off by the acceptance of the renewed bill, promissory note or bond, and reliance was placed for this contention on certain observations made by Ghose and Panton JJ., in 31 C.W.N. 703[23] at page 710. It was further contended that when a bond is renewed, at best only a notional payment takes place and notional payment is a fiction of English law which is limited to certain banking transactions and should not be extended to transactions in this country between the agriculturists and a money-lender and for this contention reliance was placed upon the following passages in the speech of Lord Macmillan in the House of Lords in (1938) A.C. 341[9] at page 357:

> My Lords, the origin of this agreeable fiction whereby debts are to be deemed to be paid without payment may be traced historically to the ingenuity of leaders in devising a method of obtaining compound interest without contravening the Usury law. It was illegal by an antecedent contract to stipulate for the payment of compound interest, 'but if you agree to settle accounts at the end of six months that not being part of the prior contract and then stipulate that you will forbear for six months upon those terms (i. e., that the interest shall carry interest for the subsequent six months) that is legal': Per Lord Chancellor Eldon in (1803) 9 Ves. 223,[24] at p. 224. On this principle it was held in (1821) 5 B. & Ald. 34[25] that bankers who, with

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22. ('38) 25 A.I.R. 1938 Oudh 208 : 177 I.C. 362 : 1938 O. W. N. 836 : 14 Luck. 151, B. N. Byas v. Barkhandi Mahesh Pratap Narain Singh.

23. ('27) 14 A.I.R. 1927 Cal. 538 : 102 I.C. 871 : 45 C.L.J. 233 : 31 C.W.N. 703, Kshetra Nath v. Har Sukh Das Bal Kishan Das.

24. (1803) 9 Ves. 223, Ex parte Bevan.

25. (1821) 5 B. & Ald. 34, Eaton v. Bell.

the knowledge of and without objection by their customers, debited them with interest with half yearly rests in accordance with their general practice, did not offend against the Usury laws. This method of dealing with loan accounts, which became common form among bankers, survived the abolition of the usury laws and is well established as the ordinary usage prevailing between bankers and customers who borrow from them and do not pay the interest as it accrues.

Now, it may well be that as between a bank and its customer this method of dealing may have the result that the accrued interest which the bank has with the customer's assent added to the principal loan thereby ceases to be due or recoverable as interest, but becomes merged in the principal loan. But has it been 'paid'?

It is further contended that U. P. Agriculturists' Relief Act contemplates an actual payment of loan and not a notional payment and for this reliance is placed upon the observation of Sir Shah Sulaiman C. J., in 1937 A.L.J. 882[2] at p. 884 :

The use of the words 'actually lent' in the definition of the word 'interest' suggests that any such fiction of law should not be imported into the definition and what the Court has to see is the actual amount advanced or lent and not what by some fiction might be imagined to have been indirectly advanced.

In the Calcutta case referred to above where the claim was by a creditor for recovery of money due on hundis which were secured by a mortgage of title deeds against subsequent purchasers of the property, the original hundis having been renewed from time to time even after the purchase, it was contended by purchasers that the prior debt and mortgage must be deemed to have been satisfied by renewal of hundis, but it was held in applying S. 62, Contract Act, to the facts of that case that prior hundis were not discharged by renewal. In the case before the House of Lords the question was whether an accrued interest on a loan, which bankers in their accounts, according to banking practice, treated as realized when in fact it was not paid, could be regarded as paid up for purposes of the Income-tax Act and the question before the House of Lords was whether that particular statute contemplated a payment in fact or a notional payment, not between the banker and the customer, but between the customer and the income-tax authorities. So far as the validity of a renewed bond is concerned, and in so far as the doctrine of notional payment applies to it, no question was raised about it and no doubt was thrown by their Lordships on its validity or applicability. Indeed, there are passages in the speeches of Lord Atkin and even of Lord Macmillan which go to support the doctrine. There is also an earlier decision of the Court of appeal in (1932) 1 K.B. 691[10] in which the validity of renewed transaction and the doctrine of the so called notional payment is fully recognised.

The observations of Sir Shah Sulaiman do not imply that notional payment is not recognized in law or that renewed loan is not a loan generally speaking or cannot be regarded as such under general law. He merely implied that on the particular statute which he was considering an actual payment was contemplated and not a payment by a fiction of law. It is true that the statute about which he was speaking is also the statute which I am considering in this case. But, these observations and the decision in which these observations were made as also decisions which followed it are the subject-matter of discussion in this Full Bench and though entitled to the greatest respect they are not binding upon me. It seems to me that it may be a particular statute that insists or recognizes an actual payment and it may not recognize what may be conveniently described as notional payment or payment by fiction of law; it may be that having regard to course of dealings between parties notional payment can be disregarded and parties can fall back upon original transaction, but apart from such and like cases the doctrine of notional payment is too firmly established to be successfully challenged and in the eye of law renewed loan is as good a loan as the original loan and loan is an expression which might suitably and appropriately be applied to both original and renewed transactions. This leads me to the question whether there is anything in the wording of interpretation clause or in the wording of S. 30 or even in the wording of Ss. 28 and 31, Agriculturists' Relief Act, to exclude a renewed loan or notionally paid up loan from the operation of these sections.

It is not disputed that the word 'loan' in its primary and dictionary meaning is wide enough to include both the original loan as well as a renewed loan. It is also not disputed that the renewal of a loan was a perfectly valid transaction recognized by law and was a matter of daily occurrence amongst the agriculturists in these provinces before the U. P. Agriculturists' Relief Act of 1934 came into force. It is also not disputed that relying upon the validity of these transactions innumerable transactions took place as a result of which very valuable rights have come into existence, but it is contended that the Legislature deliberately has used the word 'loan' in the Agriculturists' Relief

Act in the sense so as to exclude renewed loans and so as to confine it to original loans alone, and this has been done both retrospectively and prospectively for renewed loans taken after the Act came into force as also for renewed loans taken prior to Act came into force. It is true that this contention has found favour with high authorities in this Court and in Oudh, but, with greatest respect, I cannot agree. For the moment I am going to deal with renewed loan taken before the Act and I recognize that U. P. Agriculturists' Relief Act had taken a great deal of liberty with contracts of parties and S. 30, which deals with loans taken prior to Act, deals retrospectively and it takes away vested rights. But there are certain well recognized canons of construction of even a retrospective statute which deals with vested legal rights or of a statute for which it is claimed that it does not recognize a transaction which before the statute and after the statute is justified by a clearly established principle of law.

In Craies on Statute Law, fourth edition, at page 107 it is stated that :

> Express and unambiguous language appears to be absolutely indispensable in statute passed for the following purposes: . . . . . (2) conferring or taking away legal rights, whether public or private; (3) excepting from the operation of or altering clearly established principles of law . . . . . .

On page 114 of the same book it is further stated : " to alter any clearly established principle of law a distinct and positive legislative enactment is necessary ". And on page 335 of the same book it is further stated :

> It is a well recognized rule that Statute should be so interpreted, if possible, so as to respect vested rights and such a construction should never be adopted if the words are open to another construction.

In (1886) 31 Ch.D. 402[26] at p. 408, Bowen L. J. said :

> The particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well known trite maxim, *omnis nova constitutio futuris formam imponere debet, non præteritis* (2 Inst. 292). That is that, except in special cases, the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought, nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition, that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

In (1892) 3 Ch. 402,[27] at page 421 Lindley L. J. said :

> It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless the language is such as to plainly require such a construction. And the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

Is there anything in the express language of the Agriculturists' Relief Act which confines the term 'loan' to the original loan and excludes renewed loan from its operation ? Is there anything in the express language of the statute which declares a perfectly legitimate transaction on the basis of which one loan was closed and another loan started as inoperative ? Is there anything in the express language of the Act which says that a well recognised doctrine of law in money-lending transactions, viz., renewal of bonds on the basis of notional payment and as a result of which transactions were closed and settled years ago in this case before us, the first more than 20 years and the second more than eight years ago, will all be reopened and declared as not binding on the parties ? I cannot find any express language in the statute which will compel me to adopt such an interpretation. For the moment I turn again to the interpretation clauses in S. 2(10), U. P. Agriculturists' Relief Act. It is said that the definition of the words 'loan' and 'interest' as given in S. 2 justified the interpretation, that loan in S. 2 (10) means money actually lent and not what is notionally lent. I can only take S. 2 (10) as an interpretation clause which defines and not one which under the guise of definition enacts. Now, S. 2 (10) defines 'loan' as "an advance to agriculturist whether money or in kind and it includes any transaction which is in substance a loan." I should say that an original loan, when accounts have been settled and on the basis of settlement of accounts it is renewed by a fresh mortgage bond, is in substance a loan within the meaning of the definition and there is no reason to interpret the words 'which is in substance a loan' in any sense so as to destroy the validity of past transactions, and in my opinion, 'where an earlier transaction of loan is renewed, the new transaction itself is a 'loan' for purposes of S. 2 (10), U. P. Agriculturists' Relief Act (27 of 1934).

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26. (1886) 31 Ch.D. 402 : 55 L.J.Ch. 294 : 54 L.T. 100 : 34 W.R. 332, Reid v. Reid.

27. (1892) 3 Ch. 402 : 61 L.J.Ch. 580 : 67 L.T. 275 : 40 W.R. 679, Lauri v. Renad.

But it does not follow from this that the expression 'loan' as including renewed loan is always to be implied wherever the expression 'loan' is used throughout the statute. I have already stated that 'the interpretation clause does not necessarily apply on every occasion when the word interpreted is used in the Act' and the context in which the expression is used may modify or vary its meaning. Now, the word 'loan' occurs in all the four sections of Chap. 4, U. P. Agriculturists' Relief Act, and it is possible that in each of these sections it may have a somewhat different meaning and the reason for this difference may arise on account of the language of the section and the context in which it occurs. It may well be that in S. 31 for purposes of applying the rule of damdupat the expression 'loan' may have to be restricted by the words 'originally borrowed' in the section. It may be that the payment referred to in S. 29 may mean an actual payment and not a notional payment. It may further be that for purposes of Ss. 28 and 31 that is for loans taken after the Act, renewal may be permissible or it may be subject to limitation that interest realised or accrued cannot exceed the principal sum of original loan. These questions though discussed, were not fully debated before us and they do not arise for decision and I express no opinion about them. But so far as S. 30, Agriculturists' Relief Act, is concerned, I am clear in my mind that there is nothing in S. 30 to control the meaning of 'loan' as given in the interpretation clause as I have expressed above, viz. that it should be in substance a loan, and further there is nothing in the section to indicate that the expression 'loan' there is used in a sense so as to take away the pre-existing vested rights in favour of creditors on the basis of transactions which had been closed and settled and which were not subsisting when the Act came into force.

In my opinion, the expression 'loan' as used in U. P. Agriculturists' Relief Act includes a renewed loan and that the same expression as used in S. 30 is confined to subsisting loan which was operative when the Act came into force and it does not apply to a loan which was incurred originally or which was incurred previously to subsisting loan but which original or previous loan was satisfied by mutual agreement by renewal of loan by means of transactions which by mutual consent were substituted in place of original or previous loan which was treated as closed. I am further of opinion in case of a loan taken before the Act bearing compound interest, statutory rate of interest is to be charged from January 1930 not only on the principal sum due on the renewed loan but the statutory interest is to be charged on the total amount due on the subsisting loan on 31st December 1929. Subject to above I answer the question referred to this Full Bench in the affirmative.

K.S./R.K. *Answer in affirmative.*

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FULL BENCH

IQBAL AHMAD C. J., MOHAMMAD ISMAIL AND DAR JJ.

Jagat Prasad Rai Sharma—*Defendant — Appellant*

v.

Deo Nath Singh and others — Plaintiffs — Respondents.

Second Appeal No. 1160 of 1939, Decided on 2nd December 1941, from decision of Civil Judge, Azamgarh, D/- 13th May 1939.

Agra Pre-emption Act (11 of 1922), S. 11 — Sale in lieu of cash price plus expenses of suit to be brought by vendee to recover possession of property sold is pre-emptible.

A sale by the vendor who is not in possession of his property in consideration of cash price and also the expenses of the suit to be brought by the vendee for possession of the property purchased by him comes within S. 54, T. P. Act, and is pre-emptible: ('32) 19 A.I.R.1932 All. 685, *Approved*, 21 Cal. 496 (P.C.) and ('27) 14 A.I.R. 1927 All. 361, *Disting*. [P 73*a*, *b*]

Shiva Prasad Sinha, B. S. Darbari and N. R. Sharma — for Appellant.

K. L. Misra — for Respondents.

Iqbal Ahmad C. J. — This is a vendee's appeal arising out of a pre-emption suit. The vendee contested the suit inter alia on the ground that the transaction sought to be pre-empted by the plaintiff-respondents was not a sale within the meaning of S. 11, Agra Pre-emption Act, and as such, the suit for pre-emption was not maintainable. We are not concerned in the present appeal with the other contentions raised by the vendee. Both the Courts below overruled the contention noted above and decreed the plaintiff's suit. The facts that gave rise to the plea noted above are undisputed and are as follows.

The property in dispute in the present litigation belonged to one Ram Jan Rai. He died leaving five daughters, two of whom were named Mantorna and Kabutra. The daughters entered into possession of the property of Ram Jan after his death and, by two sale deeds, transferred the whole of the property to certain persons. One of the sale

deeds executed by the daughters was in favour of the plaintiffs of the present suit and certain other persons. Of the five daughters of Ram Jan, Mantorna died last of all and, on her death, the reversion opened in favour of Mahabir, the son of Kabutra. Mahabir, however, could not secure possession of the properties of Ram Jan which were in the possession of the vendees from his five daughters. On 14th July 1936, Mahabir executed a sale deed in favour of Jagat Prasad, the appellant before us. By the sale deed, he transferred the entire properties of Ram Jan in favour of Jagat Prasad for a consideration of Rs. 400. It was recited in the sale deed that Mahabir was the heir of Ram Jan and entitled to his properties, but the properties were in possession of the transferees who had no title to the same. It was also recited in the sale deed that as Mahabir was not in a position to bring a suit for possession of the properties against the transferees, he was selling the properties to Jagat Prasad in consideration of Rs. 400 and the expenses which Jagat Prasad may have to incur in bringing a suit for getting possession of the properties from the transferees. The properties sold were specified at the foot of the sale deed.

The plaintiff-respondents then brought the suit giving rise to the present appeal. The vendee appellant, as stated above, resisted the suit on the ground that as the consideration for the transaction sought to be pre-empted, was not only Rs. 400 but also the expenses of the suit to be brought by the vendee for recovering possession of the properties, the suit for pre-emption was not maintainable. The Courts below, relying on the decision of this Court in 1932 A.L.J. 851,[1] overruled this contention and decreed the suit. The learned counsel for the appellant has contended that the view taken by the Courts below is erroneous and in support of this contention he has placed reliance on the decision of their Lordships of the Judicial Committee in 21 Cal. 496[2] and a decision of this Court in 49 ALL. 488.[3] In our judgment the cases relied upon by the learned counsel for the appellant are distinguishable and the case before us is governed by the decision in 1932 A.L.J. 851.[1] In 21 Cal. 496[2] the consideration of the sale that was the subject of the suit for pre-emption was not only the cash price that was paid by the vendee to the vendor, the vendee had further agreed to incur all the expenses of a litigation that was in contemplation and was to be brought for the common benefit of the vendor and the vendee. The consideration for the sale in 21 Cal. 496[2] was, apart from cash consideration, an undertaking by the vendee to provide the money necessary for carrying on a suit, the amount of which could not be estimated. Their Lordships pointed out that the transaction in that case was "a sale of a share in a law suit". Similarly, in 49 ALL. 488[3] the consideration of the sale deed was, apart from the cash consideration, an undertaking by a vendee to pay the costs of a joint suit to be brought in the name of the vendee and the vendor to recover certain properties from the hands of certain transferees. In that case a Hindu widow had sold the properties of her husband to certain persons. On the death of the widow the nearest reversioner, not having enough money to sue for the recovery of the property, sold his interest in a portion of the property, and the vendee undertook to pay the cost of a suit for recovery of the entire property from the hands of the widow's transferees. The learned Judges constituting the Bench delivered separate but concurrent judgments. Lindsay J., held that the transfer in that case was merely a transfer of "a share" of the chance of success in a suit which was subsequently to be brought. The learned Judge, accordingly, held that "there was no transfer of proprietary interest" and, therefore, no suit for pre-emption could lie under the Agra Pre-emption Act. Sulaiman J., based his decision on the ground that "a sale which is not in lieu exclusively of a cash price, or such price as can be definitely ascertained, is not capable of pre-emption."

Reliance was placed by the learned counsel for the appellant on the observation of Sulaiman J. just quoted and it was contended that, as in the present case the consideration for the sale, over and above the sum of Rs. 400 was the stipulation by the vendee to bear all the expenses of a suit for recovery of possession of the properties from the transferees, the sale was not pre-emptible. But the observations of Sulaiman J., must be read in connexion with the facts of the case decided by him. In that case, the vendee had undertaken to meet the expenses of a suit that was to be brought not only for the recovery of possession of the properties sold but also for recovery of possession of the properties

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1. ('32) 19 A.I.R. 1932 All. 685 : 139 I.C. 693 : 54 All. 905 : 1932 A.L.J. 851, Badri Prasad v. Bijai Nand Tiwari.

2. ('94) 21 Cal. 496 : 21 I.A. 26 : 6 Sar. 399 (P.C.), Abdul Wahid Khan v. Shaluka Bibi.

3. ('27) 14 A.I.R. 1927 All. 361 : 100 I.C. 610 : 49 All. 488 : 25 A.L.J. 322, Kalyan v. Mt. Desrani.

a that had not been sold. In other words, the vendee was to bear the expenses of a suit that was to be filed for the joint benefit of the vendor and the vendee. In the case before us, there was no such stipulation between the vendee and the vendor.

The vendor sold the entire properties left by Ram Jan in lieu of a cash consideration of Rs. 400. It is true that according to the recitals in the sale deed Jagat Prasad, the vendee, had to bear the expenses of a suit for recovery of possession of the properties sold, but the suit to be brought by him could not be for the benefit of the vendor for the simple reason that the vendor had sold his b rights and interests in the entire properties of Ram Jan Rai. In other words, the only consideration that Jagat Prasad paid to the vendor for the sale was a sum of Rs. 400 and the vendor was not entitled to any other consideration over and above that amount. The sale was for a definite and ascertained amount that was paid to the vendor. Accordingly the transaction sought to be pre-empted was a sale as defined by S. 54, T. P. Act, and, as such, the suit for pre-emption was maintainable. For the reasons given above, we dismiss this appeal, but, having regard to the circumstances of the present case, we c direct the parties to bear their own costs of this litigation in all the Courts.

G.N./R.K. *Appeal dismissed.*

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BRAUND J.

Shyam Sundardas — Defendant — Applicant

v.

Gouri Nath Seth — Plaintiff — Opposite Party.

Civil Revn. No. 41 of 1941, Decided on 25th September 1941, against order of Judge, Small Cause d Court, Benares, D/- 30th November 1940.

Trustee—Liability of—Trustee contracting to purchase property for trust does so in his individual capacity—He is personally liable in absence of stipulation to contrary — Vendor's remedy is against trustee personally and not against trust estate — Simple decree against trustee personally—Beneficiaries not parties—Direction entitling trustee to reimburse himself for sum decreed from trust property is improper.

A trustee contracting to purchase property in course of execution of his trust does so as an individual and is personally liable for it in absence of an express or clearly implied stipulation as part of the contract itself that he is not to be liable as an individual and that his liability is in some way to be limited. The vendor's remedy is against the trustee personally and not against the trust estate: ('36) 23 A I R 1936 Rang 514, *Rel. on.* [P 73*f*,*g*]

The Court in such a case while passing a personal decree against the trustee should not add a e direction entitling the trustee to reimburse himself for sum decreed out of trust property when the beneficiaries are not parties to the suit and there is no issue on that behalf. [P 73*h*; P 74*a*]

S. B. L. Gour — for Applicant.

Panna Lal, S. N. Seth and N. C. Sen — for Opposite Party.

Order.—This revision raises an old point. The suit was by a plaintiff against one B. Shyam Sundardas, who, I think, was described in the plaint as being the manager of a particular dharamshala. The cause of action was a contract for the purchase of a motor pump. The plaintiff alleged that the defendant had ordered a pump from him, f that it had been delivered to him and that he was liable for the payment of its price. These facts were found against the defendant and a decree was passed for payment by the defendant of Rs. 425.

Now the defendant comes to the Court and says that the decree should not have been against him personally but should have been either against the trust estate (whatever that may mean) or against him as manager of the trust estate. This is an old confusion. It would take too long to go into it fully in this judgment but I have dealt with it fully in 14 Rang 336.[1] No decree is g possible except against a person either actual or juridical. When it comes to enforcing execution, it is possible that in certain cases, other considerations may apply. The Small Cause Court Judge was perfectly right in passing his decree against the defendant personally.

It was, however, unnecessary for him to have added the words "who will be entitled to reimburse himself for this sum from the trust property." It is quite true that a trustee who has entered into a contract in execution of, and in accordance with his powers under his trust has by law a right of indemnity against the trust property. That h is the ordinary law of the land and it was, of course, quite unnecessary for the learned Judge to have said it in the decree. Not only was it unnecessary but it was improper, because it has to be remembered that it always remains open to the beneficiaries of the trust to say that this particular contract was not one which the trustee ought to have entered into. In other words, the learned Judge purported to decide that the trustee was entitled to his indemnity as against the beneficiaries without having the latter before

1. ('36) 23 A I R 1936 Rang 514: 166 I C 247: 14 Rang 336, Mahant Singh v. U Aye.

the Court or any issue on that behalf. That, of course, he could not do. He should have contented himself with a simple decree for Rs. 425 odd with costs and interest against the defendant. There will be that slight alteration in the decree, but with that exception the revision will be dismissed with costs. The question whether the trustee is entitled to an indemnity from the trust estate in respect of the sum decreed and the costs is one which, as between himself and the estate, remains entirely open.

G.N./R.K. *Order accordingly.*

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MOHAMMAD ISMAIL AND MULLA JJ.

Emperor

v.

Abdul Hamim — Respondent.

Criminal Appeal No. 497 of 1940, Decided on 17th September 1941, from order of Sess. Judge, Bulandshahr, D/- 14th March 1940.

(a) Criminal P. C. (1898), S. 54, Secondly — Police Officer must have definite knowledge or information about person to be arrested being in possession of implement.

What the law contemplates under the second clause of S. 54 is that the police officer acting in the exercise of the powers given by that clause must have definite knowledge or at least definite information that a certain person is in possession of an implement of house-breaking before putting that person under arrest. Hence, where the only information the constables had was that some bad characters were in a certain place, the arrest of such persons cannot be justified even though house breaking implement is recovered from them after arrest. [P 76*b*,*c*,*d*]

(b) Penal Code (1860), S. 99 Expln. 1—Police Officer not having right or authority to arrest certain person not in uniform and not declaring to person arrested that he is police officer — Person is entitled to right of private defence.

It is not only proper and advisable but really necessary that when police officers act in the discharge of their official duty, they should be clothed in their uniform so that the public should always know that they are officers of the law acting in the discharge of their duty. That rule undoubtedly applies to ordinary cases. Even in emergent cases in which the police officers might act without being clothed in their uniform it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. If they fail to do so they cannot validly seek the protection of the Court. Hence, where a police officer who has no right or authority to arrest a person seeks to arrest the person without being in uniform and not declaring to such person that he is a police officer, such person is entitled to a right of private defence and his right is not taken away by S. 99. [P 76*g*,*h*]

Government Advocate — for the Crown.

Ihsanul Haq — for Respondent.

Mulla J. — This is an appeal by the Provincial Government against a finding of acquittal recorded by the learned Sessions Judge of Bulandshahr in a case in which one Abdul Hakim alias Hakima or Mohammad Ibrahim who appears as the respondent in this appeal was charged under Ss. 307 and 225B, Penal Code. The facts of the case are very simple. On 5th December 1939 some time between 6 and 6-30 A. M. two police constables named Sri Ram and Ali Ahmad were sitting at the Narsal Ghat police outpost in the city of Bulandshahr when they received information from some person, whose name has not been disclosed and who has not been examined as a witness in the case, that some bad characters were sitting and talking together on the bank of a river near the burning ghat. A small stream called Kali Nadi flows by the city of Bulandshahr and it is this stream that has been referred to in the case as a river. Upon receiving this information the two constables started at once for the spot and on their way they picked two persons named Bishambhar Dayal and Rais Ahmad to act as witnesses. The place indicated by the informer was only about 3 furlongs away from the police outpost. When this party approached the place, they saw one man sitting alone on the bank of the river below the embankment. An attempt has been made by constable Sri Ram in his evidence to show that this man, who subsequently proved to be Abdul Hakim, the respondent in this appeal, was trying to conceal his presence in a culvert. It appears, however, that in his first report of the incident which he made about half an hour later he said nothing about any culvert at all.

It appears further that two of the prosecution witnesses, namely Bishambar Dayal Vaish and Rais Ahmad have said nothing more than this that the respondent was found sitting alone on the bank of the river below the embankment. The prosecution has examined four witnesses to prove the details of the incident, namely the two constables, Sri Ram and Ali Ahmad, and two witnesses whom they had taken with them, namely Bishambhar Dayal and Rais Ahmad. There is again a material discrepancy in the evidence of constable Ali Ahmad and Rais Ahmad on the one hand and constable Sri Ram and Bishambhar Dayal Vaish on the other; the former have tried to prove that when their party approached the spot where the respondent was sitting alone, the constables first asked him to disclose his identity, the latter are equally clear that no question at all was put to the respondent but, as soon as the police party arrived on the spot, the two constables

rushed at the respondent in order to arrest him. The story is that the respondent at first threatened the constables who were approaching him with that object in view, but, as they persisted and as constable Sri Ram actually laid hands upon him, he brought out a knife and gave a stab with it which caused a wound on the left shoulder of constable Sri Ram. Constable Ali Ahmad also rushed at him and the respondent delivered one blow at him also. There was a scuffle in the course of which he delivered two more blows which fell on constable Sri Ram. The respondent was ultimately overpowered and marched off to the police outpost. Upon his person being searched, a number of articles were found including a burglar's jemmy with which alone we are concerned in this appeal.

The respondent made no statement in the Court of the committing Magistrate, but at his trial he put forward a rambling story, the substance of which is that he had come from Meerut to Bulandshahr in search of one Dr. Fateh Mohammad who had embezzled or stolen some money and while he was making some enquiries from some Hindu residents of Bulandshahr on the road in the vicinity of the burning ghat the two constables accompanied by one other person appeared on the scene and asked him why he was there and whom he was after. They took him along with them to the thana and there two badmashes named Wali Mohammad and Bundu and some other persons appeared on the scene. The two badmashes asked him to give them some money and said that without paying something to them he would not be able to discover any trace of Dr. Fateh Mohammad. When he refused to make any payment, they and the constables set upon him and when they were about to overpower him, he brought out a knife and struck at them in defending himself. He also states that he never knew that two of the persons who had thus attacked him were police constables.

The learned Sessions Judge acquitted the respondent holding that in the circumstances of the case he had a right of private defence and did not exceed that right. This finding has been challenged by the Provincial Government and all that we have to consider in this appeal is a pure question of law. The first point which arises for consideration is whether the two constables had any right to arrest the respondent at all. Upon the facts disclosed in this case, we have no hesitation in answering that question in the negative. All that is alleged in the first report made by constable Sri Ram is that his informer had told him that some bad characters were sitting and talking together on the bank of the river near the burning ghat. Nothing further than this has been disclosed by the evidence produced by the prosecution at the trial. The informer himself has not been examined and we do not, therefore, know whether he had any reason at all to say that the person or persons whom he had seen together on the bank of the river near the burning ghat were bad characters. Again it is clear in view of the time of the day at which the information was conveyed to the police constables that it could hardly be a case of any bad characters concealing themselves with a view to committing some crime. It is true that the incident took place on 5th December, but the prosecution witnesses themselves admit that it was somewhere between 6 and 6-30 and it was clear daylight at the time. Now in the absence of anything to show that the police constables had any valid reasons for believing that some bad characters were concealing their presence in order to commit some crime, we see no justification for the hasty action taken by the two police constables in this case. After all even bad characters have the liberty under the law to sit early in the morning by the bank of a river and to talk to each other. It was no case for the hurried action taken by the two constables. It is also to be borne in mind that if the information was that some bad characters were trying to conceal their presence with a view to committing some crime, the two police constables had no authority under the law to make any arrest. Upon that information action could be taken only under S. 55, Criminal P. C., which runs :

> 1. Any officer in charge of a police station may, in like manner, arrest or cause to be arrested — (a) any person found taking precautions to conceal his presence within the limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence . . . .

It is not even suggested in the present case that the two constables had been authorised by the officer in charge of the police station to arrest the person or persons regarding whom information had been received in the circumstances stated above. The learned Government Advocate relied upon cl. (2) of S. 54, Criminal P. C., which runs as follows :

> Secondly, any person having in his possession without lawful excuse, the burden of proving which

excuse shall lie on such person, any implement of house-breaking.

The argument is that as a matter of fact a jemmy was recovered from the possession of the respondent and hence the two constables were justified in arresting him under this cl. (2) of S. 54, Criminal P. C. We have no hesitation in saying that this argument has no force at all. A careful perusal of S. 54 would show that in several other clauses there is a distinct provision made by the law to enable a police officer to act upon a reasonable suspicion whereas in cl. (2) there is no such provision. It is clear from the language of this clause that what the law contemplates is definite knowledge or information on the part of the police officer before he takes any action under S. 54, Criminal P. C. In the present case it is perfectly clear that the two constables could not expect to find a jemmy in the possession of the respondent because all that they had heard from the informer was that some bad characters were sitting talking to each other on the bank of the river. We are entirely unable to accept a suggestion made by the learned Government Advocate that when a police officer acts under cl. (2) of S. 54, he does so at his own risk if no implement of house-breaking is found in the possession of the person whom he arrests. We do not think that the law intended to give a licence to every policeman moving about on the road to search any person at his sweet will merely upon some suspicion of his own which may have no reasonable foundation at all that the said person might have an implement of house-breaking in his possession. The language of cl. (2) of S. 54 leaves no doubt in our minds that what the law contemplated was that the police officer acting in the exercise of the powers given by that clause must have definite knowledge or at least definite information that a certain person is in possession of an implement of house-breaking before putting that person under arrest. It is thus clear that in the circumstances of the present case the two police constables had no right or authority to arrest the respondent. It must consequently be held that the respondent had a right of private defence unless that was taken away by S. 99, Penal Code, which runs as follows :

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law.

If this provision stood alone, the prosecution would undoubtedly be entitled to argue that the respondent had no right of private defence, but in considering this provision we have to bear in mind Expln. 1 which runs as follows :

A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Now in the present case we find that it is admitted that the two constables were not in uniform. Again there is not a word in the whole of the prosecution evidence to suggest that either any one of the two police constables or any one of the two witnesses ever declared before rushing forward to arrest the respondent that any one of them was an officer of the law trying to act in the discharge of his duty. We have very carefully perused the evidence from that point of view and we find it established beyond all doubt that what really happened was that the two constables and their two companions simply rushed forward to arrest the respondent without saying anything to him or without making any enquiries from him. The respondent could not have had any reason at all to suppose or believe that any one of the four persons who attacked him was an officer of the law. It is thus clear that the respondent's right of private defence in this case was not taken away by S. 99, Penal Code. We consider it necessary here to point out that it is not only proper and advisable but really necessary that when police officers act in the discharge of their official duty, they should be clothed in their uniform so that the public should always know that they are officers of the law acting in the discharge of their duty. That rule undoubtedly applied to ordinary cases and we can easily conceive of emergent cases in which the police officers might act without being clothed in their uniform, but in such cases it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. If they fail to do so, as the two constables did in the present case, they cannot validly seek the protection of the Court. For these reasons we uphold the finding of acquittal recorded by the learned Sessions Judge and dismiss this appeal. The respondent, who is in custody, shall be set at liberty forthwith provided he is not wanted in connexion with some other case.

K.S./R.K. *Appeal dismissed.*

a **A. I. R. (29) 1942 Allahabad 77**

YORKE J.

Mt. Masooma Bibi and others — Defendants—Appellants

v.

Haji Mohammad Said Khan, Plaintiff and others — Defendants — Respondents.

Second Appeal No. 1412 of 1939, Decided on 9th October 1941, from decision of Civil Judge, Gorakhpur, D/- 5th May 1939.

(a) U. P. Municipalities Act (2 of 1916), S. 2 (19)(a) and (b)—Land of public lane—Transfer of, as public street is ineffective.

b The transfer by the Municipality of the land of a public lane treating it as a public street is ineffective and the lane retains its character as a public lane. [P 77*h*]

(b) Public way—Lost grant can be presumed.

A lost grant in favour of the public can be presumed in the case of a lane over which the public have a right of passage. [P 77*h*]

(c) Evidence Act (1872), S. 115—Acquiescence to act as estoppel must amount to fraud.

The acquiescence which will deprive a man of his legal rights must amount to fraud. A person cannot be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights : ('26) 13 A.I.R. 1926 All. 324, *Rel. on.* [P 78*b*]

(d) Limitation Act (1908), S. 23 — Water c **course—Obstruction to, is continuing wrong.**

Obstruction to a water-course and to the flow of water is a continuing wrong as to which the cause of action is renewed de die in diem so long as the obstruction causing such interference is allowed to continue : 6 Cal 394 (P.C.), *Rel. on.* [P 78*e*]

(e) Limitation Act (1908), S. 23 and Art. 120 — Obstruction to public way is continuing wrong within S. 23—Fresh period of limitation runs at every moment of time during which wrong continues.

An obstruction to a public way which prevents some one from exercising a right of way does fall within the scope of the term "continuing wrong" in S. 23 and a fresh period of limitation begins to run under S. 23 at every moment of the time during which the wrong continues. The real crux of d the matter in regard to a right of way is that the public has a right at all times or at any time to exercise that right and the right to redress arises on every occasion when an attempt is made to exercise that right and owing to the act of the obstruction the exercise of the right is found impossible. Consequently, it is incorrect to say that where an obstruction to a public way is caused by an act which results in complete cessation of the ability to exercise the right of way as for instance by building a high wall or wire fencing or something which clearly prevents passage, there can be no question of a continuing wrong as the wrong has been completed once and for all by a single act. A right of way or a right of passage is not a right in the nature of a title or of possession from which there can be an ouster and to which the articles which enforce a limitation of either 12 years or six years can apply : 1 C.W.N. 96; 2 I.C. 410 (Cal); ('37) 24 A.I.R. 1937 Lah. 94 and ('40) 27 A.I.R. 1940 Lah. 359 (FB), *Rel. on* ; 19 Mad. 154 and e (1905) 1 Ch. D. 205, *Disting.* [P 78*f,g;* P 79*c*]

Shiva Prasad Sinha — for Appellants.

M. Waliullah — for Respondents.

Judgment. — This is a second appeal in a suit for removal of obstructions to a lane or street in the town of Gorakhpur. The plaintiff came to Court alleging that the defendants had in 1923 obtained an order from the Municipal Board for the closing of the southern end of this lane and had closed it and that 11 years later when the plaintiff wanted to reconstruct his houses which stood on the east side of the lane and had even obtained permission from the Municipal Board f the defendants unlawfully closed the northern end of the lane also and built walls in front of the plaintiff's two doors which opened on the lane. They had also opened new doors in their own house towards the disputed lane and interfered with the plaintiff's right to pass over this lane. Hence the plaintiff sought demolition of the walls erected at the north and south end of the lane and of the latrine constructed by the defendants in the lane, and an injunction restraining the defendants from passing over the lane through the doors which they had opened and from interfering with the plaintiff's right of passage g over the lane. The suit which was filed on 7th August 1934 was originally dismissed by the Munsif on 29th August 1935. It was remanded by the lower appellate Court on 21st December 1935 and again dismissed by the trial Court on 25th May 1937. On appeal the lower appellate Court on 5th May 1939 decreed the suit in part. The trial Court had held that this lane in dispute was a public street, but the lower appellate Court for reasons which are clearly correct in the light of the definition of " public street " in S. 2 (19) (a) and (b), U. P. Municipalities Act, has held that the lane in suit is not a public h street. It follows from this that when the Municipal Board in the year 1923 transferred the land of this lane to the defendants treating it as a public street the grant was ineffective and the lane in question retained its character of a public lane, that is a lane over which the public had a right of way. The lower appellate Court has accordingly found that this land lying between the houses of the plaintiff and defendants was a lane over which the public had a right of passage. It took the view that this was a case in which a lost grant should be presumed, and I can see no reason to differ from that finding. Following from this finding it

took the view that the plaintiff and the defendants had equal rights of passage over this lane and therefore the plaintiff was entitled to the relief claimed by him for the removal of the walls and gate at the north and south ends of the lane and for removal of the latrine and of a wall built by the defendants in front of the doors, be they new or old, opened by the plaintiff on the east side of the lane.

In this second appeal, learned counsel for the appellants had at first sought to argue a question of estoppel but he was unable to show that estoppel was seriously pleaded by the defendants, nor has he been able to quote the passage in the pleadings upon which he would found any plea of estoppel. He was inclined to suggest that it might be a case of estoppel by acquiescence, but the case does not seem to fall within the scope of estoppel by acquiescence as set forth in the well-known case of this Court, 24 A.L.J. 355.[1] In the course of argument, however, a fresh question arose, namely the question as to whether this suit was really filed within limitation. At first sight it appears that the suit is one to which Art. 120, Limitation Act, would be applicable and therefore the period of limitation for the suit would be six years only. Had that been the case, the suit so far as the southern gate is concerned would certainly fail, as also probably the suit in regard to the northern gate, although there might possibly be some little doubt on this point. But it is contended on behalf of learned counsel for the respondents that obstruction of a public lane that is of a public right of way, constitutes a continuing wrong and brings into operation Sec. 23, Limitation Act, and not Art. 120. So far as Art. 120 is concerned, there are a large number of cases quoted in Chitaley's Commentary, but so far as I can see none of these cases is really analogous to the case of obstruction of a public right of way.

Among the cases referred to I find a suit for injunction directing defendants to remove certain constructions erected by the latter on common land, a suit for removal of an encroachment on reserve land, a suit by a zamindar for removal of a structure put up by a mortgagee of occupancy holding without the zamindar's consent, a suit to remove buildings erected on a graveyard and so on, but all of these are cases of the nature of trespass in which someone's possession of land is affected and not the exercise of a right. On the other hand there is no room for doubt and appellant's learned counsel does not dispute that obstruction to a water-course and to the flow of water is a continuing wrong as to which the cause of action is renewed de die in diem so long as the obstruction causing such interference is allowed to continue: *cf.* 6 Cal. 394.[2] It has been remarked with regard to obstruction with reference to a right of way that there is no distinction in principle between the obstruction to a water-course and obstruction to a right of way so far as the applicability of this section (Sec. 23, Limitation Act) is concerned. An obstruction to a right of way is therefore a continuing nuisance as to which a cause of action will be renewed de die in diem so long as the obstruction continues.

It has been suggested by learned counsel for the appellants that where an obstruction is caused by an act which results in complete cessation of the ability to exercise a right, as for instance by building a high wall or wire fencing or something which clearly prevents passage, there can be no question of a continuing wrong as the wrong has been completed once and for all by a single act. It does not seem to me that this is really the conclusive point. The real crux of the matter in regard to a right of way is that the public has a right at all times or at any time to exercise that right and the right to redress arises on every occasion when an attempt is made to exercise that right and owing to the act of the opposite party the exercise of the right is found impossible. In this connection I do not consider that cases in which, for example, damage has been caused to a wall by digging a hole or a trench close beside it with the result that it cracks and thereafter continues to crack a little more are in point. Those are cases in which the injury is complete as soon as the act complained of results in damage. The same reasoning applies to cases in which by reason of a wrongful act a man's arm for example is broken. It may be that the pain of the broken arm may continue for a long time but the cause of action arises on the date when the damage is caused, and it is not a case in which a recurring cause of action arises on every occasion when the owner of the arm wants for instance to raise it or to use it. The English case in (1905) 1 Ch. D.

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1. ('26) 13 A.I.R. 1926 All. 324: 92 I.C. 1017: 48 All. 353: 24 A.L.J. 355, Jai Narain v. Jafar Beg.

2. ('81) 6 Cal 394: 7 I.A. 240: 7 C.L.R. 529: 4 Sar. 199 (P. C.), Rajroop Koer v. Abdul Hussain.

205[3] at p. 226 appears to be a case of this kind.

Learned counsel for the respondents has referred to a series of cases with reference to the obstruction of rights of way. In 1 C. W. N. 96,[4] a single Judge of the Calcutta High Court held that any interruption of the easement (in this case a right of way over the defendant's land) gave the plaintiff a recurring cause of action di die in diem under S. 23, Limitation Act, and that the two years' rule as prescribed by S. 26 was not applicable. Similarly, in 2 I. C. 410,[5] (a Calcutta case of the year 1909) it was held with reference to the obstruction of a path which had been set apart on joint lands, that the plaintiff had an absolute and indefeasible right acquired many more than 20 years ago and had enjoyed it without interruption up to quite recent times, and that the obstruction was in the nature of a continuing nuisance and under S. 23, Limitation Act, gave a fresh starting point for limitation de die in diem. A similar view was taken by a single Judge of the Lahore High Court in A. I. R. 1937 Lah. 94,[6] where the access by the plaintiff to a public street was obstructed by the defendant. The learned Judge remarked:

> In my opinion the lower Courts were wrong in holding that the suit was barred by limitation: the wrong to the plaintiff is a continuing wrong; his access to the highway from his property and from the highway to his property is prevented during every moment of the time while the erection stands.

The view taken in all these cases is clear that a right of way or a right of passage is not a right in the nature of a title or of possession from which there can be an ouster and to which the articles which enforce a limitation of either 12 years or six years can apply. Learned counsel for the appellants sought to rely first upon the Madras case in 19 Mad. 154.[7] In that case the Municipality of Madras sued to recover as forming part of a highway a strip of land adjoining the house of the defendant on which a pial had been erected more than 45 years before the suit. Held,

> assuming that the land in question was originally included in the street, that the defendant had acquired a title by adverse possession against the municipality, which was not entitled to call in aid the provisions of the Limitation Act, Sch. 2, Article 149.

But in this case the ratio of the decision was that the municipality was really suing to recover possession of a portion of their property from which they had been ousted. It was not a suit in any sense to enforce a right of way which had been obstructed. Lastly learned counsel has referred to a Full Bench case of the Lahore High Court, A.I.R. 1940 Lah. 359,[8] in which the question arising in the present case has been discussed at some length and has been referred to in the judgments of all three Judges who were members of the Bench. The judgments bring out very clearly the distinction between an ouster from possession and interference with such a right as a right of passage, and to my mind this decision so far from supporting the proposition put forward by learned counsel rather supports the other side. In my view, there can be no doubt that the obstruction which prevents someone from exercising a right of way does fall within the scope of the term, "continuing wrong" and a fresh period of limitation begins to run under S. 23, Limitation Act, at every moment of the time during which the wrong continues. On this view it is clear that the present suit was instituted within time. The plaintiff's claim in so far as it was a claim for the removal of the obstructions to the right of way, that is by removal of the two walls at the north and south end of the lane, of the latrine and of the wall built by the defendants in front of the plaintiff's doorways, was rightly decreed by the lower appellate Court. I find no force in this appeal and dismiss it accordingly with costs. The cross-objection has not been pressed and is dismissed. Leave for Letters Patent Appeal is refused.

G.N./R.K. *Appeal dismissed.*

3. (1905) 1 Ch. D. 205: 74 L. J. Ch. 219: 92 L. T. 153: 69 J. P. 62: 3 L. G. R. 321: 21 T. L. R. 98, Earl of Harrington v. Derby Corporation.
4. ('97) 1 C. W. N. 96, Sreemati Soojan Bibi v. Shamed Ali.
5. ('09) 2 I. C. 410 (Cal.), Nerode Kanta v. Bharat Chandra.
6. ('37) 24 A. I. R. 1937 Lah. 94: 171 I. C. 509, Mehr Chand v. Sain Gaman.
7. ('96) 19 Mad. 154, Municipal Commissioners for the City of Madras v. Sarangapani Mudaliar.
8. ('40) 27 A.I.R. 1940 Lah. 359: 191 I.C. 42: I.L.R. (1941) Lah. 22 (FB), Khair Mohd. Khan v. Mt. Jannat.

A. I. R. (29) 1942 Allahabad 79

COLLISTER J.

Mt. Chameli — Defendant — Appellant

v.

State Kishangarh through Thakur Amar Singh — Plaintiff — Respondent.

Second Appeals Nos. 597, 598, 599 and 618 of 1939, Decided on 22nd September 1941, from decision of Sub-Judge, Muthra, D/- 31st January 1939.

(a) U. P. Land Revenue Act (3 of 1901), S. 86 — Mere entry in wajibularz is not sufficient to legalise cess.

The mere entry in the wajib-ul-arz or the dastur-dehi by the Settlement Officer would not be sufficient to legalise the cess, unless in addition the cess was generally or specially sanctioned by the Local Government : ('23) 10 A.I.R. 1923 All. 378, *Foll.*; ('25) 12 A.I.R. 1925 All. 121, *Expl.* [P 80*f*]

(b) U. P. Land Revenue Act (3 of 1901), S.86 — Cess recorded in wajib-ul-arz of previous settlement but not recorded in proceedings of later settlement—It cannot be enforced.

At the time of each settlement only those cesses will be recorded and will be enforceable as have received the sanction of Government and if the custom is not recorded, no such sanction can be assumed. If no wajibularz is drawn up at any particular settlement, it cannot be inferred from this fact that the Government has sanctioned the continuance of the custom recorded in the wajibulraz of the previous settlement. Therefore, if a particular cess is not recorded in the proceedings of the last settlement it is unenforceable at law : ('27) 14 A.I.R. 1927 All. 520 and ('35) 22 A.I.R. 1935 All. 642, *Rel. on.* [P 81*f*, *g*]

S. C. Das — for Appellant.

G. S. Pathak — for Respondent.

Judgment. — These four appeals can be disposed of by a single judgment. The plaintiff respondent is the Kishangarh State, and the suits out of which these appeals have arisen were for recovery of chaukidari dues from certain shop-keepers at the rate of 8 annas per shop per annum for a period of four years. The claim was based upon a custom as recorded in the wajibularz of 1284 Fasli, equivalent to 1876-1877 of the Christian Era. The suits were resisted on various grounds, one being that no custom exists as alleged in the plaint; and at the trial it was contended on behalf of the defendants that the plaintiff had failed to prove any general or special sanction as required by S. 66 of Act 19 of 1873. The trial Court found on all points but one in favour of the plaintiff, but dismissed the suits on the ground that the custom did not apply to these particular defendants. There was an appeal, and the learned Judge of the lower appellate Court has reversed the decree of the trial Court and has decreed the suits. It is a matter of admission that a custom such as is alleged in the plaint is recorded in the wajibularz of 1876-1877 and that that settlement record has now been weeded out. It was, therefore, impossible for the plaintiff to prove from any document on the record whether such sanction as was required by S. 66 of Act 19 of 1873 had been accorded and it was equally impossible for the defendants to prove the contrary. In the circumstances the Courts below, having regard to the entry in the wajibularz have drawn a presumption under S. 114, Evidence Act, that the alleged sanction must have been accorded.

Learned counsel for the defendants appellant has advanced two pleas before me in second appeal. His first plea is that the entry in the wajibularz is no ground for a presumption that sanction was granted by the Government. The second plea is that, even if such presumption is warrantable in respect to the settlement of 1876-1877, the suits must fail for the reason that no wajibularz was prepared for the current settlement. Paragraph 2 of S. 66 of Act 19 of 1873 reads as follows :

> A list of all other cesses levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the Settement Officer, and no cesses not so recorded shall be enforced in any civil or revenue Court.

The corresponding section in Act 3 of 1901 is S. 86, which is to the same effect. In support of his first plea learned counsel for the defendant-appellants relies upon A.I.R. 1923 ALL. 378[1] and 47 ALL. 118.[2] In the first mentioned case a learned Judge of this Court remarked that

> . . . the mere entry in the wajib-ul-arz or the dastur-dehi by the Settlement Officer would not be sufficient to legalise the cess, unless in addition the cess was generally or specially sanctioned by the Local Government.

The proposition is not disputed on behalf of the plaintiff respondent. In the second of the two above-mentioned cases it was held by a Bench of this Court that the general sanction given by Government to the carrying on of settlement operations in a certain area cannot take the place of the general or special sanction to the recording of a cess by the Settlement Officer which is required by S. 86 of Act 3 of 1901. At page 120 the learned Judges say :

> Munshi Harbishan Dayal was appointed Assistant Settlement Officer and there was also a Settlement Officer for the tehsil of Pilibhit. There was also a notification declaring this particular tehsil to be under settlement. The general or special sanction of the Local Government is, however, wanting in this. The learned counsel for the respondent argued that the general sanction of settlement operations included a general sanction of all these cesses. We are not prepared to hold that the sanction of a settlement operation would include such a definite sanction as is required by S. 86. In our opinion these cesses, if recorded by Munshi Harbishan Dayal as Assistant Settlement Officer with the powers of a Settlement Officer under S. 231, were neither generally nor specially sanctioned by the Local Government. The cess is, therefore, not recoverable under S. 86 . . . . .

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1. ('23) 10 A.I.R. 1923 All. 378 : 71 I.C. 432, Mohammad Asghar Ali Khan v. Rammon.

2. ('25) 12 A.I.R. 1925 All. 121 : 82 I.C. 1026 : 47 All. 118 : 22 A.L.J. 900, Sukurwa v. Nazir Ahmad.

Thus the Court took into consideration the fact that in the settlement notification there was no mention of any general or special sanction, and presumably the plaintiff had not been able to prove the sanction from any other paper on the records of the settlement which was then current. In that case, therefore, any presumption which might otherwise have arisen under S. 114, Evidence Act, from the entry in the dastur-dehi was definitely rebutted by the circumstances that no recorded sanction existed in the records of the settlement proceedings. It is contended that in the present case, since the papers of the settlement proceedings have admittedly been weeded out, the Court being entitled to presume that official acts have been regularly performed, will be justified in holding that sanction had been accorded as required by law. In one of the authorities relied upon by learned counsel for the defendants appellant namely A.I.R. 1923 ALL. 378[1] already referred to, the learned Judge at p. 381 refers to a circular of the Board of Revenue dated 27th April 1876 in which it was said : "As to cesses under cl. (2) the Governor is not disposed to give any general or special sanction at present." The wajib-ul-arz in the present case was prepared two years later in 1878 and it is argued that by that time special sanction may well have been obtained for this particular cess. The circular referred to is not before me but assuming that the passage above referred to has been correctly recited in the judgment, I think that, as an indication of the policy of Government in 1876, it would at least weaken the presumption which the Court might feel inclined to draw under S. 114, Evidence Act. It is, however, unnecessary to record a finding as to whether the Courts below were or were not justified in relying upon such presumption inasmuch as I am of opinion, for reasons to be stated, that the appeals must be allowed on the second plea, that is to say on the ground that there is no record of this cess in the current settlement. In this connexion my attention has been drawn to a decision of Iqbal Ahmad J. (as he then was) in A.I.R. 1927 ALL 520,[3] which was followed by Ganga Nath J., in 1935 A.L.J. 955.[4] In both the abovementioned cases the plaintiff claimed the right to realise chaukidara on the basis of an entry in the wajib-ul-arz. In the 1927 case it was common ground that although the entry was recorded in the wajib-ul-arz of the previous settlement, it was not so recorded in the wajib-ul-arz of the last settlement of 1894-1897. This view was, as I have said, followed in the 1935 case by Ganga Nath J. who observed :

> After the settlement of 1278 Fasli, another settlement took place, but no wajib-ul-arz of it was produced. If there had been any entry of any such chaukidara cess in it as was entered in the wajib-ul-arz of 1278 Fasli, the plaintiff would certainly have produced it. As no such cess was recorded in the last settlement it is not recoverable under the provisions of S. 86, Land Revenue Act.

Learned counsel for the plaintiff-respondent seeks to distinguish the aforementioned two decisions on the ground that in the present case no wajib-ul-arz was prepared at all at the later settlement, and therefore it is argued that the custom recorded at the settlement of 1876-1877 must be deemed to have continued. As a matter of fact it does not appear whether in the 1935 case a wajib-ul-arz had or had not been prepared in the later settlement, but even if this were a fact, I am of opinion that this circumstance would in no way affect the result. It is clear from S. 86 of Act 3 of 1901 that at the time of each settlement only those cesses will be recorded and will be enforceable as have received the sanction of Government and I am of opinion that, if the custom is not recorded, no such sanction can be assumed. If no wajib-ul-arz is drawn up at any particular settlement, it cannot be inferred from this fact that the Government has sanctioned the continuance of the custom recorded in the wajib-ul-arz of the previous settlement. It is unnecessary to consider what the position might be in respect to a cess recorded at the earlier settlement if, though no wajib-ul-arz was prepared at the later settlement, there was a notification relating to that settlement which contained such sanction for that is not the case here. The words ". . . . and no cesses not so recorded shall be enforced in any civil or revenue Court" leave, I think, no room for doubt that if a particular cess is not recorded in the proceedings of the last settlement it is unenforceable at law.

This being my view, these appeals must be and hereby are allowed. The decrees of the Courts below are set aside and the suits are dismissed. There remains the question of costs. There was no specific plea in the written statements as regards S. 66 of Act 19 of 1873 or S. 86 of Act 3 of 1901 but it is clear from the judgment of the trial Court that

3. ('27) 14 A.I.R. 1927 All. 520 : 100 I.C. 740, Tirkha Ram v. Chhotey.

4. ('35) 22 A.I.R. 1935 All. 642 : 155 I.C. 658 : 1935 A.L.J. 955, Mohammad Uddin v. Bhupan.

this plea was advanced at the trial. On the other hand it does not appear to have been taken before the lower appellate Court. In the circumstances I direct that the parties shall bear their own costs in both Courts. Leave to appeal under the Letters Patent is refused.

K.S./R.K. *Appeals allowed.*

A. I. R. (29) 1942 Allahabad 82

BRAUND J.

Pyare Lal and others — Defendants — Appellants

v.

Chhotey Lal and others — Respondents.

First Appeal No. 277 of 1940, Decided on 28th October 1941, from order of Small Cause Court Judge, Allahabad, D/- 7th September 1940.

(a) Civil P. C. (1908), O. 47, R. 1 — Applications under O. 47, R. 1 should be treated with considerable caution—Applicant should at least prove strictly diligence he claims to have exercised and that evidence sought to be produced is nearly if not absolutely conclusive of matter — Proper function of review application stated —Plaintiff held did not attain that high standard of diligence which O. 47, R. 1 required.

Applications under O. 47, R. 1 must be treated with a considerable measure of caution. That is a matter of public policy as it is obviously necessary that, save in exceptional circumstances, finality in litigation should be achieved at some point. The person who wants a review should at least prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive of the matter. It is not the proper function of a review application merely to supplement evidence or to make it serve the purpose merely of introducing evidence which might possibly have had some effect on the result. Order 47, R. 1 requires a high standard of diligence. [P 84*d*,*e*]

The plaintiff in the suit made some efforts to compel the other party to produce a certain document in his possession on which the plaintiff relied but gave up the pursuit when he found that it would involve expense and trouble as the party had gone away to another place. Subsequently, the plaintiff discovered that the document had been filed by the party, in whose possession it was, in some other litigation and therefore it would be easier to get the same on record and therefore applied under O. 47, R. 1 to have the document admitted in evidence :

Held that the plaintiff did not attain that standard of diligence which O. 47, R. 1 required and the admission of the document was beyond the scope of O. 47, R. 1. [P 84*f*,*g*]

(b) Civil P. C. (1908), O. 47, R. 1—Applicant ought to furnish Court with evidence he seeks to have admitted.

In an application for review the applicant ought always to see that the Court is furnished with the evidence which he asks to have admitted because otherwise it is impossible to tell what its value really is. [P 84*h*]

(c) Practice — Burden of proof — Suit to recover loan—Plaintiff must show that he is entitled to sue — There is no question of rebutting defendant's case.

In a suit to recover a loan it is for the plaintiff to establish that he has such an interest in the loan as would entitle him to maintain the suit. He must prove his own case. There is no question of rebutting the defendant's case. [P 85*a*]

Brij Mohan Lal Srivastava — for Appellants.

G. S. Pathak — for Respondents.

Judgment. — This is a troublesome little matter involving an application for a review under O. 47, R. 1 of Sch. 1, Civil P. C. The suit was one by the plaintiff, who is respondent 1, against (originally) three defendants, Pyare Lal, Sukru and Guddun. These three defendants are the sons and heirs of one Bhujai. It is necessary to note the name of another man, namely Bansi Dhar. What had happened was that in October 1934, Bhujai the father of the three defendants had borrowed a sum of money. The nominal lender —whether he was the real lender is the matter in dispute—was Bansi Dhar and by a document dated 9th October 1937, Bhujai admitted that he had borrowed a sum of Rs. 150 from Bansi Dhar upon the security of certain cattle. In due course both Bhujai and Bansi Dhar died, the former leaving the three defendants as his heirs and the latter leaving a widow, Mt. Chaubabai.

I pass on now to the plaint. The suit was started in 1938 or 1939 and the plaint alleged that the plaintiff, that is to say, respondent 1, Chhotey Lal, had lent this money to Bhujai—in short that the loan was not Bansi Dhar's at all but was the plaintiff's and that the whole transaction was a benami one. On that footing the plaintiff sued to recover what was owing. It was then apparently realized that this involved a possible conflict with the widow of Bansi Dhar and that lady was added as a defendant. Subsequently three other defendants were added who, as far as I can see, had nothing to do with the matter.

The three original defendants then filed a written statement in which they told this story. They said that their father Bhujai—and this is not disputed — had had a good many money-lending transactions with Bansi Dhar many of which were still outstanding at the time of the loan to which this suit relates and that, in connexion with the earlier transaction, Bansi Dhar held considerable quantities of jewellery in pawn belonging to Bhujai. They then said that the loan of October 1934 also was taken by Bhujai from Bansi Dhar and not from Chhotey Lal at

all—in other words that Chhotey Lal was not the lender and had nothing to do with the matter. If that is true, it, of course, puts an end to the whole matter because, in that event, whatever may be the rights as between those who claim through Bansi Dhar and the defendants, it would not give Chhotey Lal any footing to maintain the suit. That, therefore, was the first issue in the suit. If it failed, it put an end to the matter, because from that point onwards the plaintiff would cease to have any interest. The defendants, however, seem to have raised another contention which is really in the nature of an alternative defence. They said that there had been a settlement between themselves and Mt. Chaubabai, as representing her deceased husband, Bansi Dhar, which included not merely what was owing upon the loan of October 1934, but also all previous transactions as well. It was said that there was one comprehensive settlement, the occasion for which arose in consequence of a theft in which some of the jewellery was lost which put an end to all controversy in connexion with this and all other transactions. That, therefore, was the second issue, and, as I have pointed out it really only arose if the plaintiff succeeded in establishing his first point that he had some interest in the loan of October 1934, upon which he could found a cause of action in this suit.

In those circumstances, it first came before the Munsif who took evidence and tried the matter and came to the conclusion, as a matter of fact, that the plaintiff was not, and never had been, the lender of the money. The Munsif, I think, might have stopped there and dismissed the suit. But he went further and he also found that, in any case, the debt had been discharged in account between the sons of Bhujai and the widow of Bansi Dhar. That might possibly raise more serious questions than the Munsif was able to consider, but I do not propose to discuss them at this stage. The point to notice is that he found as a fact that the money was not advanced by the plaintiff. He had evidence before him and at this point it is necessary to refer again to what happened when the settling up took place between Bansi Dhar's widow and the first three defendants. Ultimately, on 11th October 1937, a final payment of Rs. 84 in full settlement of all the outstanding obligations between them appears to have been made by the widow, Chaubabai, to the three defendants and a receipt was given—apparently it was in the nature of a release—acknowledging the discharge of all obligations on either side. But it is also said that a certain book or register was kept by Mt. Chaubabai which, if produced, would show what the transactions between Bhujai and Bansi Dhar had been and that this book would disclose that the loan of October 1934 was not one of the personal transactions between them. The significance of that apparently was that from it the plaintiff suggested that it could be inferred that the loan of October 1934 stood on a different footing from all the others and must, therefore, be presumed to be something which was not personal to Bansi Dhar. It was said that that assisted the suggestion that it was really the plaintiff's money. Now Mt. Chaubabai was apparently summoned to bring this book more than once to the Court of the Munsif. Ultimately, when she did not appear in answer to these summonses, an application was made for her arrest. I have seen this application and the entries in the order sheet. It appears that it came before the Court and the plaintiff, whose application it was, was asked to furnish an affidavit. The respondents' advocate tells me with admirable frankness that this was not pursued because it was found that the lady in question had left Allahabad and gone to Cawnpore and that her address was not known. He confessed that in so small a matter it was not worth pursuing it at that stage. It, therefore, came before the Munsif who decided it on the oral and other evidence which he had before him and without the register.

The next thing was that in February 1940 it went on appeal to the Small Cause Court Judge. Now, as I read the learned Judge's judgment, he divided the case—quite rightly I think — into two parts, first whether the plaintiff had any interest in the loan or not and secondly whether the loan had been discharged at the time of the general settling up in 1937. And again he came to the conclusion, as it seems to me as quite a separate issue, that the loan was advanced by Bansi Dhar and not by the plaintiff. He says quite plainly :

> Therefore, I believe the defendants' case that Bansi Dhar was the real lender. I am not prepared to believe the plaintiff that he had had previous talk with the defendants' father about this loan. When the defendants' father had already a lender, there is no reason why he should have run to numerous persons for taking loans and within the knowledge of the previous lender.

Moreover, from what immediately follows that passage, it is quite clear that the learn.

ed Judge had in his mind, not only the settling up which took place in 1937, but also the very book or register which I have referred to above. He actually refers to Chaubabai being summoned and to her failure to attend and I must infer that he was content to go on and decide the case without that book. Nor apparently did either party consider it at that stage of such vital importance as to make it necessary to ask to have the trial adjourned till the lady was found and fetched. The learned Judge then went on to consider the other question, namely whether, if the plaintiff had had any interest, the loan or any part of it was still outstanding. It is really upon that last issue that the register becomes vital, though I do not deny that it might have had some indirect bearing on issue 1 also. But its really direct bearing is on issue 2, which was really a matter of account. The learned Judge, therefore, dismissed the appeal.

A month later the plaintiff came before the Small Cause Court Judge with an application under O. 47, Rule 1 asking for a review. The story is that in a casual conversation with someone he had discovered that Mt. Chaubabai had lodged the book in Court in some other litigation and that in consequence it was now easily accessible. He asked that the decree against him dismissing his suit should be reviewed upon the ground, presumably, that the whereabouts of the book was a discovery by him of new and important matter or evidence which, after the exercise of due diligence, he had not been able to produce either at the hearing before the Munsif or at the hearing before the Small Cause Court Judge. It is not true, of course, to say that it had not been previously within his knowledge, because he admittedly had known about it all the time. But what had really happened was that, although he had known about it, he was not able to produce it notwithstanding his efforts. The learned Small Cause Court Judge in a short judgment has acceded to his prayer for a review and it is from that that the defendants have appealed to me.

In the first place, I think that applications under O. 47, R. 1 must be treated with a considerable measure of caution. That is a matter of public policy as it is obviously necessary that, save in exceptional circumstances, finality in litigation should be achieved at some point. And I think it is a proper principle in applications such as these that the person who wants a review should at least prove strictly the diligence he claims to have exercised and also that the matter or evidence which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive of the matter. It is not, in my opinion, the proper function of a review application merely to supplement evidence. It is not a proper use of O. 47, R. 1, as I think to make it serve the purpose merely of introducing evidence which might possibly have had some effect on the result. I think it has to go a good deal further than that. Now, in the present case I am impressed by two circumstances. While I do not for a moment suggest that the plaintiff showed any unreasonable slackness, I am not altogether satisfied that he did attain that standard of diligence which O. 47, R. 1 requires. He admits quite frankly that he went half way with the proper steps to compel Mt. Chaubabai to produce the document in question but was deterred when he found that a pursuit of the lady to Cawnpore was going to involve a certain amount of expense and trouble. I think O. 47, R. 1 requires a high standard of diligence. I can quite understand why he went no further, but that it is not necessarily discharging his obligation of showing due diligence within the meaning of O. 47, R. 1. In effect what he has done is that, having found it difficult to get hold of the lady in 1937, he has now discovered that he can put his hand on the document very readily and seeks on that account to devise a means by which he can get it into evidence. That, in my view, goes beyond O. 47, R. 1.

There is, however, another reason why I think that this appeal must be allowed. It is that I am by no means satisfied that, even if the book or register is produced in evidence, its effect will be necessarily so great as to conclude the question before the Court. Actually no steps have been taken to produce the book before me. I point out that on applications of this kind the applicant ought always to see that the Court is furnished with the evidence which he asks to have admitted because otherwise it is impossible to tell what its value really is. But in this particular case, even assuming that the book is all that the plaintiff says it is, it does not amount to more than that in that particular book this transaction is not recorded. It does not prove either that the loan was not advanced by Bansi Dhar — indeed, it is admitted that it was — nor that, being so advanced, it was not out of his own money. Still less does it prove that it was advanced out of the plaintiff's money. I think that the learned Judge is wrong when he says : "If

the entries on this page are genuine then they appear to rebut the defendants' case."

It is not a question of rebutting the defendants' case. It was for the plaintiff to establish in the circumstances that he had such an interest in this loan as would entitle him to maintain the suit. He had to prove his own case, and I am by no means satisfied that the production of this book is more than a mere item of evidence of doubtful value. And, as I have already pointed out, I think that the learned Judge himself had it in mind when he dismissed the appeal. For all these reasons, I think that I must disagree with the learned Small Cause Court Judge and dismiss the Civil Miscellaneous Case No. 1 of 1940 with costs and allow this appeal also with costs.

G.N./R.K. *Appeal allowed.*

C. P. C. —
(a) ('40) Chitaley O. 47 R. 1 N. 10 Pt. 3 ; N. 12 Pts. 2 and 3 ; N. 13 Pt. 2.
('41) Mulla Page 1230 Pt. (w).
(b) ('40) Chitaley O. 47 R. 1 N. 10.
('41) Mulla Page 1230, Note "Discovery of new and important matter or evidence."

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* A. I. R. (29) 1942 Allahabad 85

COLLISTER AND BAJPAI JJ.

Seth Ram Gopal through Seth Fateh Chand — Objector — Appellant

v.

Lala Shanti Lal — Respondent.

Civil Revn. No. 246 of 1941, Decided on 9th September 1941, against order of Addl. Civil Judge, Moradabad, D/- 19th January 1935.

(a) Civil P. C. (1908), Sch. 2 Paras 15, 16 — Objection to award dismissed and decree in accordance with award — No appeal lies *(Obiter)* **— Proceedings can be converted into revision if interference is necessary.**

Where an objection to the validity of an award, which might have been raised under para. 15 of the schedule 2 to the Civil Procedure Code, is not raised within the time limited, or, being raised, is rejected, and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie if the decree passed is neither in excess of, nor not in accordance with the award : ('14) 1 A.I.R. 1914 All. 446 (F.B.), *Expl. and Foll.* ; ('37) 24 A.I.R., 1937 All. 65 (F.B.), *Rel. on.* [P 86*g*,*h*]

The aggrieved party can bring the matter up in revision if the Court had assumed jurisdiction where it had none or had acted illegally or with material irregularity in the exercise of its jurisdiction. The High Court can also convert the proceedings into an application in revision, if it is satisfied that its interference is called for, provided there is no question of limitation or any question of court-fee and the respondent is not being taken by surprise or is not in any way being prejudiced by such action. [P 86*h*; P 87*a*,*b*]

*** (b) Civil P. C. (1908), S. 144 and Sch. 2, Para. 1—Restitution proceedings—Sch. 2 does not apply.**

So far as the Allahabad High Court is concerned though restitution proceedings are not in the nature of applications for execution, an application for restitution is not the same thing as the presentation of a plaint in a suit. Therefore Sch. 2 does not apply to restitution proceedings and the Court has no jurisdiction to refer the matter to arbitration : ('34) 21 A.I.R. 1934 All. 626 (FB), *Rel. on.* [P 87*e*,*f*; P 88*c*]

(c) Civil P. C. (1908), Ss. 141, 144 and Sch. 2 Para. 1 — S. 141 does not make Sch. 2 applicable to restitution proceedings.

It cannot be said that the Sch. 2, Civil P. C., becomes applicable to proceedings under S. 144 by reason of the provisions of S. 141, Civil P. C. : ('27) 14 A.I.R. 1927 Cal. 534, *Rel. on.* [P 88*a*]

(d) Civil P. C. (1908), O. 32, Rr. 7, 15 and Sch. 2, R. 1 — "Agreement in O. 32, R. 7" — Agreement to refer to arbitration — Leave of Court is necessary—Court should exercise discretion in the interest of minor or lunatic — Court acting illegally in exercise of discretion — Interference in revision.

An agreement to refer to arbitration is an agreement within the meaning of O. 32, R. 7 and therefore the leave of the Court expressly recorded in the proceedings is necessary before the matter can be referred to arbitration. (Reason for necessity of such leave explained). The Court should before granting leave exercise a judicial discretion as to the propriety of the reference to arbitration in the interest of the minor or the lunatic. The Court must have materials before it and nothing should be concealed from the Court in a matter like this and the materials must satisfy the mind of the Court that the action proposed is for the benefit of the minor or the lunatic : 17 All. 531 and 28 All. 585 (P.C.), *Rel. on.* [P 88*e*,*f*,*g*,*h*]

And where the lower Court acts illegally and with material irregularity in the exercise of its jurisdiction in referring the matter to arbitration, the High Court will interfere in revision. Where an application for reference to arbitration is made to the High Court in a case of a lunatic and the arbitrator is the natural father of one of the parties to the reference and is himself interested in the subject matter of dispute, leave should not be granted. [P 89*g*,*h*]

S. C. Das, G. S. Pathak and Jagnandan Lal — for Appellant.

Panna Lal — for Respondent.

Bajpai J.—The facts which have given rise to this appeal may be stated. One Seth Ram Gopal instituted Suit No. 149 of 1921 against Rai Bahadur Seth Mewa Ram for dissolution of partnership and partition of partnership assets on the allegation that he was a partner with the defendant in the ginning factories situate at Saharanpur and Chandausi. There were certain other suits more or less connected with Suit No. 149 of 1921, but it is not necessary to give the details of those suits. The suit under consideration, namely Suit No. 149 of 1921, was decreed by the trial Court on 10th August 1922 and a

receiver was appointed to sell the factories and goods by 30th September 1922. On 23rd August 1922 the parties came to an arrangement which was to the effect that the plaintiff should be put in possession of the Chandausi factory and Mewa Ram defendant should continue in possession of the Saharanpur factory. An appeal (first appeal No. 366 of 1922)* was filed by Mewa Ram against the decision of the trial Court, but private arrangement at which the parties arrived on 23rd August 1922 continued during the pendency of the appeal. Mewa Ram died while the appeal was pending in this Court and his adopted son Shanti Lal was brought on the record as his legal representative. On 31st May 1926 the High Court decreed the appeal of Mewa Ram and dismissed the suit.

On 11th November 1926 Shanti Lal made an application in the Court of the Additional Subordinate Judge of Moradabad under S. 144, Civil P. C., for restitution. On 15th January 1927 Seth Ram Gopal filed objections to Shanti Lal's application. On 17th October 1927 the objections of Seth Ram Gopal and the application of Shanti Lal were disposed of. The result of the adjudication was against Shanti Lal and he, therefore, preferred an appeal to the High Court. On 21st December 1931 the High Court remanded the case, holding that the applicant was entitled to restitution by possession of the old factory in addition to the other reliefs already decreed. He was also held to be entitled to profits, if any, accruing from the factory during the period of management by the plaintiff. The Court further held that the lower Court had not given a decision as to the amount of the profits. The case was, therefore, remanded under O. 41, R. 23, Civil P. C., for disposal of the questions arising between the parties on the merits.

Some time after the decision of the High Court, Ram Gopal became a lunatic, and on 20th May 1932 the wife of Ram Gopal applied to be appointed the guardian of her husband during the pendency of the proceedings. She, however, was not appointed the guardian of her husband, but Ram Gopal's maternal uncle Rai Saheb Behari Lal was appointed the guardian and he filed his objections to the claim of Shanti Lal on 3rd August 1932. After this the matter went to arbitration. We shall have occasion to discuss the circumstances under which the matter was referred to arbitration and in that connexion we shall discuss the various applications of the parties, but at the present moment it is enough to say that the matter was referred to arbitration. On 26th April 1933 the arbitrator Seth Champa Lal gave an award which was adverse to Seth Ram Gopal. On 19th January 1935 the Court below held that the objections had no force and passed a decree in terms of the award.

It is against this decree that the present appeal has been filed by Seth Ram Gopal. A preliminary objection has been taken on behalf of the respondent that no appeal lies against the decree passed by the Court below in accordance with the award. Our attention has been drawn to paras. 15 and 16, of Sch. 2, Civil P. C., where it is provided that an award shall be set aside on certain grounds, but if the award is neither remitted or if no application has been made to set aside the award or the Court has refused such an application, then the Court shall proceed to pronounce judgment according to the award and "upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award." There is a plea by the appellant that Sch. 2 is entirely inapplicable to the facts of the present case. We shall notice this plea later. At the present moment we are assuming that the schedule is applicable and if it is so applicable the preliminary objection has great force. In 36 ALL. 69,[1] it was held by a Full Bench of this Court as follows :

> Where an objection to the validity of an award, which might have been raised under para. 15, Sch. 2, Civil P. C., is not raised within the time limited, or, being raised, is rejected, and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie except on the grounds stated in para. 16 of the same schedule.

It is conceded that the decree passed by the Court below is neither in excess of, nor not in accordance with, the award, and therefore an appeal would be incompetent. Although the authority of this Full Bench in other matters was greatly shaken by the subsequent Full Bench case in I.L.R. (1937) ALL. 317,[2] it was held again that the decision of the Court overruling an objection to the award and passing a decree in accordance with the award cannot be challenged by an appeal. It was, however, held in that case that the aggrieved party could bring the matter up in revision if the Court had

* *See* ('26) 13 A. I. R. 1926 All. 591.

1. ('14) 1 A.I.R. 1914 All. 446: 21 I.C. 989: 36 All. 69: 12 A.L.J. 57 (F.B.), Lutawan Kubar v. Lachiya.
2. ('37) 24 A.I.R. 1937 All. 65: 167 I.C. 99: I.L.R. (1937) All. 317: 1936 A. L. J. 1333 (F. B.), Mt. Mariam Bibi v. Mt. Amina Bibi.

assumed jurisdiction where it had none or had acted illegally or with material irregularity in the exercise of its jurisdiction. As we said before, learned counsel for the appellant has argued that Sch. 2, Civil P. C., was inapplicable to the present proceedings and therefore the bar to an appeal as contained in para. 16 of Sch. 2 does not arise, but, for the purposes of the present case, we shall, without deciding the matter, assume that the preliminary objection is sound and that an appeal does not lie. This assumption is entirely at the instance of the respondent. We can, however, convert the proceedings before us into an application in revision, and, as we are satisfied in the present case that interference of this Court is called for, we have converted this appeal into an application in revision. There is no question of limitation nor any question of court-fees, nor can it be said that the respondent is being taken by surprise or is in any way being prejudiced by our action.

The first question which is then raised by Mr. Pathak on behalf of the applicant is that the proceedings in the Court below were under S. 144, Civil P. C., and they could not be referred to arbitration. The arbitration in the present case was through the intervention of the Court and is said to be an arbitration in a suit. Paragraph 1, Sch. 2, Civil P, C., provides: "Where in any suit all the parties interested agree, etc.", and the contention is that proceedings under S. 144, Civil P. C., do not amount to a suit. The word 'suit' has not been defined in the Civil Procedure Code, but S. 144, cl. (1) provides that the proceedings will be started on the application of a party entitled to any benefit by way of restitution, and cl. (2) says that no suit shall be instituted for the purpose of obtaining any restitution. It is clear from the phraseology of S. 144 itself that there is a distinction between a suit and an application for restitution. Section 89, Civil P. C., provides :

> . . . . all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2.

Here again there is reference to a suit. Section 26 says that "every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed," and S. 144 says that the proceedings shall be initiated on the application of a party and no suit shall be instituted, or in other words no plaint shall be presented, for the purpose of obtaining restitution. It was held in 52 Cal. 559,[3] that Sch. 2, Civil P. C., is not applicable to execution proceedings because execution proceedings cannot be considered to be suits, but really arise after the decision of a suit, and this view was followed by a learned single Judge of this Court in A.I.R. 1935 ALL. 125,[4] where Bennet J. held that :

> An execution proceeding is not a suit and therefore Sch. 2 does not entitle the parties to an execution proceeding to file an application for a reference to arbitration. The arbitration proceedings are invalid and the Court is not entitled to enforce these arbitration proceedings.

It is well settled so far as this Court is concerned that restitution proceedings are not in the nature of applications for execution, but at the same time it has not been laid down by this Court or by any other Court, and learned counsel for the parties have not been able to cite any authority to the effect that an application for restitution is the same thing as the presentation of a plaint in a suit. In 57 ALL. 26,[5] it has been held that an application for restitution is not an application in execution, but there cannot be the slightest doubt that proceedings by way of restitution are taken as the result of a suit and not by institution of a suit, nor can they be said to be the continuation of a suit. Mr. Panna Lal on behalf of the opposite party has drawn our attention to certain cases where a comprehensive definition has been given to the word "suit." In 39 ALL. 626,[6] their Lordships were considering certain proceedings in insolvency matters and there they were prepared to assign a very wide meaning to the word "suit," and in Calcutta in A.I.R. 1930 Cal. 258[7] the word "suit" as used in Cl. 12, Letters Patent of the Calcutta High Court, was interpreted as meaning any proceeding initiated on an originating summons. We have, however, got to interpret the word "suit" as used in Sch. 2, and we find no warrant for extending its meaning beyond the one to be evolved out of S. 144 and S. 26, Civil P. C. In 1933 A.L.J. 175[8] at p. 183, their Lordships of the

3. ('25) 12 A.I.R. 1925 Cal. 812 : 87 I. C. 633 : 52 Cal. 559 : 42 C.L.J. 26 : 29 C.W.N. 886, T. Wang v. Sona Wangdi.
4. ('35) 22 A. I. R. 1935 All. 125 : 161 I. C. 103, Bachan Lal v. Amar Singh.
5. ('34) 21 A.I.R. 1934 All. 626 : 150 I. C. 1096 : 57 All. 26 : 1934 A.L.J. 503 (F.B.), Parmeshwar Singh v. Sitladin Dube.
6. ('18) 5 A.I.R. 1918 All. 346 : 43 I. C. 573 : 39 All. 626, Pita Ram v. Jujhar Singh.
7. ('30) 17 A.I.R. 1930 Cal. 258: 122 I.C. 197 : 56 Cal. 979, Provas Chandra v. Ashutosh Mukherji.
8. ('33) 20 A.I.R. 1933 P. C. 63 : 142 I. C. 7 : 54 All. 1067 : 60 I. A. 13 : 1933 A.L.J. 175 (P. C.), Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.

Privy Council said :

The word 'suit' ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint.

It was then said on behalf of the opposite party that by reason of S. 141, Civil P. C., the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction, but it does not follow therefrom that Sch. 2, Civil P. C., becomes applicable to proceedings under S. 144 by reason of the provisions of S. 141, Civil P. C. In this connexion we cannot do better than quote what was said by Mukerji J. in 54 Cal. 405[9] at p. 410 :

An elaborate research into the history of S. 141 and an exhaustive analysis of the case law bearing on it will be found in the recent judgment of Page J. in the case in 53 Cal. 679.[10] Now amidst the hopelessly conflicting mass of judicial decisions which have clustered round S. 141 and S. 647 which stood in its place before the solid bed-rock on which it is safe to take one's stand is the decision of the Judicial Committee in 17 All. 106.[11] Their Lordships' decision makes it perfectly plain that the section does not apply to applications for execution, but only to 'original matters in the nature of suits such as proceedings in probates, guardianships and so forth.' The expression 'so forth' must in my opinion be read as meaning proceedings ejusdem generis with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificate and the like and the expression 'original matters' in my opinion confirms that view as meaning matters which originate in themselves and not those which spring up from a suit or from some other proceedings or arise in connexion therewith.

Section 141, Civil P. C., therefore, does not help the opposite party. This being our view, Sch. 2, Civil P. C., does not apply to restitution proceedings and the Court below had no jurisdiction to refer the matter to arbitration. Even if we were to assume that the Court below had jurisdiction and that S. 144 proceedings are capable of being referred to arbitration, we think that in this particular matter the trial Court acted illegally and with material irregularity in the exercise of its jurisdiction. We said before that the dispute between the parties was referred to arbitration and that we shall at a later stage discuss the various applications and the circumstances under which the dispute was referred to arbitration. It is clear that Ram Gopal had become insane in 1932 and a guardian had been appointed. Order 32, R. 15, Civil P. C., says that :

The provisions contained in Rr. 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind . . . .

Order 32, R. 7 provides :

No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Paragraph 1 of Sch. 2 says : "Where in any suit all the parties interested agree, etc." The agreement to reference is, therefore, an agreement within the meaning of O. 32, R. 7, Civil P. C. This had been laid down by the Full Bench case of *Mariam Bibi*[2] to which we have already referred. The position, therefore, is that there must have been the leave of the Court expressly recorded in the proceedings before the matter could have been referred to arbitration. Although in the case of persons who are under no such disability as minority or lunacy the leave of the Court for a compromise or for an agreement to refer is not necessary because they are expected to protect their interests, such a requirement in the case of minors and lunatics is based on the fact that the minors and lunatics are after all wards of the Court and it must be clear that the leave of the Court was obtained and that it was expressly recorded in the proceedings. As pointed out by Lord Macnaghten in 28 ALL 585,[12]

there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained.

It is also clear that the Court should before granting leave exercise a judicial discretion as to the propriety of the compromise or the reference to arbitration in the interest of the minor. The Court must have materials before it and nothing should be concealed from the Court in a matter like this and the materials must satisfy the mind of the Court that the action proposed is for the benefit of the minor or the lunatic. It is not possible to lay down any hard and fast rule as to what should be done in a matter like this. In some cases it has been held that there should be an affidavit of the guardian that the compromise or the reference was for the benefit of the minor; in other cases it has been held that there should be an opi-

9. ('27) 14 A.I.R. 1927 Cal. 534 : 103 I.C. 69 : 54 Cal. 405 : 31 C. W. N. 576, Sarat Chandra v. Bisweswar Mitra.

10. ('26) 13 A.I.R. 1926 Cal. 773 : 96 I.C. 705 : 53 Cal. 679 : 30 C. W. N. 570, Basaratulla Mia v. Reajuddin Mia.

11. ('95) 17 All. 106 : 22 I.A. 44 : 6 Sar. 526 (P.C.), Thakur Prasad v. Fakir-ullah.

12. ('06) 28 All. 585 : 9 O. C. 219 : 33 I. A. 128 : 3 A. L. J. 710 (P. C.), Manohar Lal v. Jadunath Singh.

nion of the counsel or a statement by the counsel at the bar that the compromise is a proper one and should be sanctioned in the interest of the minor, but there can be no doubt that all facts necessary for the exercise of a judicial discretion by the Court should be placed before the Court and nothing should be concealed, for where the matter is being referred to arbitration and one of the parties is a lunatic there should be abundant good faith. In 17 ALL. 531,[13] it was held that :

> The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise.

In the present case we find that on 6th February 1933 an application was filed in Court purporting to be one on behalf of Seth Ram Gopal through Babu Murli Manohar Agarwal, advocate, and in that it was said that Rai Bahadur Seth Champa Lal was the natural father of Lala Shanti Lal, applicant to the suit, and Ram Gopal was willing that the matter in dispute might be referred to him as arbitrator. Narain Singh, special attorney, and Sohan Lal, pairokar on behalf of Ram Gopal approached the Seth Saheb aforesaid at Beawar alias Naya Nagar and made a request to him and the Seth Saheb had agreed. On the last date of hearing, it was submitted on behalf of the applicant that if the Seth Saheb agreed, the matter might be referred to him for arbitration. It was prayed that the matter might be referred to Seth Saheb aforesaid for arbitration. There is no allegation in this application which seems to be the first application in the matter regarding any benefit arising to Seth Ram Gopal by a reference to arbitration. The application was presumably shown to counsel for Shanti Lal and a week's time was prayed for for giving a reply. On 13th February 1933, the Court rejected the application for reference to arbitration because Shanti Lal after taking a week's time had filed no application consenting to refer the case to arbitration and the conclusion, according to the Judge, was clear that he did not want to refer the case. On 18th February 1933 there was an application by Shanti Lal expressing his agreement to the appointment of Seth Champa Lal as an arbitrator, and it is on 23rd February 1933 that an application was presented on behalf of Seth Ram Gopal by his counsel and by his mukhtar khas Narain Singh stating that permission may be granted for the appointment of Seth Champa Lal as arbitrator and stating that the decision of the matter at issue by arbitration was beneficial to Seth Ram Gopal. Then and there the Court accepted the prayer by putting down the word "allowed" on the application.

We notice that on a former occasion the proceedings for reference to arbitration proved infructuous because of the hesitation of Shanti Lal himself, but they were revived at the instance of Shanti Lal, and when on 23rd February 1933 an application was made on behalf of the mukhtar khas of the guardian of the lunatic, the Court should have been alive to the gravity of the situation and should have asked for some more information on the subject. It has been established beyond any doubt that Seth Champa Lal is a creditor of Shanti Lal to the extent of a lakh or so. There are documents at pp. 55, 61 and 69 of our record which show that Mewa Ram, the predecessor of Shanti Lal, had mortgaged the ginning factory at Chandausi to Seth Champa Lal and the arbitrator was therefore interested in the subject-matter of dispute between Shanti Lal and Ram Gopal. Whether this fact was known to the pairokars of Ram Gopal or not is a question of minor importance. It was undoubtedly known to Shanti Lal and the fact ought to have been brought to the notice of the Court when Shanti Lal revived the application on 18th February 1933 for sending the case to arbitration. Seth Champa Lal is the natural father of Shanti Lal, the opposite party before us, and speaking for ourselves we are prepared to say that if an application for reference to arbitration had been made to us in a matter like this, where the arbitrator was the natural father of one of the parties to the reference and was himself interested in the subject-matter of dispute, we would not have in the case of a lunatic granted leave.

We are not attaching any very great importance to the fact that leave was granted by writing the single word "allowed" on the application, but we feel that the Court below did not exercise a judicial discretion in the matter and gave leave as matter of routine. For the reasons given above, we are satisfied that the Court below acted illegally and with material irregularity in the exercise of its jurisdiction in referring the matter to arbitration. Certain other points were taken by learned counsel for the applicant to show that the award was vitiated by reason of the

13. ('95) 17 All. 531 : 1895 A.W.N. 126, Kalavati v. Chedi Lal.

fact that the arbitrator decided certain extraneous matters or that the minor's guardian was guilty of gross negligence, but we do not think that these are matters on which we can pay any attention in our revisional jurisdiction. On the whole, we have come to the conclusion that this application in revision should be allowed. We accordingly allow the same, set aside the decree of the Court below dated 19th January 1935, revoke the order of reference to arbitration and send back the case to the trial Court with directions to dispose of the application under S. 144, Civil P. C., made by Shanti Lal after giving notice to the guardian of Seth Ram Gopal to file such objections as he may be advised to take in the matter. Parties will bear their own costs both in the Court below and in this Court.

K.S./R.K. *Application allowed.*

C. P. C.—

(a) ('40) Chitaley, Sch. 2, Para 16 N. 4 Pt. 3 and N. 9 Pt. 2.

(b) ('40) Chitaley, S. 144, N. 30 Pt. 3.
('41) Mulla, Page 459, Pt. (t).

(c) ('40) Chitaley, S. 141, N. 2.

(d) ('40) Chitaley, O. 32, R. 7 N. 15 Pt. 4.
('41) Mulla, Page 1030, Pt. (r).

A. I. R. (29) 1942 Allahabad 90 (1)

GANGA NATH J.

Jaddu Lohar — Applicant

v.

Emperor.

Criminal Revn. No. 727 of 1941, Decided on 13th November 1941, from order of Sess. Judge, Azamgarh, D/- 25th June 1941.

U. P. Opium Smoking Act (3 of 1934), S. 25 —Sanction of prosecution does not amount to making complaint.

Sanction of prosecution is not the same thing as making a complaint or report because the prosecution might be sanctioned and yet there may be no complaint or report. Consequently, a Magistrate has no jurisdiction under S. 25 to take cognizance of an offence where the District Magistrate merely sanctions a prosecution and makes no report or complaint. [P 90*e*]

K. L. Misra — for Applicant.

Deputy Government Advocate—for the Crown.

Order.—This is an application in revision by Jaddu Lohar against his conviction and sentence under Ss. 13 and 14, Opium Smoking Act. The house occupied by the applicant was raided by the police on 12th January 1941 at about 8 P. M. The accused with another person was found in the house with prepared opium and apparatus for smoking opium. A charge sheet was submitted by the Sub-Inspector to the learned District Magistrate for "sanction to prosecute." It appears from the charge sheet that the prosecution was sanctioned, but no report or complaint was made by the learned District Magistrate himself. Under S. 25, Opium Smoking Act :

> No Magistrate shall take cognizance of an offence punishable under the Act except on the complaint or report of the Collector or an officer of the Excise Department not below the rank of an Excise Inspector.

It has been contended, and I think rightly, that the learned trial Magistrate had no jurisdiction to take cognizance of the offence as no complaint or report was made by the Collector. Sanction of prosecution is not the same thing as making a complaint or report because the prosecution might be sanctioned and yet there may be no complaint or report. The trial therefore was without jurisdiction. It is, therefore, ordered that the application be allowed and the conviction and sentence of the applicant be set aside. The applicant need not surrender to his bail. The fine, if paid, be refunded.

G.N./R.K. *Application allowed.*

A. I. R. (29) 1942 Allahabad 90 (2)

DAR J.

Kalka Prasad and another —
Plaintiffs — Appellants

v.

Sarju Prasad and another —
Defendants — Respondents.

Second Appeal No. 814 of 1939, Decided on 8th October 1941, from decision of Dist. Judge, Cawnpore, D/- 23rd May 1939.

(a) Vendor and purchaser — Auction sale — Purchaser depositing purchase money with auctioneer — Sale going off on account of default of seller — Auctioneer is stake-holder and is bound to return deposit to purchaser on notice — Auctioneer does not cease to be stake-holder even if he hands over deposit to vendor — Action by purchaser to recover purchase money is not based on any contract but is one for money had and received — S. 230, Contract Act, does not apply—Liability of auctioneer and seller is joint and several — Successive actions are permissible.

The position of an auctioneer is that of a stake-holder. Where a deposit is made of a portion of the purchase money in an auction sale with the auctioneer and later on it is found that the vendor had no title to convey, a case arises in which a deposit was made on a consideration which had failed and an action would lie against the auctioneer for money had and received. Even in cases where the auctioneer has handed over the deposit to the seller his liability as a stake-holder does not cease : (1757-1771) 98 E. R. 387 ; (1814) 5 Taunt. 815 and (1828) 1 Man. & Ry. 614, *Rel. on.* [P 93*g*,*h*; P 94*b*,*c*,*d*]

When the purchaser wants the return of the deposit made to the auctioneer on a consideration which had failed, he does not seek to enforce any contract against the agent. In a case like this, the purchaser does not rely upon a contract at all. He brings the action which in English law is well

known, viz., an action for money had and received. Consequently, when money is paid by the purchaser under a mistake of fact on a consideration which was supposed to exist, but eventually turned out to be without any substance, S. 230, Contract Act, has no application, and the purchaser is entitled to ask for the return of the deposit made with the auctioneer. [P 94*e*,*f*]

On failure of consideration for sale the purchaser brought a suit against the auctioneer for return of the purchase money which was deposited with him by the purchaser. Pending the suit, the seller applied under the U. P. Encumbered Estates Act and the suit was stayed under the provisions of that Act. In the proceedings under that Act, the purchaser as he was bound to do got his claim registered against the seller for damages including the return of the earnest money paid to the auctioneer and obtained a decree for the same. It was contended that since the purchaser had obtained a decree against the seller, no decree could be passed in the suit which had been stayed against the auctioneer :

Held that the mere fact that the purchaser had obtained a decree against the seller could not prevent him from obtaining a fresh decree against the auctioneer with regard to the deposit, since the liabilities of the auctioneer and the seller though arising out of one transaction and in a way allied to each other, were joint and several and therefore successive actions could be maintained on such liabilities. There could be no objection to the two decrees being granted subject to the condition that if any money was realized in execution of one decree, it will have to be credited in the other and the purchaser will not have any right to recover the amount twice over. [P 94*h* ; P 95*a*]

(b) Vendor and purchaser — Auctioneer — Commission — Principle governing right to, stated — Right to commission may be lost by auctioneer's negligence or misconduct — Auctioneer held entitled neither to costs of suit nor commission.

Primarily, the right to commission arises under a contract between the auctioneer and the seller and the primary liability to pay this amount is on the seller and even if the auctioneer has a lien on the deposit with regard to his commission, the lien ordinarily is enforcible against a deposit when the deposit becomes the property of the seller. In certain circumstances, on equitable considerations, it may be possible to allow an auctioneer to recover his commission from the deposit even against the purchaser. But the right to claim commission may be lost by the auctioneer's negligence or misconduct. [P 95*f*,*g*]

[Auctioneer held entitled neither to costs of suit nor to commission.] [P 95*f*,*g*]

K. C. Mital and S. N. Verma — for Appellants.

S. N. Seth and M. L. Chaturvedi — for Respondents.

Judgment. — This is an appeal against a judgment and decree, dated 23rd May 1939, of the District Judge of Cawnpore by which he reversed a judgment and decree, dated 18th October 1938, of the Civil Judge of Cawnpore in a suit for recovery of money. On Friday, 2nd August 1935, Sohan Lal and Sons, Government and public auctioneers, Cawnpore, sold by public auction a three storeyed pucca house with a shop (present No. 48/173) situated in Generalgunj Bazaza, Cawnpore. This sale was made under instructions from the owner of the house. The highest bid made at the sale was by Kalka Prasad Kapoor who made a bid at the sale of Rs. 6600 for which the auction sale was concluded. One-fourth of this purchase money, a sum of Rs. 1650, was deposited on that day by Kalka Prasad with Sohan Lal and Sons who passed a receipt in favour of Kalka Prasad Kapoor. At the time of the conclusion of the sale, a title deed relating to this house was handed over by the auctioneers to the purchaser. This title deed is dated 20th November 1929 and it purports to be a sale executed by Ram Das in favour of Govind Prasad of the property which was put to auction. There was some controversy at one stage of the case whether the auctioneers who sold the house for the owner of the house acted for Govind Prasad or whether they acted for some different person, but it has now been ascertained by the two Courts below that the person who instructed the auctioneers was Govind Prasad and it was his right and interest in the house which were purported to be sold.

According to the terms of the auction sale, the remaining amount of the consideration, viz., three-fourths of the purchase money, was to be deposited within 15 days and within 15 days sale was to be executed before the Registrar. Before this stage could be reached, it was discovered that Govind Prasad for whom the auction sale took place had no title to convey. It was found that some 15 months before, on 8th May 1934, Govind Prasad had executed a deed of gift of the house, which was the subject of auction, in favour of his wife, Gulab Devi who was dead on the date of auction, leaving minor sons and daughters. This defect having been discovered in the title of the vendor, Kalka Prasad Kapoor naturally declined to proceed any further with the matter. In or about September 1935, a fresh arrangement took place between Kalka Prasad and Govind Prasad by which Govind Prasad was to execute a sale of the house in favour of Kalka Prasad's wife, Mt. Jasoda Kuar, and Govind Prasad was also to execute a security bond to guarantee that the title conveyed was effective and in this security bond, Govind Prasad purported to charge another house of his situated in Subzimandi, Cawnpore. Difficulties arose about this arrangement also and two documents, one sale deed and one security bond, were actually

prepared upon a stamped paper, and were signed on 21st September 1935 but before they could be registered it was discovered that Govind Prasad had no title to convey with regard to the house which he purported to charge as a security.

Kalka Prasad, having been deceived second time, now referred to the criminal Court. In the course of proceedings before the criminal Court, an agreement took place, dated 29th January 1936 by which it was arranged that Govind Prasad would take steps to get the deed of gift in favour of his wife cancelled and would convey the property with a good title to Kalka Prasad and, in the event of his failure to convey good title, Govind Prasad would pay a fixed and specified sum as liquidated damages. Some difficulty arose about this agreement also and in April 1936 Kalka Prasad served a notice upon the auctioneers, Sohan Lal and Sons, to return the deposit of Rs. 1650 which was made with them in circumstances mentioned above. On 28th April 1936, the auctioneers acknowledged this notice but they declined to return the deposit on the ground that there was some adverse claim put forward against it by Govind Prasad and the auctioneers therefore stated that they were unable to return the money unless Kalka Prasad could secure them against the adverse claim of Govind Prasad.

On 29th April 1936, Kalka Prasad and his wife Mt. Jasoda Kuar raised an action in the Court of the Civil Judge of Cawnpore for recovery of a sum of Rs. 2591 against Govind Prasad, the owner of the house, and Sarju Prasad the proprietor of the firm of the auctioneers, and the plaintiff's claim of Rs. 2591 included a claim for the return of the deposit as also a claim for damages and for interest due upon the said deposit. The suit was contested both by Govind Prasad, the owner of the house, and by Sarju Prasad, the proprietor of the firm of auctioneers, by separate defences. The main defence of Govind Prasad was that he had a good title to convey, that on 29th January 1936 a fresh agreement took place between Govind Prasad and Kalka Prasad as a result of which the previous controversy between the parties was settled and a breach of the agreement of 29th January 1936 was made by the plaintiff and he was, therefore, not entitled to maintain any action. The defence of Sarju Prasad was that he was holding the deposit in good faith because there were rival claims about it and in any case he was entitled to be reimbursed for the commission and expenses which he had incurred in making the auction sale.

During the pendency of the suit an application was made by Govind Prasad for administration of his estate under the Encumbered Estates Act and during the time that proceedings under the Encumbered Estates Act were pending, the trial of the case instituted by Kalka Prasad mentioned above was stayed. Kalka Prasad appeared in proceedings under the Encumbered Estates Act and got his claim registered and finally in those proceedings a decree was passed for a sum of Rs. 1843-12-0 in favour of Kalka Prasad against Govind Prasad. After the termination of proceedings under the Encumbered Estates Act the trial in the suit which Kalka Prasad and Jasoda Kuar had instituted against Govind Prasad and Sarju Prasad was resumed. The trial Court found that Govind Prasad had no title to convey and whatever breach of agreement had taken place had all been on the side of Govind Prasad and none on the side of the plaintiff. With regard to Govind Prasad, the lower Court remarked at one place that "defendant 1, while in the witness box impressed me as a first class crook." In the end of the judgment the lower appellate Court observed:

> The suit is dismissed against defendant 1 but in view of his conduct he must pay the full costs of the plaintiffs, taking the valuation of the suit as Rs. 2091, and must bear his own costs.

There are other equally uncomplimentary observations with regard to him in other portions of the judgment and I have got no reason to think that they are unjustified. The trial Court further found that inasmuch as a decree had already been passed in proceedings under the Encumbered Estates Act against Govind Prasad, the claim for a further decree against Govind Prasad was not maintainable but a decree can and should be passed against Sarju Prasad, the auctioneer, for the return of the deposit which was made with him in circumstances mentioned above. Accordingly it granted to plaintiff 1 a decree for a sum of Rs. 1650 against the defendant Sarju Prasad with pendente lite and future interest at 6 per cent., and it directed Sarju Prasad also to pay three-fourths of the costs of the plaintiffs. The defendant Sarju Prasad made an appeal to the District Judge of Cawnpore and the learned Judge who heard the appeal reversed the judgment of the trial Court and dismissed the claim of the plaintiffs against Sarju Prasad with costs. The view of the learned Judge shortly stated is that Sarju Prasad,

the auctioneer, was a pure and simple agent of the vendor Govind Prasad and, Govind Prasad being a disclosed principal, no action will lie against Sarju Prasad for recovery of the deposit made with him. The learned Judge has not expressly referred to any law with regard to his view but it has been contended before me that the law governing this matter is laid down in S. 230, Contract Act (9 of 1872), and I have no doubt some such provision was in contemplation of the learned District Judge also.

The plaintiffs have made this second appeal and it is contended before me that the learned Judge has entirely misconceived the law which applies to this case. Mr. Verma's contention shortly put is that the auctioneer who sells property by public auction in the absence of any contract to the contrary, and in ordinary circumstances is nothing but a stake-holder with regard to the deposit which he receives from a purchaser and, it is the duty of the stake-holder to keep the deposit with him till the transaction goes through and if the transaction fails on account of failure of consideration or on account of some fault of the vendor and notice is served upon the auctioneer to hold up the deposit, the auctioneer is bound in law not to pay the deposit to the vendor. It is contended on the other side that an auctioneer in India is nothing but an agent, pure and simple, of the vendor and the deposit which he receives from the purchaser is money received for the vendor and even in a case where consideration has wholly failed, the remedy of the purchaser is to sue the seller for breach of contract and for damages and no action can lie against the auctioneer either for the return of the deposit or for any other relief. In England the legal position of an auctioneer with regard to the deposit which he receives from purchaser is well settled and the law in this matter is thus stated in Halsbury's Laws of England (Hailsham Edition) vol. 1, at page 709:

Paragraph 1167. In the absence of a special agreement the auctioneer receives the property as stake-holder for the vendor and the purchaser and it is his duty to hold it until the completion or rescission of the contract and to pay it to the party ultimately entitled.

If the auctioneer pays the money prematurely to either vendor or purchaser and it turns out that the person paid was not entitled to it, the auctioneer is liable to make good the money to the party to the contract eventually held to be entitled.

Where the purchaser is entitled to the return of the deposit, the auctioneer can set up the purchaser's right to the money in answer to any claim to it made by the vendor. . . . . .

Paragraph 1169. The auctioneer should be ready at any time to account for the deposit but he is not liable to pay interest on it for the period during which he rightfully holds it as stake-holder nor until demand for payment has been made by some person entitled to receive it.

In Bowstead on Agency, Edn. 9, at p. 307, the law on this subject is stated as follows:

Article 127.

To repay money received for use of principal.

Where money is paid to an agent for the use of his principal and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay such money in the following cases, viz.

. . . . . .

(c) Where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud, or wrongful act, and repayment is demanded of the agent or notice is given to him of the intention of the payer to demand repayment, before he has in good faith paid the money over to, or otherwise dealt to his detriment with, the principal in the belief that the payment was a good and valid payment. . . . . .

Illustration 10 to the above article is as follows:

10. The auctioneer at the sale by auction receives a deposit and pays it over to the vendor. He is personally liable to refund the amount on the default of the vendor because it was his duty to hold it as a stake holder until the completion or rescission of the contract. But he is not liable to pay interest, however long he may have held the deposit, until it has been demanded, and he has improperly refused to pay it over to the person entitled—at all events unless he is shown to have received interest on the money.

In Chitty's Law of Contracts (Edn. 18), at p. 355, the legal position of the deposit in the hand of an auctioneer is stated as follows:

The auctioneer, if he receives the deposit (as he frequently does), receives it as a stake-holder for both parties to pay over to one of them according to the event, but this rule does not apply to the case of a solicitor receiving the deposit as agent for the vendor, to whom he must pay it over on demand.

Where a deposit is made of a portion of the purchase-money in an auction sale and later on it is found that the vendor had no title to convey, a case arises in which a deposit was made on a consideration which had failed and it is settled law that in case like this an action would lie against an auctioneer for money had and received. In Halsbury's Laws of England (Hailsham Edition), vol. 7, at p. 282 it is stated as follows:

But the action does not lie at the suit of a third person against an agent who has accounted to his own principal for money received by him for the principal's use from such third person before notice not to part with it, unless it was obtained by duress or by means of some other wrong on the part of the agent.

And again in para. 393 on p. 282 the law is stated as follows:

A stake-holder who has received money for the express purposes of holding it until it has been ascertained who is entitled thereto is liable in this

form of action if he wrongfully parts with the money, and this principle applies to the case of an auctioneer holding a deposit.

It is contended that an auctioneer in India is nothing but an agent, pure and simple, for the seller. In the first place, this is not strictly accurate. In Anson's Law of Contract, Edn. 18, p. 406, the law on this part of the case is stated as follows :

An auctioneer is an agent to sell property at a public auction. He is primarily an agent for the seller, but upon the property being knocked down, he becomes also the agent of the buyer, but only for the purpose of recording the bid 'at the time and as part of the transaction' so as to provide a memorandum within the meaning of S. 40 (1), Law of Property Act, 1925, and of S. 4, Sales of Goods Act.

To the same effect is the law stated in Halsbury's Laws of England (Hailsham Edition), vol. 1, p. 699, but it is not necessary to go into the question as to how far the auctioneer can be regarded as an agent for the purchaser nor is it necessary to go into the other and larger question as to the circumstances in which an auctioneer is allowed to maintain actions himself personally to recover purchase money or to seek other reliefs. In England, since the case in (1757-71) 98 E.R. 387[1] was decided an auctioneer has always been regarded as a stake-holder and it has never been doubted that if he has received a notice from the purchaser to return the deposit in a case where sale had gone off on account of the default of the seller, the auctioneer would be bound to return the deposit to the purchaser. Whatever difficulty has arisen in England is with regard to the liability of the auctioneer in those cases where the deposit is not with him but he had handed it over to the seller and even in those cases his position as a stake-holder had always been recognised : *see* (1814) 5 Taunt. 815[2] and (1828) 1 Man. & Ry. 614[3] at p. 615. Mr. Misri Lal Chaturvedi has strongly contended before me that the entire law governing the relation of the auctioneer with the purchaser and seller in India is codified in the Indian Contract Act and the English law which I have quoted above and the cases decided by English Courts were not applicable to a transaction arising in this country. I find nothing in the Indian Contract Act which is in any way inconsistent with the law laid down in England with regard to auctioneers in relation to the deposit. Section 230, Contract Act, on which reliance is placed is as follows :

In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by them.

When a purchaser wants the return of the deposit made to an auctioneer on a consideration which had failed, he is not seeking to enforce any contract against the agent. In a case like this, the purchaser is not relying upon a contract at all. He is bringing an action which in English law is well known, viz., an action for money had and received. The money in this case was paid by the purchaser under a mistake of fact on a consideration which was supposed to exist, but eventually turned out to be without any substance. In my opinion, in a case like this, S. 230 has got no application, and the plaintiffs were entitled to ask for the return of the deposit which was made with the auctioneer, and there was no valid defence to the action.

But it is further contended that inasmuch as Kalka Prasad had obtained a decree against Govind Prasad in proceedings under the Encumbered Estates Act, such rights as Kalka Prasad had are now merged in that decree and it is no longer open to Kalka Prasad to seek a fresh decree against Sarju Prasad. The circumstances in which the decree was passed against Govind Prasad are these : During the pendency of the present action, proceedings were taken by Govind Prasad under the Encumbered Estates Act. When the action was brought and was pending in the Court below the deposit was in the hands of Sarju Prasad, the auctioneer, and it was not known whether Sarju Prasad would return the deposit to the purchaser or to the seller. After the suit was instituted the trial of the action was stayed. Under the provisions of the Encumbered Estates Act, Kalka Prasad was bound to register his claim and he did so and obtained a decree. The question arises whether the mere fact that Kalka Prasad had obtained a decree against Govind Prasad prevents him from obtaining a fresh decree against Sarju Prasad with regard to the deposit. The law is well settled in England that where liability is joint and several, successive actions are allowed on such liabilities. In this particular case the two liabilities of Sarju Prasad and Govind Prasad, though arising out of one transaction and in a way allied to each other, are joint an several. The claim against Sarju Prasad is in substance for

1. (1757-71) 98 E.R. 387, Burrough v. Skinner.
2. (1814) 5 Taunt. 815 : 1 Marsh. 377 : 15 R.R. 662, Edwards v. Hodding.
3. (1828) 1 Man. & Ry. 614 : 6 L.J.K.B. 154 : 3 C. & P. 40 : 31 R.R. 343, Gray v. Gutteridge.

return of deposit. The claim against Govind Prasad is in substance for damages, though it also includes the return of the earnest money. In my opinion there is no objection to the two decrees being granted subject to the condition that if any money is realised in execution of one decree, it will have to be credited in the other and Kalka Prasad will not have any right to recover the amount twice over.

It remains now to consider the decree which should be granted to the plaintiff. So much is clear that the plaintiff is entitled to the return of his deposit and a decree can be passed against Sarju Prasad for that amount, but the contention of Sarju Prasad is that he has spent a sum of Rs. 50 in bringing about the auction sale, in publication of notices and in other matters and he is entitled to a sum of Rs. 330 as commission, being 5 per cent., on the total value of the sale. So far as out-of-pocket expenses are concerned, these may be allowed to the auctioneer as this part of the claim has not been seriously contested by Mr. Verma who appears for the plaintiff. But Mr. Verma has serious objections with regard to the other claim of Sarju Prasad, viz., for the alleged commission of Rs. 330. In Halsbury's Laws of England (Hailsham Edition) in para. 1171 the law in relation to auctioneer's commission and charges is stated as follows:

> If the auctioneer is made a defendant to an action for specific performance of rescission, he will in general be dismissed from the action on paying the balance of the deposit in Court after deducting his charges, but he will not be so dismissed if relief be claimed against him personally on some ground other than the mere fact that he holds the deposit on the ground of his misconduct at the auction.

With regard to the remuneration which an auctioneer is entitled to recover on an auction sale, it is stated as follows in para. 1180 at p. 713 of the Laws of England (Hailsham Edition):

> The remuneration payable to an auctioneer by a private vendor may be fixed by express agreement as to both its amount and the events in which it is to be paid.
>
> In the absence of express agreement, the remuneration is determined by custom or, failing custom applicable to the particular circumstances, the auctioneer will be entitled to a fair and reasonable amount.
>
> In most circumstances where the services of the auctioneer have been fully performed, a customary rate of payment calculated by percentage will be adopted as the measure of such amount.
>
> The auctioneer may be entitled to commission on a sale to a purchaser introduced by the auctioneer even where no sale by auction has been actually effected.
>
> The right to claim commission may be lost by the auctioneer's negligence or misconduct.

In this case before me Sarju Prasad, the auctioneer, has not conducted himself as a stake-holder. Upto this moment he has not returned the deposit which he received from the purchaser and it is still in his hands. In the trial Court he contested the claim of the purchaser on various grounds and when the judgment went against him, the auctioneer made an appeal to the District Judge and got the plaintiff's claim dismissed with costs. It is true that in this second appeal before me Mr. Seth who appeared for him has taken a more reasonable attitude and Mr. Seth has left the controversy between the purchaser and the seller to be decided by me and to abide by any decision which I might give. But having regard to the conduct of the auctioneer throughout the proceedings this is not a case in which he can be safely dismissed out of the action and this is certainly not a case in which he is entitled to his costs. The other question whether he is entitled to anything for his commission raises somewhat different considerations. Primarily the right to commission arises under a contract between the auctioneer and the seller and the primary liability to pay this amount is on the seller and even if the auctioneer has a lien on the deposit with regard to his commission, the lien ordinarily is enforcible against a deposit when the deposit becomes the property of the seller. In certain circumstances on equitable considerations it may be possible to allow an auctioneer to recover his commission from the deposit even against the purchaser but this is not a case in which such equitable considerations apply. The finding of the trial Court is that although the charge of fraud against the auctioneer broke down the conduct of the auctioneer was open to a certain amount of suspicion. I am therefore of the opinion that it would be sufficient in the ends of justice if the auctioneer is allowed to recover out of the deposit a sum of Rs. 50 which he has spent in publication of notices and bringing about the sale for his out of pocket expenses and he must return the remaining sum of Rs. 1600 back to the plaintiff.

In the course of arguments in this appeal Mr. Seth stated that Govind Prasad has instituted a suit against the auctioneer Sarju Prasad in the Court at Cawnpore for recovery of this deposit of Rs. 1650. I do not know whether this is a matter which could be taken into account in the present litigation. But, any way, as Kalka Prasad and

Sarju Prasad and Govid Prasad are all parties to this appeal, any decision arrived at here between the parties will be binding in the future litigation. I allow the appeal, set aside the decree of the Courts below and grant to plaintiff 1 a decree for Rs. 1600 with pendente lite and future interest at 6 per cent. per annum against defendant 2, but subject to the condition that plaintiff 1 shall not recover the said sum of Rs. 1600 twice over in execution of this decree and in the decree which plaintiff 1 has obtained against Govind Prasad, defendant 1, in proceedings under the Encumbered Estates Act. And if this sum of Rs. 1600 or any portion of it is realized in execution of this decree, credit will have to be given for it in the other decree and vice versa. And further subject to the condition that if plaintiff 1 recovers the said sum of Rs. 1600 or any portion of it from defendant 1, then defendant 1 will be entitled to recover the said sum so realized from defendant 2. The defendants shall bear their own costs throughout and defendant 1 shall pay the entire costs of the plaintiff in all the Courts. These costs plaintiff 1 shall be entitled to include at his option in his decree in proceedings under Encumbered Estates Act in this way that the credit of Rs. 1600 if realized from defendant 2 in satisfaction of this decree, shall be given in decree under Encumbered Estates Act after deducting the amount of costs of the plaintiff awarded by this decree. Leave to appeal in Letters Patent is refused.

G.N./R.K. *Appeal allowed.*

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* A. I. R. (29) 1942 Allahabad 96

BAJPAI AND DAR JJ.

Mohammad Abdul Hashim—Defendant — Appellant

v.

Srimad Jagatguru Sri Mahant Malik Arjun, Plaintiff and others, Defendants — Respondents.

First Appeal No. 124 of 1935, Decided on 5th September 1941, from decision of Addl. Sub-Judge, Benares, D/- 21st February 1935.

*** (a) Custom — Haq-e-chaharum — Custom prevails in Mohalla Lachhmanpura in Benares City — Ordinarily auction purchaser who had deposited money in Court is not liable — But where he has purchased property for low price with margin for payment of haq-e-chaharum, he is liable.**

The custom of haq-e-chaharum prevails in the Mohalla Lachhmanpura in the City of Benares and it applies equally to private sales and to auction sales. The seller is personally liable and the zamindar is entitled to one-fourth of the sale consideration or purchase-money. In a court sale where the purchaser has deposited the entire sale proceeds in Court for payment to rightful claimants, he has discharged his obligation to see that the money is made available for the payment of the zamindar and in such a case, no further liability remains against the purchaser and the zamimdar's rights are in such a case to recover his haq-e-chaharum out of the sale proceeds and failing that from the decree-holder : *Case law reviewed.* (In this case their Lordships express that they are inclined to hold that the right of the zamindar to recover haq-e-chaharum out of the sale proceeds and the right of the zamindar to recover haq-e-chaharum from the execution creditor is primarily a matter of the proof of custom and of its incidents; but on the principle of stare decisis they follow the law laid down in (1867) N.W.P.H.C.R. 404 and other cases. [P 98*a*, *b*, *g*, *h*; P 100*d*, *e*]

But where the auction purchaser has purchased the property for a low price with a margin for the payment of haq-e-chaharum and with full knowledge of the liability of the payment of haq-e-chaharum, he cannot be exempted in absence of proof of a custom from liability to the zamindar's claim and a decree against the decree-holder personally or a direction that the zamindar's haq-e-chaharum is to be recovered only from the sale proceeds in deposit in Court cannot be made : 1867 N. W. P. H. C. R. 404 and L. P. A. No. 25 of 1935, *Disting.* [P 99*h*]

(b) Civil P. C. (1908), S. 34—Interest prior to suit.

Where there is neither a custom nor any contract for the payment of interest and the claim has been brought soon after the cause of action without undue delay, interest should not be allowed : ('38) 25 A.I.R. 1938 P.C. 67, *Applied.* [P 101*f*]

Mushtaq Ahmad, M. A. Aziz and S. N. Katju — for Appellant.

P. L. Banerji, B. Malik, R. K. Malaviya and Satya Narain Prasad — for Respondents.

Dar J. — This is an appeal from a judgment and decree, dated 21st February 1935 of the Additional Subordinate Judge of Benares by which the plaintiff's claim for a sum of money as zar-e-chaharum was partly decreed and partly dismissed. The plaintiff Malik Arjun is a Mahant of a Hindu religious endowment in the City of Benares and as such, he is the zemindar of a Mohalla in the City of Benares called Lachhmanpura. In this Mohalla, there is plot of land No. 9701 measuring 5 biswas 17 dhurs. Many years ago, this plot of land was leased out in three portions by the then Mahant of the endowment, to three persons for building houses, on a total rent of Rs. 121 per annum. On 26th August 1884, on 6th July 1887 and on 25th January 1896, the said three persons, namely Ganpat, Baiju and Mt. Udasia executed three separate qabuliats in favour of the zamindar by which they agreed to hold the property as leasehold property on payment of certain rent and on certain terms and conditions specified therein. In all the

three qabuliats, it is set out that a custom of haqechaharum prevails in the locality and applies to the leasehold property and by virtue of the custom, the zamindar is entitled to recover one-fourth of the sale proceeds in case of sale of the leasehold interest or any building constructed thereon by the lessee. In the first two of the qabuliats, the operation of custom is not expressly stated to extend to auction sales but in the third and the last one, it is so stated. The lessees, in due course built small houses on the land leased and on 22nd November 1900, on 27th November 1900 and on 29th March 1901, the lessees by separate deeds conveyed their rights and interest in the said leasehold property to Gopaldas and in due course, Gopaldas entered in possession of the property and made substantial buildings upon it.

On 9th April 1920 and on 1st February 1921, Gopaldas by two separate deeds mortgaged his rights and interest in the said leasehold property in favour of Mahant Shivanath Puri and default having been made by Gopaldas in payment of the mortgage money, Shivanath Puri raised an action in the Court of the Subordinate Judge of Benares to enforce the mortgage and obtained a decree for a sum of Rs. 47,363-14-0. In execution of this mortgage decree, the property mortgaged, which at the time was a large and substantial house with shops on plot No. 9701, was sold by public auction and purchased by Abdul Hashim for a sum of Rs. 50,000. The auction sale was concluded on 9th January 1934 and was confirmed by Court on 9th March 1934. On 9th March 1934 a notice of demand was served by Mahant Malik Arjun, the zemindar of mohalla Lachhmanpura on the purchaser, Abdul Hashim for payment of Rs. 12,500 his haqechaharum being one-fourth of the price for which the property was sold. The purchaser, Abdul Hashim demurred and denied his liability to pay any haqechaharum and referred the zemindar to Court to recover his haqechaharum if any was due to him, from the sale proceeds which were deposited in Court. A claim was put forward by the zemindar before the execution Court for one-fourth of the purchase money in deposit in Court out of the sale proceeds which was opposed by the decree-holder and eventually by an order of the Court, dated 28th April 1934, a sum of Rs. 12,500 was held back pending the settlement of controversy between the rival claimants about it and the rest of the sale proceeds were distributed according to law. This sum of Rs. 12,500 is still in deposit in the Imperial Bank and awaits the decision of controversy between the rival claimants.

On 21st May 1934, the zemindar, Malik Arjun raised an action in the Court of the Subordinate Judge of Benares for recovery of Rs. 12,500 against Gopaldas, the owner of leasehold interest whose property was sold by auction, Mahant Shivanath Puri, the decree-holder under whose decree the property was sold and against Muhammad Abdul Hashim, the auction purchaser of the property and these three persons were made defendants 1, 2 and 3, respectively to the action. The plaintiff's case shortly stated is that in mohalla Lachhmanpura in the City of Benares the custom of haqechaharum prevails which custom entitles the zemindar in case of each sale of any property in the locality to receive one-fourth of the sale consideration as haqechaharum, that this custom applies to private sales as well as to auction sales and under this custom the seller, the purchaser and the decree-holder are all liable for the payment of haqechaharum. The suit was contested by Shivanath Puri, the decree-holder defendant 2 and by Abdul Hashim, the auction purchaser, defendant 3 by separate defences. They denied that the custom of haqechaharum prevails in the locality, they further denied its extension to auction sales. The auction purchaser, Muhammad Abdul Hashim further pleaded that the zemindar was entitled to recover the haqechaharum from the sale proceeds deposited in Court and the auction purchaser having deposited the entire sale proceeds in Court was not personally liable to the claim. Shivanath Puri, the decree-holder defendant 2 further pleaded that the entire purchase money, in law, was to be applied in satisfaction of the decree and the zemindar's remedy, if any, is against the seller and the auction purchaser and not against the decree-holder personally or against the deposit in question in Court.

The trial Court found that the custom of haqechaharum prevailed in the locality and that it applies both to private sales as well as to auction sales. He further found that the seller and the purchaser, defendants 1 and 3, were both liable to the plaintiff's claim and the decree-holder defendant 2 was not liable to any such claim. He further found that the plaintiff was not entitled to claim any interest on the haqechaharum which was due to him. As a result, the plaintiff was given a decree for Rs. 12,500 against defendants 1 and 3 with costs. The rest of the claim was dismissed. Against that judg-

ment and decree, the purchaser, Muhammad Abdul Hashim, defendant 3 has made this appeal and the plaintiff, the zamindar has filed cross-objections relating to the claim of interest which was disallowed by the trial Judge.

Some of the questions which were in controversy before the trial Court have not been debated before us. It is now conceded that the custom of haqechaharum prevails in the locality and it applies equally to private sales and to auction sales. It is also not disputed before us that in any case, the seller, defendant 1 is personally liable and the plaintiff zamindar is entitled to one-fourth of the sale consideration or purchase money. The real controversy in the case is as to the respective liability of the auction purchaser and of the decree-holder for this haqechaharum. On behalf of the auction purchaser, it is contended that the zamindar is entitled to recover haqechaharum out of the sale proceeds and sale proceeds alone and the sale proceeds having been deposited in Court, the zemindar's remedy is to take his haqechaharum out of the said sale proceeds and the auction purchaser is not liable at all and the person who is liable is the decree-holder. On behalf of the decree-holder, it is contended that the sale proceeds are the fruits of the execution of his decree and he is entitled, in law, to appropriate the entire sale proceeds in execution of his decree and the zemindar is not entitled to take any share out of it and the remedy of the zemindar is to get a personal decree against the seller and the purchaser.

The right in dispute being a customary right, the question of respective liability of the seller, the auction purchaser and the decree-holder is primarily a question of proof of custom and of its incidents. It is a matter of agreement that by virtue of the custom, the liability of the seller is absolute. There is some controversy as to the liability of the purchaser. On the one hand, it is contended that the liability of the purchaser is absolute and in all cases where the zamindar had not received haqechaharum and he had to go to Court to enforce his claim, a decree had been invariably passed against the purchaser. On the other hand, it is contended that the liability of the purchaser is a conditional one and is limited to see that the purchase money is made available to the zamindar and in case of court sale after the auction purchaser has deposited the money in Court for payment to persons rightfully entitled to it, the liability of the auction purchaser disappears. The evidence led in the case is not sufficient to establish as an incident of the custom, the liability of the decree-holder. In the course of his judgment, the trial Judge has remarked as follows :

> Of all the judgments and decrees produced in this case, there are not more than two or three instances so far as it has been shown to me, in which a claim for 'zare-chaharum' was decreed against the decree-holder as such. In other cases the decree-holder himself was the auction purchaser and then the claim was decreed against him.

This portion of the judgment was not challenged before us and it has not been contended that by virtue of any custom the decree-holder, in an auction sale, becomes liable to the zamindar for payment of haqechaharum. It is also not disputed that in a private sale, as a matter of arrangement between the purchaser and seller, if a portion or the entire sale consideration is in fact, paid to a creditor of the seller then the zamindar will not be able to enforce his claim against the creditor and the zamindar's remedy will be only against the seller and the purchaser. Is there any distinction between the cases of an ordinary creditor and an execution creditor and in the case where the creditor has been paid off and the case where money has not yet been paid but is only deposited for the creditors payment? Mr. Mushtaq Ahmad, on behalf of the purchaser, contends that apart from custom or any incidents of custom, as a matter of law, the zemindar is entitled to recover his haqechaharum out of the sale proceeds and sale proceeds alone. In a case where the purchaser does not see that the sale proceeds are made available for the payment of the zemindar, the purchaser becomes liable for the claim of the zemindar but in a court sale where the purchaser has deposited the entire sale proceeds in Court for payment to rightful claimants, he has discharged his obligation to see that the money is made available for the payment of the zemindar and in such a case, no further liability remains against the purchaser and the zemindar's rights are in such a case, to recover his haqechaharum out of the sale proceeds and failing that from the decree-holder and in support of this contention he relies upon 1867 N.W.P.H.C.R. 404[1] which decision has been followed in this Court, more recently, in a L. P. A. No. 25 of 1935[2] in a well considered judgment of Sir Shah Sulaiman C. J.

1. ('67) 1867 N.W.P.H.C.R. 404, Byjnath Pershad v. Mahomed Fazle Hossein.
2. L. P. A. No. 25 of 1935, Viswa Nath v. Asharfi Singh.

and Bennet J. on 9th December 1935. In (1867) N. W. P. H. C. R. 404[1] the claim of the zemindar for haqechaharum against the execution creditor was affirmed and in the course of the judgment with reference to the right of 'haqechaharum' the following observations were made :

> His (the zamindar's) right arises upon the sale and it is a right (arising probably from the property right in the soil on which the house is built) to a portion of the sale proceeds as a fine or fee on every change in the ownership of the house. His right attaches to the sale proceeds and is a prior charge upon the proceeds. If the judgment-creditor obtains the whole of the proceeds, nothing or not sufficient remaining to satisfy the zamindar's due, he obtains something which belongs to the zamindar.

These remarks lend support to the contention that in the sale proceeds which arise on auction sales, the zamindar has some vested right to the extent of his haqechaharum and this right amounts to ownership or charge in the fund. In L. P. A. No. 25 of 1935[2] the claim for haqechaharum against the auction purchaser was dismissed on the ground that the auction purchaser had deposited the entire purchase money in Court which the decree-holder took away and the decree-holder being primarily liable, was not made by the zemindar, a party to the auction. In the course of this judgment after approvingly quoting the remarks referred to above in (1867) N.W.P.H.C.R. 404[1] Sir Shah Sulaiman explained the liability of the auction purchaser to the claim of the zamindar for haqechaharum on the analogy of a surety from English law. The relevant passage in Sir Shah Sulaiman's judgment is as follows:

> The second question is whether the plaintiff is entitled to a decree when he has left out the decree-holder who took away the whole of the purchase money. As already pointed out, the plaintiff's right is to recover 1/4 of the sale price. Prima facie the right to recover it would be enforced against the person who has taken away the whole price including the one-fourth share. That person, as was pointed out in (1867) N.W.P.H.C.R. 404,[1] is the judgment-creditor himself. So the person who would be primarily liable to the plaintiff would be the decree-holder who had taken away the whole sale price. He should really have paid 1/4 of it to the zamindar in discharge of his due and then enforced his decree for the realisation of the balance of the decretal amount or brought a suit against the judgment-debtor to be reimbursed. The auction purchaser has paid the full price and he cannot, in fairness, be called upon to pay 1/4 of the price over again. Although it may not be strictly speaking possible to regard him as if he were exactly in the position of a surety, there seems in my mind to be no doubt that his position is analogous to that of a surety. His liability merely arises because the person who has taken away the money has not paid the zamindar's dues, and not because the auction purchaser has not himself paid the full price including the amount of his due. In these circumstances it would be unfair to pass a decree against the auction purchaser alone when the decree-holder has not been impleaded, because the auction purchaser would then be compelled to bring another suit against the decree-holder and fight out the whole question including the existence or non-existence of the custom of 'haqechaharum' against him. This, in my opinion, would be unfair and unjust. In the case of sureties it is well-settled at least so far as this Court is concerned, that if the creditor forbears and omits to enforce his remedy against the principal debtor within the time allowed by law so that his right against any such debtor is barred by time, he would not be allowed to proceed against the surety for the latter may not be able to recover the amount from the principal debtor who owing to the lapse of time stands discharged : *see* 24 All. 504.[3] It may also be added that in none of the cases mentioned above the zamindar sued the auction purchaser alone excluding the decree-holder. I am therefore of the opinion that the plaintiff zamindar is not entitled to obtain the decree against the auction purchaser when he has omitted to implead the decree-holder who has taken away the 1/4 of the price paid by the auction purchaser, which was the zamindar's due.

On the other hand, there is a strong current of authority in this Court to the effect that in a case where the purchaser has paid the sale consideration to the seller the zamindar is entitled to recover haqechaharum from the purchaser and the zamindar is not bound to follow the purchase money or its destination : *see* 1867 N.W.P.H.C.R. 63,[4] 23 ALL. 209[5] and 44 ALL. 739.[6] In 23 ALL. 209,[5] the earlier Full Bench decision of the N. W. P. High Court Reports in (1867) N.W.P.H.C.R. 63[4] was considered and explained as follows :

> We construe the judgment of the Full Bench as deciding that in the case of a customary right to receive haqechaharum where it does not appear that the zamindar's right to a share of the purchase money is limited to a right to claim it from the vendor, the right can be enforced against the vendee also.

It follows from this that the zamindar's right to receive haqechaharum is not in the nature of a charge on the sale proceeds, nor is it in the nature of ownership of the fund but it is a right which can be enforced personally both against the seller and the purchaser and the sale proceeds only furnish a measure to determine the amount of the haqechaharum and the zamindar's right is not necessarily confined to the sale proceeds and to the sale proceeds alone. The main controversy between the auction purchaser and the decree-holder in this case is on the interpretation of the authorities of this Court. The contention of the auction purchaser is

3. ('02) 24 All. 504 : 1902 A.W.N. 166, Ranjit Singh v. Naubat.
4. ('67) 1867 N.W.P.H.C.R. 63 (F.B.), Heera Ram v. Raja Deo Narain Singh.
5. ('01) 23 All. 209 : 1901 A. W. N. 61, Dhandai Bibi v. Abdur Rahman.
6. ('22) 9 A.I.R. 1922 All. 370 : 69 I.C. 99 : 44 All. 739 : 20 A.L.J. 646, Kedar Nath v. Datta Prasad.

that the zemindar has vested interest in the sale proceeds. He has got a charge over a vested interest in the fund and his right is to recover his haqechaharum from that fund and that fund alone. The contention of the decree-holder is that one-fourth of the purchase money furnishes only a measure or a standard to determine the amount of customary right but it creates no charge or ownership in the purchase money, and the questions of ownership or charge in the purchase money and further questions of the liability of seller and purchaser and the decree-holder are matters relating to the incidents of custom and fall to be proved like other facts in the case. If the matter were res integra, we should be inclined to hold that the right of the zamindar to recover haqechaharum out of the sale proceeds and the right of the zamindar to recover haqechaharum from the execution creditor is primarily a matter of the proof of custom and of its incidents. But, on the principle of *stare decisis*, we are prepared to follow the law laid down in (1867) N.W.P.H.C.R. 404[1] in a case similar or analogous to those cases. The case, however, before us presents certain distinguishing features. In the City of Benares, the prevalence of custom of haqechaharum is well known. The property in dispute when it was put to court sale was sold as a parjot land, in other words, land liable to pay the rent to the zamindar. The decree-holder, the judgment-debtor and the auction purchaser are all residents of Benares well acquainted with the custom. It may, therefore, be well presumed that at the time of the auction sale, the liability of payment of haqechaharum was fully known to the parties concerned. The trial Judge has also found :

> I am satisfied that the auction purchaser bought the property with the knowledge that zarechaharum would have to be paid.

This finding is based upon evidence and it seems to us in the circumstances of the case to be sound. On the evidence which was led before him, the trial Judge has further found that the value of the property sold was about Rs. 62,000 and 'there was a margin in the price paid for the payment of zarechaharum' by the auction purchaser, Abdul Hashim, defendant 3. In the course of arguments before us, the decree-holder offered to purchase the property for Rs. 62,500 and further agreed to pay full costs of both Courts to the purchaser and the offer was kept open for several days. The auction purchaser took time to consider it and finally rejected it. We think, therefore, that the finding of the trial Judge as to the value of the property should also be accepted and it should further be accepted that the auction purchaser purchased the property in dispute for Rs. 50,000 keeping a margin for the payment of haqechaharum. It is true that at the time of the auction sale, the liability to pay haqechaharum was not notified. It is also true that there was no clear and distinct agreement to the effect that the auction purchaser would be called upon to pay haqechaharum over and above the bid of Rs. 50,000 at which the sale was concluded. But it is also clear that he purchased the property at a low price keeping a margin for the payment of haqechaharum and he knew full well that haqechaharum was payable to the zamindar and if before the sale was confirmed any controversy had been raised about the haqechaharum, the probabilities are that the sale might have been avoided and a resale of the property might have taken place, but if the haqechaharum is now ordered by a decree of Court, to be recovered out of the sale proceeds, the judgment-debtor and decree-holder both will suffer by the sale of the property at a low price and the auction purchaser who has purchased it will make a bargain.

Mr. Mushtaq Ahmad contends that if there is no agreement, no estoppel and no statutory bar why should not the purchaser be allowed to make a bargain ? A decree has been passed by the trial Court against the seller, defendant 1 and against the auction purchaser, defendant 3 and the decree-holder, defendant 2, by the decree of the trial Court, has been exempted from the claim. The question for our consideration is, is there any valid reason for exempting defendant 3 from the claim and for imposing a decree against defendant 2. In our view, the liability against defendant 2 can only be imposed on the basis of and on proof of custom and the proof of custom is lacking in the case. No doubt in a proper case on the authority of (1867) N. W. P. H. C. R. 404,[1] and the Letters Patent decision referred to above, a liability could be imposed against a decree-holder or against execution creditor to pay the haqechaharum to the zamindar but the principle of those cases, in the absence of proof of custom, should not be extended to a case where the auction purchaser has purchased the property for a low price with a margin for the payment of haqechaharum and with full knowledge of the liability of the payment of haqechaharum. No case is, therefore, made out for exempting the auction purchaser from liability to the zemindar's claim and

for imposing a decree against the decree-holder personally or for a direction that the zemindar's haqechaharum was to be recovered only from the sale proceeds in deposit in Court.

And if the matter had rested here, the decree of the trial Court might have had to be affirmed in its entirety. But Mr. Banerji, on behalf of the decree-holder, defendant 2, has made an offer to purchase the property sold to defendant 3 as is specified in the sale certificate dated 14th March 1934, printed on p. 441 of the record of this appeal for a sum of Rs. 50,000 plus a sum of Rs. 12,500 plus a further sum equal to costs of both Courts incurred by defendant 3 and he has further agreed to let this offer stand not only with a view to an amicable settlement of the controversy but, in the events of the failure of that settlement, to enable us to pass an equitable decree in the case. And Mr. Malik on behalf of the plaintiff agrees to the transfer being effected by defendant 3 in favour of defendant 2 in substitution of auction sale of 9th January 1934, and agrees not to make any fresh claim for haqechaharum on the basis of the subsequent transfer. Now, in this case the auction sale of 9th January 1934 took place either subject to the implied understanding that the zemindar's haqechaharum would have to be paid by the auction purchaser over and above the last bid of Rs. 50,000 for which the sale was concluded or it took place without any such understanding, but all the same under a misapprehension as to the liability of payment of haqechaharum and of the persons who would be liable for it and the funds from which it would be recoverable. It seems, therefore, in the circumstances of the case equitable to give the auction purchaser defendant 3 an option to keep the property and to pay the haqechaharum to the zamindar or to transfer the property to the decree-holder on condition of receiving the entire sale consideration paid by the auction purchaser and all costs incurred by him and of making the decree-holder liable for payment of haqechaharum to the zemindar. There remains now to consider the cross-objection of the plaintiff relating to the claim of interest which was disallowed by the trial Court. In 1938 A.L.J. 169[7] Sir Shadi Lal in delivering the judgment of the Board has stated the law in the following words :

Now interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate or it is payable by the usage of trade having the force of law or under the provisions of any substantive law entitling the plaintiff to recover interest.

And his Lordship further pointed out in the course of his judgment that interest could not be recovered as damages under S. 37, Contract Act, where it was not recoverable under the Interest Act (Act 23 of 1839). In the case before us, the trial Judge has found as follows :

I do not think that this is a case in which any interest should be allowed. Neither there is any custom nor any contract for the payment of interest. The claim was brought soon after the confirmation of sale. There has not been undue delay. Hence, interest by way of damages should also not be allowed.

We think that the reasons given by the trial Judge for disallowing interest are sound and his judgment on this part of the case should be maintained except in the manner indicated below. The result is that both appeal and cross-objection are allowed in part and in modification of the decree of the trial Court there will be the following decree in the case : The plaintiff's claim is decreed for Rs. 12,500 only against defendant 3 subject to following conditions. Within 30 days of this date defendant 3 shall exercise the option of retaining the property sold to him by sale certificate dated 14th March 1934 or of transferring it to defendant 2. This option shall be expressed in writing by a petition to the lower Court. In the event of defendant 3 expressing the option of retaining the said property, defendant 3 shall be liable to pay a sum of Rs. 12,500 to the plaintiff and defendant 3 shall further pay costs of both Courts to the plaintiff and failing this payment the plaintiff's decree for Rs. 12,500 and said costs shall be executed against defendant 3 and also at the option of the plaintiff against defendant 1 for the principal sum of Rs. 12,500. In the event of defendant 3 expressing the option of transferring the property to defendant 2 defendant 2 shall deposit within 60 days of the expression of option or within such further time as the Court below in its discretion may extend or allow, a sum of Rs. 50,000 for the payment of defendant 3 this being the amount paid by defendant 3 at auction sale and a further sum of Rs. 1848-9-3, this being the cost of defendant 3 in both Courts and a further sum of Rs. 12,500 this being the haqechaharum due to the plaintiff. On the deposit of the said three sums being made the right of defendant 3 in the said property shall be deemed

7. ('38) 25 A.I.R. 1938 P.C. 67 : 173 I.C. 15 : I.L.R. (1938) 2 Cal. 72 : 32 S.L.R. 374 : 65 I.A. 66 : 1938 A.L.J. 169 (P.C.), B. N. Ry. Co. Ltd. v. Rattanji Ramji.

to be transferred and conveyed to defendant 2. On the said deposit being made by defendant 2, the said sums of Rs. 50,000 and Rs. 1848-9-3 shall be paid to defendant 3 and the said sum of Rs. 12,500 shall be paid to the plaintiff and the plaintiff shall only execute decree for his costs of both Courts against defendants 2 and 3 half and half and the plaintiff shall not be entitled to claim any further sum for haqechaharum on the basis of transfer by defendant 3 in favour of defendant 2 as herein provided.

In the event of defendant 3 expressing the option of transferring the said property to defendant 2 and defendant 2 failing to make the said deposits the plaintiff shall not execute his decree against defendant 3 but the plaintiff shall execute his decree for Rupees 12,500 and for his costs of both Courts against defendant 2 personally or the plaintiff shall be entitled to recover Rs. 12,500 with such interest as accrued due on the said sums which is in deposit in Imperial Bank, Benares, as the result of the execution of decree of defendant 2 in Suit No. 93 of 1932 (Execution Case No. 154 of 1932) of the Court of the Additional Subordinate Judge of Benares, Mahant Sheonath Puri v. Gopal Das and the plaintiff shall execute his decree for costs of both Courts against defendant 2. Save as provided above, in other contingencies, defendants 2 and 3 shall bear their own costs.

K.S./R.K. *Order accordingly.*

Civil P. C.—
(b) ('40) Chitaley, S. 34 N. 6 Pt. 2.
('41) Mulla, Page 144 Pt. (b).

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GANGA NATH J.

Ramji Lal and others — Applicants

v.

Emperor.

Criminal Revn. No. 738 of 1941, Decided on 26th November 1941, from order of District Magistrate, Muzaffarnagar, D/- 24th July 1941.

Northern India Canal and Drainage Act (8 of 1873), S. 70—Person constructing water-course on his own land and permitting another to use it—Removal of water-course is no offence.

A right to obtain the passage of water over another man's property can be secured legally by the canal department acting on its own authority or it can be obtained on the application of a private person to the Divisional Canal Officer under S. 21 of the Act. Such a right can also be obtained by a private agreement. But where a person constructs water-course on his own land and merely permits another to use it, he cannot be held guilty under S. 70 if he subsequently discontinues the permission and removes the water-course, since the Act in no way contemplates that one man has a right to the passage of water for his fields through the fields of another except that such right is derived under the Act from the canal authorities or obtained by private agreements: ('21) 8 A.I.R. 1921 Lah. 327, *Foll.* [P 103*d*,*e*]

R. B. Jaini and M. A. Kazmi — for Applicants.

Deputy Government Advocate — for the Crown.

Order.—This is an application in revision by Ramji Lal, Prithi, Chamela and Budh Singh against their conviction and sentences under S. 70, Northern India Canal and Drainage Act (No. 8 of 1873). They have each been sentenced to pay a fine of Rs. 45 or to undergo one month's rigorous imprisonment in default. The case for the prosecution was that the applicants removed a water-course from their own fields through which water used to pass to the fields of the complainant. It has been found by the learned trial Magistrate that the water-course had been made by the accused on their own land and that it was with their permission that it was used by the complainant to irrigate his fields. The learned trial Magistrate has observed :

As regards S. 430, Penal Code, I find that the water-course in question was made by the accused in their own land and the complainant utilized it with their permission. Of course he had no right to irrigate his land through that channel. The offence of mischief is defined in S. 425, Penal Code, and the words 'wrongful loss' which appear in the definition are also defined as the loss of the property by unlawful means to which the person losing it is legally entitled. Now it is obvious that the complainant was not entitled in any way to use that khul and therefore the accused cannot be convicted of the offence under that section.

It has been urged by the prosecution that "water-course" has been defined in S. 3 (2), Northern India Canal and Drainage Act, and in view of the definition it is immaterial for the purposes of S. 70 whether the water-course belongs to the accused, has been constructed by them on their own land and is used by the complainant with their permission or not. "Water-course," as defined in S. 3 (2) of the Act means any channel which is supplied with water from a canal, but which is not maintained at the cost of the Provincial Government, and all subsidiary works belonging to any such channel. According to the definition, a water-course, to interfere with which it would be an offence under S. 70 of the Act, may not necessarily have been constructed or maintained at the cost of the Provincial Government but does not bring every water-course under the provisions of S. 70. If it were so, it would be an offence to make any alteration in the drains constructed by a person in his own field for irrigating it in a particular manner. In one

year he may cultivate his field and divide it into sub-plots and irrigate them in one manner and in the next year he may do so in another manner. According to the contention of the prosecution, it would not be possible for him to do so; and if he did so, he would be guilty of an offence under S. 70. This would obviously be illogical. A water-course may be made and maintained either at the expense of the Provincial Government by the canal authorities or at the expense of a private person on the land of other persons. Section 21 of the Act lays down :

Any person desiring the construction of a new water-course may apply in writing to the Divisional Canal Officer, stating —

(1) that he has endeavoured unsuccessfully to acquire, from the owners of the land through which he desires such water-course to pass, a right to occupy so much of the land as will be needed for such water-course;

(2) that he desires the said canal officer, in his behalf and at his cost, to do all things necessary for acquiring such right;

(3) that he is liable to defray all costs involved in acquiring such right and constructing such water-course.

According to it a person may acquire a right to occupy a part of the land of another person which may be needed for a water-course, either by a private arrangement or through the canal officer. In either case it would be unlawful for the owner of the land to interfere with such water-course under S. 70 of the Act. In the present case the water-course did not belong to the complainant. It belonged to the accused themselves, and it was with the accused's permission that the complainant was allowed to take water through it for irrigating his fields. The complainant had not acquired any right to occupy any part of the land which was needed for the water-course. In fact, no water-course of the complainant existed on the land in dispute which belonged to the applicants. The applicants cannot therefore be held guilty of any offence under S. 70 of the Act. In A.I.R. 1921 Lah. 327,[1] it was held:

A right to obtain the passage of water over another man's property can be secured legally by the Canal Department acting on its own authority or it can be obtained on the application of a private person to the Divisional Canal Officer under S. 21 of the Act. Such a right can also be obtained by a private agreement. But where one person merely permits another to take water on a water-course existing on the former's land and then discontinues the permission and stops the water-course, he is not guilty under S. 70. The Act in no way contemplates that one man has a right to the passage of water for his fields through the fields of another except that such right is derived in any of these ways from the canal authorities or obtained by private agreements.

The applicants have not committed any offence. It is therefore ordered that the application be allowed and the conviction and sentences of the applicants be set aside. The fine, if paid, will be refunded.

G.N./R.K. *Application allowed.*

1. ('21) 8 A. I. R. 1921 Lah. 327 : 61 I. C. 717 : 22 Cr.L.J. 429: 13 P.L.R. 1921, Hukman v. Emperor.

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IQBAL AHMAD C. J.

Mt. Farkhanda Begam and another — *Plaintiffs* — *Appellants*

v.

Hasnain — *Defendant* — *Respondent.*

Second Appeal No. 554 of 1940, Decided on 25th November 1941, from decision of Civil Judge, Budaun, D/- 9th January 1940.

U. P. Agriculturists' Relief Act (27 of 1934), S. 33—Construction—Original debtor agriculturist on date of loan—Heir can sue under S. 33 provided he is agriculturist at date of suit.

The operation of S. 33 cannot be confined only to cases where the original agriculturist debtor was himself alive and was the plaintiff in the suit. A suit by the heir of an agriculturist debtor for accounts under S. 33 is maintainable provided the debtor himself was an agriculturist on the date of the loan and the heir is agriculturist on the date of the suit: ('39) 26 A.I.R. 1939 All. 31 and ('39) 26 A.I.R. 1939 All. 448, *Disting.* [P 104*c*,*d*,*e*]

M. A. Aziz — for Appellants.

Mansur Alam — for Respondent.

Judgment.—This is a second appeal by plaintiffs whose suit for accounts under S. 33, Agriculturists' Relief Act, was decreed by the trial Court, but dismissed by the lower appellate Court. The suit was for accounts with respect to a mortgage debt that was evidenced by a deed dated 17th March 1925. The mortgage was for a sum of Rs. 200 and was executed by Aftab Ahmad, the husband of plaintiff 1 and father of plaintiff 2. The defendant contested the suit inter alia on the ground that as the plaintiffs were not agriculturists on the date of the advance of the loan they were not entitled to maintain the suit. This contention was overruled by the trial Court but given effect to by the lower appellate Court. It was common ground that Aftab Ahmad was an agriculturist on the date of the loan and that on his death, the plaintiffs succeeded by right of inheritance to the properties left by him. The Courts below, therefore, further held that the plaintiffs were agriculturists on the date of the suit. The trial Court held that inasmuch as the predecessor-in-title of the plaintiffs was an agriculturist when the loan was advanced to him and, as the plaintiffs were agriculturists on the date of the

suit, they were entitled to sue for accounts under S. 33, Agriculturists' Relief Act. The lower appellate Court, on the other hand, relying on the decisions of this Court in 1938 A.L.J. 976[1] and 1939 A.L.J. 243[2] held that as the plaintiffs themselves were not agriculturists on the date of the loan the suit brought by them under S. 33 was not maintainable.

In my judgment the decision of the lower appellate Court cannot be supported. The decisions of this Court relied upon by the lower appellate Court have no application to the facts of the present case. In those cases the plaintiff in the suit under S. 33 was the very person who had taken the loan, and it was held that, as it was not proved that the plaintiff was an agriculturist on the date on which he had taken the loan, he was not entitled to sue under S. 33 of the Act. In the present case the plaintiffs are the legal representatives of the person who had originally taken the loan, viz., of Aftab Ahmad. The fact that Aftab Ahmad was an agriculturist on the date of the loan was, as already stated, not disputed at the trial. It is also clear now that the plaintiffs were agriculturists on the date of the suit. It follows that the debt was advanced to an agriculturist and the plaintiffs in the suit, who were the legal representatives of the original debtor, were agriculturists on the date of the suit. That being so, the suit was, in my judgment, clearly maintainable. It is true that S. 33 speaks of a suit by an agriculturist debtor for an account of money lent or advanced to him, but this provision, to my mind, does not disentitle the heir of an agriculturist debtor to bring a suit under that section provided the heir is also an agriculturist on the date of the suit. By inheriting the property of an agriculturist debtor the person inheriting the property becomes a debtor within the meaning of the Act and is liable to pay the debt to the extent of the assets received by him. That being so, there seems to be no apparent reason why the heir of an agriculturist debtor should be debarred from availing himself of the benefit conferred by S. 33 of the Act. To hold otherwise would be to put a very restricted interpretation on S. 33 and to confine its operation only to cases where the original debtor was himself alive and was the plaintiff in the suit.

I can find no justification for putting such a restricted interpretation on S. 33. The Act was passed with the object of making provision for the relief of agriculturists from indebtedness and I cannot persuade myself to believe that the Legislature, while conferring benefit on an agriculturist debtor, intended to deprive his heir of the benefit conferred by the Act. I therefore hold that a suit by the heir of an agriculturist debtor for accounts under S. 33 is maintainable provided the debtor himself was an agriculturist on the date of the loan and the plaintiffs in the suit, who are the original debtor's heirs, are agriculturists on the date of the suit. For the reasons given above I allow this appeal set aside the decree of the lower appellate Court and remand the case to that Court with the direction to restore the appeal to its original number and to dispose it of according to law. The appellants are entitled to the costs of this appeal. The costs of the Court below will be in the discretion of the lower appellate Court.

G.N./R.K. *Appeal allowed.*

1. ('39) 26 A I.R. 1939 All. 31: 179 I.C. 247: 1938 A.L.J. 976, Sundar Lal v. Kaushi Ram.
2. ('39) 26 A.I.R. 1939 All. 448: 183 I.C. 94: I.L.R. (1939) All 498: 1939 A.L.J. 243, Chedi Lal v. Bharat Tamoli.

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COLLISTER AND BAJPAI JJ.

Jagat Singh Bist Chaudhri — *Defendant — Appellant*

v.

Behari Lal, Plaintiff and others — *Defendants — Respondents.*

First Appeals Nos. 498 and 362 of 1934, Decided on 16th September 1941, from decision of Sub-Judge, Almora, D/- 3rd July 1934.

(a) Deed—Construction—Security bond — *A* executing bond in penal sum of Rs. 10000 in *B*'s favour on security of certain property — *B* entitled to realise from *A* or his property entire loss *A* might suffer — *A* held incurred personal liability for loss — Property held charged for Rs. 10000 only.

A executed a security bond in favour of *B* "in the penal sum of Rs. 10000" on the security of certain property. In the security bond it was stated that *B* will be at liberty to "realise from me or my property given below your entire money or loss, whatever may be found, with interest or damages as you like." It was further stipulated in the bond that, "this property shall remain pledged as security to you for Rs. 10000 : "

Held that the executant incurred a personal liability for whatever loss *B* might suffer and that the property hypothecated was charged to the extent of Rs. 10000 only. [P 107*c*]

(b) Civil P. C. (1908), S. 11 — Security bond in penal sum — Execution proceedings under S. 386, Criminal P. C., against executant—Objection under S. 386, Criminal P. C., read with O. 21, R. 90 that charge created was for larger amount than notified—Decision as to extent of charge created operates as res judicata.

A executed a security bond in the penal sum of Rs. 10000 in favour of *B* on the security of certain property. Subsequently *A* was charged with embezzlement and fined. In the execution proceedings under S. 386, Criminal P. C., *B* raised an objection under S. 386, Criminal P. C., read with O. 21, R. 90, Civil P. C., that his charge over *A's* property ought to have been notified for the amount embezzled by *A* and not merely for Rs. 10000. The criminal Court on a construction of the bond held that a charge for Rs. 10000 only was created over the property secured :

Held that the decision as to the extent of the charge created over the property secured operated as res judicata in a subsequent suit between the parties. [P 107*e*]

(c) Mortgage—Security bond by *A* on hypothecation of properties *X* and *Y* in *B's* favour — Execution under S. 386, Criminal P. C., against *A*—Property *X* sold subject to *B's* charge — Balance, after deducting fine, representing proportionate share of *B's* charge over property *X* returned to *B*—*B* obtaining decree in suit against *A* on security bond and for recovery of amount embezzled by *A*—Pending appeal by *A*, *B* executing decree against property *Y* and purchasing same—*B* himself having broken integrity of mortgage by sale of property *Y*, *B* held not entitled to enforce his charge any further against property *X* and could not proceed against it on basis of *A's* personal liability.

A executed a security bond in favour of *B* on the security of properties *X* and *Y*. In execution proceedings under S. 386, Criminal P. C., against *A* property *X* was sold subject to *B's* charge at auction. The balance of the sale proceeds, after deducting the amount of the fine, which represented *B's* proportionate share of *B's* charge on the property sold was handed over to *B*. Subsequently, *B* brought a suit to enforce the security bond and to recover the amount alleged to have been embezzled by *A*, and obtained a decree. Pending the appeal by the defendant *A*, *B* in execution of the trial Court's decree got the property *Y* sold and purchased it himself :

Held that by executing the trial Court's decree against property *Y*, *B* had himself broken the integrity of the mortgage, and the appellate Court was justified in taking notice of that fact. *B* therefore was not entitled to enforce his charge any further against the property *X* which was sold at auction; and since it was a valid sale, he could not proceed against property *X* on the basis of *A's* personal liability. [P 107*g*,*h*]

(d) Custom — Kumaun customs — Applicability.

The Kumaun customs mentioned in Panna Lal's book apply to the Khasas and not necessarily to the Hindu immigrants from the plains, who, in the absence of evidence to the contrary, will be deemed to be governed by the law of the country from which they migrated : ('39) 26 A.I.R. 1939 All. 437, *Foll.* [P 108*e*]

(e) Practice—New plea—Kumaun custom — Parties residents of Kumaun — Custom not pleaded in plaint but trial Court referring to same in its judgment — Plea held should be allowed to be raised in appeal.

In a suit between the parties who were residents of Kumaun where the suit was tried, the Kumaun custom was not specifically pleaded in the plaint but a reference was made in the trial Court's judgment to Panna Lal's Book on Kumaun Customs and para. 34 of the same was mentioned :

Held that the plea of custom should be allowed to be raised in appeal in view of the whole matter. [P 108*f*]

(f) Specific Relief Act (1877), S. 42 — Suit to enforce security bond — Transfer by debtor of moveable property not covered by bond—Plaintiff cannot get declaration that transfer is void and decree which he might obtain is executable against that property.

In a suit to enforce a security bond the plaintiff cannot be given a declaration that a transfer of certain moveable property, not covered by the bond, by the debtor is null and void and that the decree which he may obtain will be executable against it : 11 M.I.A. 468 (P.C.) and ('39) 26 A.I.R. 1939 Rang. 332 (FB), *Rel. on.* [P 109*f*]

P. L. Banerji, B. L. Dave and D. P. Uniyal— for Appellant.

G. S. Pathak, Bankey Behari Lal, M. L. Chaturvedi and R. N. Verma — for Respondents.

Collister J. — These two appeals arise out of the same judgment and can be disposed of together. Appeal No. 498 is an appeal by Jagat Singh Bisht, who was defendant 3 to the suit. Appeal No. 362 is an appeal by Gosain Singh Nain Mal, who was defendant 4. The plaintiff — whose name is Behari Lal—was the Government Treasurer at Almora, and his case as set out in the plaint may be summarized thus: On 17th February 1928 Prem Lal Sah—who is defendant 1—executed a security bond as tahvildar or cashier of the treasury "in the penal sum of Rs. 10,000," the property secured being a house in the Khazanchi mohalla and a house in the Karkhana Bazar. He also did the banking business of a firm of which the plaintiff is a joint proprietor. Defendant 1 embezzled Rs. 80,000 from the treasury and Rs. 3125 from the money belonging to the plaintiff's firm. Thereafter defendant 1 was tried under S. 409, Penal Code, and he was convicted of the charge and was sentenced to imprisonment for three years and to pay fines aggregating to Rs. 2000. The plaintiff was directed to pay Rs. 30,000 to Government, out of which he has paid Rs. 15,000; and he is liable to pay the balance of Rupees 15,000 in annual instalments of Rs. 5000. Defendant 3, having full knowledge of the above facts, purchased half the Karkhana Bazar house when it was sold at auction in 1932 in proceedings under S. 386 (1) (b), Criminal P. C., and purchased the other half of the aforesaid house under a sale deed executed on 5th October 1932 by Ratan Lal, who is defendant 2 and who is a son of defendant 1.

It was further alleged in the plaint that the firm known as Prem Lal-Ratanlal, of

which defendant 1 was — according to the plaintiff—the sole proprietor, had obtained a decree against a certain person for Rupees 10,047-6-0 and that on 16th February 1933 defendant 4—who is the appellant in Appeal No. 362 of 1934— knowing all the facts stated above, wrongfully purchased the balance of this decree — a portion of which had been attached by other creditors — from defendant 2. The relief sought was (1) that the suit be decreed for recovery of Rs. 33,125, (namely Rs. 30,000 payable to Government plus Rs. 3125 misappropriated from the monies of the plaintiff's firm), (2) that it be declared that the aforesaid transfers are null and void as against the plaintiff and (3) that the plaintiff be authorized to recover the decretal amount by sale of the hypothecated property and of all the property belonging to defendant 1, the plaintiff having a prior charge upon all such property.

There were two other defendants to the suit, defendants 5 and 6, but they do not come into the picture and may be ignored. The case of defendant 3 was that the security bond was only good for Rs. 10,000, that he had a paramount title in respect to the half share of the Karkhana Bazar house which was sold at auction, that defendant 1 had no interest in the other share of the aforesaid house which defendant 3 purchased from defendant 2 and that the suit was barred by the principle of res judicata as regards the amount of the plaintiff's incumbrance. The defence of defendant 4 was that the security bond created no charge upon the decree which he had purchased, and that if there was any such charge upon it, this defendant was a bona fide purchaser for value without notice of the aforesaid charge. The Court below has decreed the suit for the whole amount claimed in the following terms:

> I, therefore, decree the suit to the amount of Rs. 33,125 with past and future interest at 6 per cent. and costs as against defendants 1 to 4 inclusive. Defendants 5 and 6 will get their costs from plaintiff, suit against them being dismissed. I further grant to plaintiff a declaration that the transfers of the half share of the Karkhana Bazar house to Jagat Singh and a part of a decree for Rupees 10,047-6-0 to Gosain Singh are null and void; and that he may have these two properties sold in execution of the decree issuing on this suit, and also that he may recover the decretal amount by the sale of these two properties and any other property belonging to Prem Lal.

It is in evidence that in execution proceedings under S. 386, Criminal P. C., the half share of defendant 1 in certain property —or what the executing authority apparently regarded as being his share in the property —was attached and was put up for sale, and on 20th October 1932 defendant 3 purchased this half share in the Karkhana Bazar house and 11/16ths nalis of land appurtenant thereto : *vide* the sale certificate dated 17th January 1933 at page 147 of our paper-book. The amount paid was Rs. 5510-8-0. There is an order of the Deputy Commissioner dated 3rd January 1933 at page 145 of our paper-book, which indicates that the half share of the Karkhana Bazar house was sold to defendant 3 for Rs. 1610; but, as will appear hereafter, this represents only so much of the sale proceeds as went in liquidation of the fine which had been imposed upon defendant 1. Lot No. 1 mentioned in this order admittedly relates to the Karkhana Bazar house and is therefore the same as what is shown in the sale certificate—apparently by mistake — as lot No. 2. It also appears from this order of 3rd January 1933 that lot No. 3, that is to say the 11/16ths nalis of land, was sold for Rs. 608-4-0, of which Rs. 455 went towards the fine while the balance of Rupees 153-4-0 was the proportionate amount of the plaintiff's encumbrance of Rs. 10,000. This order, as we have already said, does not actually specify what amount was paid to the plaintiff from the sale proceeds of the half share of the house as the proportionate amount of the aforesaid encumbrance, but it is a matter of admission that the plaintiff received Rs. 3000 odd on this account.

We may mention that this order of the Deputy Commissioner dated 3rd January 1933 was passed in connexion with an objection by the plaintiff under S. 386, Criminal P. C., read with O. 21, R. 90, Civil P. C., in which the plaintiff claimed that his encumbrance ought to have been notified as Rupees 30,000 and not Rs. 10,000 but his objection was dismissed, apparently on the ground that the fine due to Government was a first charge upon the property. From this order the plaintiff appealed to the District Judge, but his appeal was dismissed on 25th August 1933. In the judgment of that Court it is stated that, out of the price paid by defendant 3 for the half share of this house, a sum of Rs. 3282-4-0 was received by the plaintiff, this representing the proportionate amount of the encumbrance of Rs. 10,000 upon the whole house. We have already seen that out of the sale proceeds of the half share of this house a sum of Rs. 1610 was paid towards the fine and that out of the sale proceeds of the 11/16ths nalis of land, amounting to Rs. 608-4-0, a sum of Rs. 455 went towards the fine and a sum of Rupees

153-4-0 was received—or so it appears from the order dated 3rd January 1933 — by the plaintiff as the proportionate amount due to him upon this property in respect to his encumbrance of Rs. 10,000. There is no explanation of the difference in the ratio of apportionment in the sale proceeds of this patch of land and the sale proceeds of the half share of the house. Anyway, the total of these various sums amounts to Rs. 5502-8-0 and there is thus a slight discrepancy of Rs. 8 between this total and the sale proceeds as shown in the sale certificate dated 17th January 1933. Meanwhile, defendant 3 had purchased the other half of this Karkhana Bazar house on 5th October 1932 by private sale from defendant 2. Thus, by means of this private sale and the sale at auction defendant 3 became subject to the result of this litigation the owner of the whole house in the Karkhana Bazar. We shall first take up Appeal No. 498 of 1934, in which defendant 3 is the appellant. The first plea taken on his behalf by Mr. P. L. Banerji is that the charge on the property is limited to Rs. 10,000 and the security bond cannot be enforced for more than this amount; and it is also pleaded that this issue is res judicata.

It is admitted in the plaint that the security bond was executed "in the penal sum of Rs. 10,000." In para. 3 of the security bond, it is stated that the plaintiff will be at liberty to "realise from me or my property given below your entire money or loss, whatever may be found, with interest or damages as you like." In para. 5 it is stipulated that, "This property shall remain pledged as security to you for Rs. 10,000." In our opinion, the only possible meaning which can be attached to these recitals is that the executant incurred a personal liability for whatever loss the plaintiff might suffer and that the property hypothecated was charged to the extent of Rs. 10,000 only. The learned District Judge in his judgment dated 25th August 1933 in appeal against the Deputy Commissioner's order of 3rd January 1933 which was passed in respect to an objection by the plaintiff under S. 386, Criminal P. C., read with O. 21, R. 90, Civil P. C., said :

> As for the third objection, that to enter only Rs. 10,000 as the encumbrance is incorrect, from a perusal of this security or indemnity bond I find that prima facie this bond appears to be for Rupees 10,000 only and I find the objection to have no force.

This amounts to a finding, we think, that upon a plain reading of the terms of the security bond, a charge was created to the extent of Rs. 10,000 on the property secured. This finding operates as res judicata between the parties. We accordingly accept the contention of learned counsel for the defendant-appellant in respect to both these points. The next plea taken is that there is no longer any liability upon the half share of the Karkhana Bazar house which was sold at auction to satisfy the proportionate amount of the plaintiff's claim. A half-hearted attempt was made to show that this issue also is res judicata, but there is no force in the contention. The question remains whether the plaintiff is or is not entitled to enforce his claim against this property which was put up for sale subject to the plaintiff's encumbrance of Rs. 10,000. In this connection it is pointed out that under the judgment and decree of the Court below there is no declaration in respect of this half-share of the Karkhana Bazar house. The sale proceeds of this half share—excluding the 11/16ths nalis of land—are stated by the District Judge in his judgment of 25th August 1933 to have been Rs. 4894-4-0 of which Rs. 1610 went towards payment of fine and Rs. 3284-4-0 was paid to the plaintiff. This sum represented the proportionate amount of the charge of Rs. 10,000 on the whole house—not on the half share only. It is admitted before us that the plaintiff received Rs. 3000 odd out of the sale proceeds of the auction sale and we may, therefore, take the District Judge's figures as correct.

Thus the sum of Rupees 3284-4-0 cannot possibly represent less than the proportionate amount of the plaintiff's charge on the half share sold. Learned counsel for the plaintiff-respondent contends that the integrity of the mortgage was not broken and therefore the plaintiff is not confined to realising the proportionate amount only of his charge from the property bought by the defendant-appellant at auction. He admits, however, that in execution of the decree under appeal the plaintiff has put to sale and has purchased the Khazanchi mohalla house for Rs. 4000. This is one of the two properties which were hypothecated under the security bond. Thus he has himself now broken the integrity of the mortgage, and we think that we are justified in taking notice of this fact. The position, therefore, is that the plaintiff is not entitled to enforce his charge any further against the half share of the Karkhana Bazar house which was sold at auction; and since it is a valid sale, he cannot proceed against this property on the basis of the defendant-appellant's personal liability. The last question which we have to decide

in this appeal relates to the other half share of the Karkhana Bazar house, which was sold by Ratan Lal, defendant 2, to the defendant-appellant on 5th October 1932. The major part of the consideration was a decree for Rs. 3558 which had been obtained by the defendant-appellant against defendant 1, as appears from the recitals in the sale deed. These recitals also show that defendant 2 was selling this half share as exclusive owner thereof. The Court below has found that defendant 1 was the sole owner of this property, but learned counsel for the defendant-appellant contends that this is wrong; he pleads that defendant 2 was the owner of this half share and was entitled to convey it to the defendant-appellant. The house was purchased at auction on 20th October 1916. It appears that defendant 1 had a cloth business in the name of Prem Lal Ratan Lal, and the sale certificate of 2nd January 1917 shows that the house was sold to Prem Lal Ratan Lal. Ratan Lal was born in November 1908 and was therefore under eight years of age at the date of sale, and the view taken by the Court below is that defendant 1 was the sole proprietor of the business and that the name of defendant 2 was recorded benami in the sale deed relating to this house. Learned counsel for the defendant-appellant challenges this finding. In his grounds of appeal he pleaded that defendant 2 was the separate owner of this half house. In argument he contends that, whether defendant 1 and defendant 2 each owned a separate half share or whether it was joint family property, defendant 2 was equally competent to sell it. This contention is repudiated on behalf of the plaintiff-respondent, whose counsel pleads that the house was the exclusive property of defendant 1, as found by the Court below, and that defendant 2 had no right to sell a half share in it. Inter alia he relies upon paras. 34 and 290 of Panna Lal's "Kumaun Local Customs." Para. 34 says :

During the life-time of a man his descendants have no share in or claim to the property, ancestral or self-acquired.

In para. 290 the learned author says :

I found absolute unanimity on the following points : (a) A son cannot demand a partition of his share against the wishes of the father. (b) The family property in the hands of the father is not liable to be seized in execution of decrees against the son for his separate debts, whereas the whole of the property can be attached and sold to satisfy a decree against the father for his debts, thus leaving nothing for the sons. (c) The son cannot alienate any part of the property in the life-time of the father. Thus the three principal characteristics of a Mitakshara coparcener are not to be found in the case of the son in Kumaun. Their position rather resembles that of son in the Dayabhaga. It follows that during his father's life-time he is not a coparcener in the sense the term is used in Hindu law. He has no share in the family property until his father's death.

In 1939 A. L. J. 213,[1] this bench held that the customs mentioned in Panna Lal's book apply to the Khasas and not necessarily to the Hindu immigrants from the plains who, in the absence of evidence to the contrary, will be deemed to be governed by the law of the country from which they migrated. At p. 219 we made some observations about the Sahs, to which class defendants 1 and 2 also belong. Learned counsel for the defendant-appellant pleads that this custom ought to have been specifically set up in the plaint. It was certainly not set up there, but we must bear in mind the fact that the parties are residents of Kumaun, where the suit was tried, and it is clear from the judgment of the Court below that reference was made to Panna Lal's book, for the learned Judge has mentioned para. 34 of the aforesaid book — though the sentence in which he refers to it is not easily intelligible. Upon the whole matter we are of opinion that we would not be justified in shutting out the plaintiff-respondent from pleading this custom in appeal before us. This and various other questions arising out of the sale of a half share of the house by defendant 2 cannot, however, be satisfactorily decided on the materials before us and we are, therefore, constrained to remit the following issues to the Court below : (1) Whether defendants 1 and 2 are governed by the Mitakshara law or by the customary law of Kumaun? (2) Whether defendants 1 and 2 were members of a joint Hindu family? (3) Whether at the date when defendant 1 started the business known as Prem Lal-Ratan Lal there was a nucleus of joint family property? (4) Alternatively, whether defendant 2 was admitted to the benefits of this business? If so, when and in what manner?

The parties will be at liberty to adduce such additional evidence as may be relevant to the above issues. The findings should be returned within three months, and thereafter the usual ten days will be allowed for objections. We will now take up Appeal No. 362 of 1934. On 2nd August 1923, a suit was instituted against one Bishan Singh for recovery of Rs. 6574. The plaintiff to the suit

1. ('39) 26 A. I. R. 1939 All. 437 : 183 I. C. 38 : I. L. R. (1939) All. 406 : 1939 A.L.J. 213, Lachhman Singh v. Jhagar Singh.

was designated as "Lala Prem Lal, aged 50 years, son of Lala Hira Lal Chaudhri, owner of shop Lala Prem Lal-Ratan Lal Chaudhri, cloth merchant ....." The plaintiff apparently obtained a decree in this suit. This decree (the amount of which had by now risen to Rs. 10,047-6-0) was attached to the extent of Rs. 5374 by certain creditors. On 16th February 1933 defendant 2 sold the balance of the decree to the defendant-appellant, Gosain Singh Nain Mal, for Rs. 4676 in satisfaction of a debt due to the vendee. It is recited in the sale deed that the vendor is selling the decree "for himself and as a decree-holder and son and heir of Lala Prem Lal Sah Chaudhri." Further on there is a recital to the following effect: "My father is undergoing his sentence in the Bareilly jail. I am his heir and I have obtained his consent." This decree formed no part of the property charged in the security bond, but it is pleaded on behalf of the plaintiff-respondent that it was the exclusive property of defendant 1 as held by the Court below and that defendant 2 had no right to sell it. Learned counsel for the defendant-appellant on the other hand contends that the transfer by defendant 2 was valid and that this property cannot now be touched by the plaintiff-respondent. It is further pleaded on behalf of the defendant-appellant that no suit lies in respect to this decree under S. 42, Specific Relief Act. Section 42 provides:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

The defendant-appellant did not deny and was not interested in denying the plaintiff's legal character as a creditor of defendant 1. And as regards the plaintiff's right to the property, he was not competent to claim in this suit a declaration as regards this particular item of property, which was not charged in the security bond and to which, at the date of the institution of the suit, he had no right. In 11 M.I.A. 468[2] a suit on a simple bond was instituted against one Mt. Rutta Koer. The plaintiff also impleaded as defendants nine other persons on the ground that they illegally had certain estates belonging to Mt. Rutta Koer transferred to themselves. It was prayed that the amount claimed be decreed against the defendants and the aforesaid estates. Their Lordships of the Privy Council held that the plaintiff had no ground of suit against the transferee defendants inasmuch as the instrument which was the basis of the suit created no charge upon the estates transferred. At p. 473 their Lordships say:

> If he (the plaintiff) can obtain judgment on his bond and is not satisfied, he may possibly be entitled hereafter to raise such a case as that suggested in the plaint against the land and against the defendants; but any such proceedings before execution on the judgment are premature.

It is true that the Specific Relief Act had not then been enacted, but the principle is as good today as it was in 1867, when the judgment of the Privy Council was pronounced. So far as the subject of this appeal is concerned, reliefs (b) and (c) in the plaint amount to this, that the plaintiff was claiming a declaration that the transfer of the decree is null and void as against him and that the decree which he may obtain under relief (a) will be executable against it. It was held by a Full Bench of the Rangoon High Court in A.I.R. 1939 Rang. 332,[3] that a creditor cannot sue under S. 42, Specific Relief Act, for a bare declaration that a transfer of moveable property has been made by his judgment-debtor. That case is distinguishable to this extent that the plaintiff there had apparently already obtained a decree; but, we think that the observations in the judgment apply with even greater force to the case which is before us. In our opinion the plaintiff was not entitled to sue for a declaration in respect to this decree and therefore the appeal of Gosain Singh Nain Mal must succeed. We accordingly allow this appeal and set aside the decree of the Court below so far as this appellant is concerned. Having regard to the fact that the bar of S. 42, Specific Relief Act, was not pleaded in the written statement and was not specifically pleaded in the grounds of appeal (ground No. 4 being of a wide and general scope), we make no order as to costs as between the defendant-appellant and the plaintiff-respondent. Defendants 5 and 6 have been unnecessarily impleaded in this appeal and they are therefore entitled to recover their costs from the defendant-appellant.

G.N./R.K. *Order accordingly.*

2. ('66-67) 11 M.I.A. 468 : 9 W.R. 9 : 2 Suther 107 : 2 Sar. 320 (P.C.), Mohammud Zahoor Ali Khan v. Mt. Thakooranee Rutta Koer.

3. ('39) 26 A.I.R. 1939 Rang. 332 : 183 I.C. 746 : 1940 R.L.R. 59 (F.B.), Mg. Ba Mg. v. Mg. Ba Yin.

Civil P. C.—
(b) ('40) Chitaley, S. 11 Notes 23 and 28.

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BAJPAI AND DAR JJ.

Ramanand Lal and another —
Plaintiffs — Appellants

v.

Damodar Das and others —
Defendants — Respondents.

First Appeal No. 248 of 1935, Decided on 16th September 1941, from decision of Addl. Sub-Judge, Benares, D/- 21st February 1935.

(a) Hindu law — Alienation — Necessity— Widow—Alienation for payment of Government revenue and maintenance is valid in absence of any other available source.

Payment of Government revenue and borrowing money for maintenance are legitimate purposes for which a Hindu widow is entitled to alienate the husband's estate, provided the maintenance and the revenue could not be met out of the income of the estate or out of the available funds of the estate; but while keeping the income to herself where income exists and, keeping husband's funds to herself where husband's funds exist, which might enable her to pay off the Government revenue it is not open to a Hindu widow to pay Government revenue by borrowing. [P 112*f*,*g*]

(b) Hindu law—Alienation—Widow—Essentials to be proved by alienee to justify transaction stated—Position of transferee from alienee is same.

The alienee in order to justify an alienation by a Hindu widow must prove either that there was legal necessity in fact; or that he made proper and bona fide inquiry as to the existence of the necessity and did all that was reasonable to satisfy himself as to the existence of the necessity. In no case, however, is he bound to see that the money paid by him is applied to meet the necessity. The same rule applies to a transferee from an alienee though presumptions of facts may arise in either case when by lapse of time evidence has disappeared. [P 113*a*,*b*,*c*]

(c) Hindu law — Alienation — Necessity— Widow—Entire consideration found for necessity—Fact that alienee is unable to prove application of small portion of consideration for purposes of necessity is no ground for setting aside alienation — Nor is alienee liable to pay that portion of consideration to those challenging alienation—Part of consideration not justified by necessity—That portion is not binding on reversioners.

No doubt in the case of a mortgage by a widow when it is proved that there was legal necessity in fact for entire consideration of transfer or there was a representation of necessity for entire consideration which on bona fide inquiry was believed and found correct and in case of sales there was also legal necessity for sale of property and an adequate price was paid for the same, the fact that the alienee is unable to prove that a small portion of the consideration was applied for the purposes of legal necessity, is no ground for setting aside the alienation, nor can the vendee or the mortgagee be held liable to pay to those challenging the alienation that portion of the consideration for which legal necessity is not positively established : ('27) 14 A. I. R. 1927 P. C. 37 ; ('27) 14 A. I. R. 1927 P. C. 121 ; ('27) 14 A. I. R. 1927 P. C. 246 and ('29) 16 A.I.R. 1929 P. C. 143, *Rel. on.* [P 113*e*,*h*]

But where a mortgage is made by a Hindu widow for a consideration part of which is not justified by legal necessity, that portion of the mortgage is not binding upon the reversioner; and if a decree has been passed on such a mortgage, a part of the decree will be binding on the reversioner, and a part will not be binding and if in execution of such a decree property is sold, the sale is liable to be set aside at the instance of the reversioner on payment of the consideration which was binding on the reversioner though cases may arise where the portion of the consideration not binding on the reversioner is negligible or unsubstantial in a mortgage which has resulted in an execution sale and such cases may have to be considered on their own special equities : ('35) 22 A. I. R. 1935 Cal. 20 and 29 All. 331 (P.C.), *Rel. on.* [P 114*c*,*d*]

(d) Hindu law—Alienation—Widow—Transaction challenged after long delay—Recitals in deed — Whether necessity existed in fact or representation of necessity was made and on bona fide enquiry believed — Presumptions— There is no hard and fast rule—Presumptions consistent with evidence, probabilities and surrounding circumstances of case may be made— Deed silent—Presumption as to necessity, whether can be drawn — Reversioner challenging transaction after long delay—Circumstances in which transaction need not be disturbed stated.

In transfers made by the Hindu widow which are challenged after a long delay there is no hard and fast rule about presumptions which can be made either with regard to recitals in the deed of transfer or with regard to the question whether necessity existed in fact or whether a representation of necessity was made and on bona fide enquiry was believed. Each case must be considered on its merits and presumptions may be made which are consistent with the evidence, the probabilities and the surrounding circumstances in the case. If the evidence, the probabilities and the circumstances warrant, the Court may find that necessity for the transfer existed in fact or the Court may find that a representation of necessity was made and it was believed and for that reason, the transferee is protected, though the factum of necessity is not proved. When the recital in the deed is silent as to the necessity, in a proper case, having regard to probabilities, circumstances and evidence in the case, a presumption may be raised either with regard to the factum of the necessity or with regard to representation of the necessity which the circumstances of the case warrant : ('32) 19 A. I. R. 1932 Mad. 762 and ('38) 25 A. I. R. 1938 Mad. 300, *Rel. on.* [P 115*f*,*g*,*h*]

In all transactions of Hindu widows which are challenged by reversioners after a great lapse of time and in which presumptions are raised to fill in the gaps of evidence there is some risk of speculation; but in the absence of evidence of waste and extravagance on the part of the widow and unfairness on the part of the transferees and inadequacy of the price of sale consideration in view of the fact that the reversioners allowed transactions to stand long and the transferees made improvements upon property transferred in good faith, the transfers need not be disturbed. [P 118*g*]

P. L. Banerji and Ambika Prasad — for Appellants.

Sir Tej Bahadur Sapru, Gopi Nath Kunzru and Lalta Prasad — for Respondents.

Dar J. — This is an appeal against a judgment and decree dated 21st February 1935, by which the plaintiff's claim for possession of immovable property with mesne profits was dismissed. A zamindari share in 'Taluqa' Akhtha Mawaiya and the appended villages of Mawaiya, Benipura and Nawapura in the Benares District and a pakka built house situated in Piari Kalan, Benares City, which is the property in suit, at one time formed part of the estate of a Hindu named Sheo Pragash Lal, who died in the year 1869. On the death of Sheo Pragash Lal his estate, which included the above property, devolved by right of inheritance upon his widow, Jasoda Kuer, who died on 4th November 1929. On 26th June 1881, she executed a simple mortgage of the said house in favour of Kamta Nath for Rs. 1000. The purpose for which the money was borrowed is not recited in the deed. On 25th August 1884, she borrowed another sum of Rs. 2500 from Gobind Das by mortgaging another house, not in dispute in this case. It is recited in the deed that Rs. 2330 was raised for the payment of Government revenue and the rest was brought by the lady to her own use. In 1884 Kamta Nath raised an action in the Court of the Subordinate Judge of Benares (No. 76 of 1884) for recovery of money due on the bond of 1881 and on 18th December 1884, Kamta Nath obtained a decree for a sum of Rs. 1464-11-0. In 1885 Gobind Das raised an action (No. 82 of 1885) in the Court of the Subordinate Judge of Benares against Mt. Jasoda Kuer for recovery of money due on the bond of 1884, and on 10th September 1885, Gobind Das obtained a decree for a sum of Rs. 3163-14-6.

On 7th January 1886, Mt. Jasoda Kuer executed a mortgage deed in favour of Gobardhan Das for a sum of Rs. 6000. It is recited in the bond that the money was raised for payment of the two decrees mentioned above and for other necessary expenses of the lady. The property mortgaged was the house in the City of Benares which had been previously mortgaged to Kamta Nath and Taluqa Akhtha Mawaiya, the property which is now in suit, and one other village Kundhai. In 1888 Gobardhan Das raised an action (Suit No. 85 of 1886) against Mt. Jasoda Kuer for recovery of money due on the bond of 1886 and, on 2nd August 1888, a decree was passed for Rs. 10,521-6-0. In execution of Gobardhan Das's decree, Taluqa Akhtha Mawaiya was sold on 20th May 1890, by a court auction and was purchased by Gobardhan himself for Rs. 8000. In further execution of Gobardhan Das's decree the house at Piari Kalan in the City of Benares was sold by public auction on 23rd August 1895, and was purchased by Ishwar Sahai for Rs. 1600. Gobardhan Das, after his purchase, entered into possession of Taluqa Akhtha Mawaiya, and on his death his two sons and three grandsons succeeded to the property and they are in possession of it at present and have been made defendants 1 to 5 in the present action. Ishwar Sahai the purchaser of the house, by a conveyance dated 12th August 1915, sold the house to Ganga Prasad for Rs. 1900 and Ganga Prasad by virtue of that purchase entered into possession of the house and on his death the house came into possession of Ganga Prasad's son and grandson, who are defendants 12 and 13 in the action, and Ishwar Sahai, the purchaser of the house in the year 1896, being dead his sons are joined in this action as defendants 6 to 10. Mt. Jasoda Kuer had a brother Mathura Prasad who died leaving a son Shyam Bahadur Lal and he has been made defendant 11 in the action.

The plaintiffs, Ramanand Lal and Shyama Nand Lal are two brothers, sons of Rameshwar Dial who died in 1895. The plaintiffs, alleging that they as reversionary heirs of Sheo Pragash Lal being entitled to Sheo Pragash Lal's estate on the death of his widow, Jasoda Kuer, which took place on 4th November 1929, raised an action on 3rd January 1934 in the Court of the Civil Judge, Benares, for recovery of possession of Taluqa Akhtha Mawaiya and the house in the City of Benares against defendants 1 to 13 and for mesne profits which accrued due since the death of the lady, and their case, shortly stated is that Sheo Pragash Lal had died leaving a considerable estate which came into possession of his widow Jasoda Kuer, that Jasoda Kuer without any legal necessity created the mortgages of 1881, 1884 and 1886 and in enforcement of the said mortgages allowed the property to be sold in execution sales and that the house was purchased 'benami' by her brother Mathura Prasad in the name of Ishwar Sahai and the village was purchased by Gobardhan Das the decree-holder but the mortgage being without legal necessity the execution sales which followed were not binding upon the plaintiffs the reversionary heirs and they were entitled to recover possession of the estate with mesne profits from the purchasers. The suit was contested by the purchasers. They denied the plaintiffs' relation with Sheo Pragash Lal and the plaintiffs' rever-

sionary title. They pleaded that the mortgages were made for legal necessity and the auction sales which followed the mortgages were binding upon the plaintiffs as reversionary heirs, and they further pleaded that they had made additions and improvements to the property in their respective possession and they were not liable to be evicted without receiving proper compensation for them.

The trial Judge found regarding the mortgage of 1886 in favour of Gobardhan Das of Rs. 6000 that legal necessity was proved except for a sum of Rs. 1230, and the learned Judge held that the failure of proof of necessity with regard to the sum of Rs. 1230 might be disregarded and the mortgage was binding upon the reversioners. The trial Judge further found that the purchasers had made certain additions and improvements to the property subsequent to their purchases and these would have to be compensated for; but, on the finding that the mortgages and the auction sales were justified by legal necessity, the learned Judge has dismissed the claim, and against that dismissal the plaintiffs have made this appeal. This is an action by Hindu reversioners for recovery of possession of immovable property transferred by a Hindu female on the death of the said female. The transfers which require consideration were made in 1881, 1884 and 1886, and the auction sales took place in 1890 and 1896 and the action was raised in 1934, 51 years after the first transaction in dispute and 48 years after the third transaction in dispute. In the mortgage of 1881, there is no recital as to the purpose for which money was borrowed. In the mortgage of 1884, it is recited that the money was borrowed for payment of Government revenue which could not be paid from collections and income of the property, and in the mortgage of 1886 it is recited that the money was being raised in order to pay off the decrees which had been passed on two previous mortgages and for a further sum of money for household expenses.

There has been a great deal of discussion at the bar as to the law which applies to this case. Sir Tej, on behalf of the purchasers has contended that it is sufficient in an old transaction for the transferees of a Hindu widow to show that money was required for a purpose for which Hindu law allows widows to make a transfer of the property and that it is not necessary for the transferees to show that the widow had no other means of meeting that purpose except by borrowing. Sir Tej has further contended that, whatever may be the burden upon the original alienee of a Hindu widow, the burden is not the same upon the transferee of an alienee who was no party to the original transaction. And in an old transaction the factum of necessity as well as representation of necessity and bona fide enquiry on the part of the transferee may both be presumed, even when recitals of legal necessity in the deed of transfer are absent or silent by reason of obliteration of evidence which may have taken place on account of lapse of time. And that a mortgage made by a widow for legal necessity is binding on the reversioner, even when a portion of the consideration was not proved to be for legal necessity and that the same consideration applies to an auction sale which is based on the mortgage. We think that up to a certain stage the law which is applicable to this case is well settled. Payment of Government revenue and borrowing money for maintenance are legitimate purposes for which a Hindu widow is entitled to alienate the husband's estate, provided the maintenance and the revenue could not be met out of the income of the estate or out of the available funds of the estate; but it is not the law that while keeping the income to herself where income exists and, keeping husband's funds to herself where husband's funds exist, which might enable her to pay off the Government revenue it is open to a Hindu widow to pay Government revenue by borrowing. In Mulla's Hindu Law, Edn. 9 at p. 181 the law in this matter is stated as follows :

> Payment of arrears of Government revenue and of decrees for rent accrued due after the death of the deceased owner, provided she had no funds when she mortgaged or sold the property to pay the revenue or the decrees and the mortgage or sale was absolutely necessary in order to discharge the debt, which if not discharged would have resulted in a forcible sale of the property. If there is an actual existing necessity, the circumstances that the necessity was brought about by the mismanagement of the widow does not vitiate the mortgage or sale, unless it is shown that the mortgagee or purchaser himself contributed to the mismanagement.

In Mayne's Hindu Law and Usage, Edn. 10 at p. 787 the law is stated as follows :

> One very common case of necessity is that of a loan of money, or a mortgage or sale of part of the property to pay off arrears of Government revenue provided there is no other available source.

This, in our opinion, is a correct statement of law and is amply supported by authority. With regard to the burden of proof which rests upon the alienee of a Hindu widow, there also cannot be much dispute. The alienee, in order to justify a transaction by

a a Hindu widow, has to prove a legal necessity in fact for the transaction, or a representation of legal necessity which the transferee after bona fide enquiry believed and that he advanced money on its basis. Here again, in Mulla's Hindu Law, Edn. 9 the law is correctly stated at p. 184 as follows :

If the sale or mortgage is impeached the burden lies on him to prove (a) either that there was legal necessity in fact; or (b) that he made proper and bona fide inquiry as to the existence of the necessity and did all that was reasonable to satisfy himself as to the existence of the necessity.

If he proves that there was a necessity in fact, the alienation will be upheld even though the necessity was brought about by the mismanagement of the limited heir, unless it be shown that he himself
b contributed to the mismanagement.

Even if he fails to prove that there was a necessity in fact, the alienation will be upheld if he proves that he made such inquiry as aforesaid and that the facts represented to him were such as, if true, would have justified the transaction.

In no case, however, is he bound to see that the money paid by him is applied to meet the necessity. The reason is that he can rarely have the means of controlling the actual application unless he himself enters on the management.

The same rule applies to a transferee from an alienee.

In our own opinion the alienee from a Hindu widow and a transferee from alienee stand in the same position in the matter of
c burden of proof and both have to discharge the same burden as against a reversioner though presumptions of facts may arise in either case when by lapse of time evidence has disappeared. When a Hindu widow transfers immovable property of her husband and part of consideration of the transfer is for necessity and part of it is not, is the transaction binding upon the reversioner ? Sir Tej's contention is that if a substantial portion of the consideration is for legal necessity, then the transfer is binding and a presumption should be made that the remaining portion also was for legal necessity
d and in support of this contention Sir Tej relies upon the well-known pronouncement of the Judicial Committee in 49 ALL. 149[1] which has subsequently been applied and affirmed by their Lordships in 8 Lah. 597,[2] 25 A.L.J. 967[3] and 51 ALL. 430[4] and on the head-note of 25 A.L.J. 80[1] which is as follows :

Where it is established that the sale or a mortgage by a Hindu widow or a Hindu father or manager of a joint Hindu family was justified for e
legal necessity, the fact that the vendee or the mortgagee is unable to prove that a small portion of the consideration was applied for the purposes of legal necessity, is no ground for setting aside the alienation, nor can the vendee or the mortgagee be held liable to pay to those challenging the alienation that portion of the consideration for which legal necessity is not positively established.

A great deal of controversy exists as to whether the rule laid down in 49 ALL. 149[1] applies to cases of sales or whether it applies to mortgages also and further whether it applies to a case of partial necessity or whether it applies only to a case of total necessity. In 4 Luck. 107[5] and in A I.R. 1934 ALL. 789[6] the rule laid down in 49 ALL. 149[1] f
was not applied to mortgages. In 8 Pat. 558[7] the rule was applied to mortgages also, while in 14 Pat. 595[8] the rule was confined to sales and was not extended to mortgages. In 62 Cal. 733[9] the question whether the rule applies to sales and mortgages was left undecided, but it was held that the Privy Council decision referred to above was a case in which a representation of necessity was made to transferee which on bona fide inquiry was believed by him and

two conditions, namely, the existence of a bona fide enquiry and the existence of evidence to show that the sale itself was justified by legal necessity must co-exist in order to attract the application of g
this rule to a particular case.

We do not think that the rule enunciated in 49 ALL. 149[1] and in other cases which follow it applies to a case of partial necessity. They were all cases in which either legal necessity was proved in fact for the transfer and for the entire consideration of transfer or there was a representation of the legal necessity for transfer and for the entire consideration and the transferee after bona fide inquiry believed and acted upon it; and the Privy Council only emphasised that in such cases the transferee was not bound to account for the application of the money. The Privy Council did not hold—and the point did not h
arise in those cases—that where a part of the transfer or a part of the consideration of the

1. ('27) 14 A.I.R. 1927 P.C. 37 : 100 I.C. 130 : 49 All. 149 : 54 I.A. 79 : 25 A.L.J. 80 (P.C.), Sri Krishan Das v. Nathu Ram.
2. ('27) 14 A.I.R. 1927 P.C. 121 : 101 I.C. 373 : 8 Lah. 597 : 54 I.A. 211 (P.C.), Niamat Rai v. Din Dayal.
3. ('27) 14 A.I.R. 1927 P.C. 246 : 107 I.C. 4 : 25 A.L.J. 967 (P.C.), Gauri Shankar v. Jiawan Singh.
4. ('29) 16 A.I.R. 1929 P.C. 143 : 116 I.C. 605 : 51 All. 430 (P.C.), Ram Sundar v. Lachhmi Narain.
5. ('28) 15 A.I.R. 1928 Oudh 465 : 113 I.C. 489 : 4 Luck 107 : 5 O.W.N. 836, Jai Inder Bahadur Singh v. Khairati Lal.
6. ('34) 21 A.I.R. 1934 All. 789 : 153 I.C. 859, Durga Prasad Singh v. Lachhmi Narain.
7. ('29) 16 A.I.R. 1929 Pat. 360 : 115 I.C. 886 : 8 Pat. 558 : 10 P.L.T. 79, Hitendra Narain Singh v. Sukhdeo Prasad Jha.
8. ('35) 22 A.I.R. 1935 Pat. 178 : 156 I.C. 859 : 14 Pat. 595 : 16 P.L.T. 613, Dwarka Ram v. Bakshi Parnaw Prasad Singh.
9. ('36) 23 A.I.R. 1936 Cal. 116 : 161 I.C. 595 : 62 Cal. 733 : 61 C.L.J. 593, Durga Prosad v. Jew Dhari Singh.

transfer is not justified by legal necessity or *a* by a representation of necessity which the transferee had believed the unjustified consideration or transfer in such a case would be binding upon the reversioner. In Mulla's Hindu Law, Edn. 9 at p. 196, the law on this part of the subject is stated as follows:

> Cases frequently arise in which property inherited by a widow from her husband is sold by her for legal necessity but the whole of the price is not proved to have been applied to purpose of necessity and the sale is challenged by the reversioners on that ground. In such cases, if the sale itself is justified by legal necessity and the purchaser pays a fair price for the property sold and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not *b* proved to have been applied for purposes of necessity, would not invalidate the sale, the purchaser not being bound to see to the application of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied to purposes of legal necessity is considerable or small.

This, in our opinion, is a correct statement of law and 49 ALL. 149[1] and that type of cases only apply when it is proved that there was legal necessity in fact for entire consideration of transfer or there was a representation of necessity for entire consideration which on bona fide inquiry was believed and found correct and in case of sales there was also legal necessity for sale *c* of property and an adequate price was paid for the same, but the transferee is not able to prove that a small portion of sale consideration was applied for purposes of legal necessity. Those cases do not apply when these elements wholly or in part are wanting or, in other words, where the transfer is for partial necessity either with regard to its consideration or with regard to the property transferred. It follows from this that if a mortgage is made by a Hindu widow for a consideration part of which is not justified by legal necessity, that portion of the mortgage is not binding upon the reversioner; *d* and if a decree has been passed on such a mortgage, a part of the decree will be binding on the reversioner, and a part will not be binding on the reversioners and if in execution of such a decree property is sold, the sale is liable to be set aside at the instance of the reversioner on payment of the consideration which was binding on the reversioner, as was done in 62 Cal. 204[10] and in 29 ALL. 331.[11] Cases may, however, arise where the portion of the consideration not binding *e* on the reversioner is negligible or unsubstantial in a mortgage which has resulted in an execution sale and such cases may have to be considered on their own special equities. But as a general rule, if a part of a mortgage made by a widow is not binding on the reversioners, the decree made upon such a mortgage is also not binding upon them and an auction sale made in execution of the decree is also not binding upon the reversioners and they are entitled to recover the property on payment of the consideration which is binding upon the estate.

It was contended at the bar that in the *f* case of an old transaction which is challenged 50 years after it took place if there was a recital in the deed to the effect that the transfer was being made for payment of Government revenue, a presumption should be made in fact that there were no other means of paying revenue and that it could not be paid out of the income and borrowing was necessary. On the other side, it was contended that, if the deed by which transfer is made is silent as to its necessity, no presumption can be made about necessity and presumptions are only permissible in cases where there is a recital in the deed about the necessity. It was further conten- *g* ded that, if there were recitals in the deed to show that money was required for a necessary purpose, presumptions may be made that a representation of necessity was made to the transferee and the latter on bona fide inquiry, found it to be true, but no presumption can be made as to the existence of necessity, in fact. In 44 Cal. 186[12] Lord Chancellor observed as follows at p. 196:

> But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available *h* the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside, for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made

10. ('35) 22 A.I.R. 1935 Cal. 20 : 156 I.C. 209 : 62 Cal. 204 : 60 C.L.J. 404 : 39 C.W.N. 226, Santi Kumar Pal v. Mukanda Lal Mandal.

11. ('07) 29 All. 331 : 34 I.A. 72 : 10 O.C. 117 : 4 A.L.J. 232 (P.C.), Deputy Commissioner of Kheri v. Khanjan Singh.

12. ('16) 3 A.I.R. 1916 P.C. 110 : 36 I.C. 420 : 44 Cal. 186 : 43 I.A. 249 (P.C.), Banga Chandra v. Jagat Kishore.

proper inquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital, coupled with such circumstances would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time.

In 43 Mad. 541[13] which was a case in which a transfer by a widow was challenged 82 years after it took place, Lord Shaw approved and adopted the statement of law on the subject by the Madras High Court which was to the following effect :

It is not disputed that the onus lay upon the defendant to prove the necessity for the sale but having regard to the great lapse of time since the transaction took place, that is about 82 years, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienation made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time.

On the other hand, in 38 Cal. 721[14] at pp. 738, 746 the Calcutta High Court has remarked as follows :

It is for the appellant to establish either that there was legal necessity in fact for these large borrowings or that from sufficient enquiries made he honestly believed that there was such necessity. It has been argued that the onus upon the appellant is lightened by reason of the lapse of time but lapse of time does not affect such a matter except in so far as it might give rise to a presumption of acquiescence or save the appellant from adverse inferences arising from the scanty proof offered. In the present case there was admittedly no acquiescence . . . Then it is said that the expenses were incurred in the course of the litigations which took place between Durga Kumari and Durga Prasad. That there were such litigations is a fact, and expenses must have been incurred. But it is not sufficient to establish these two facts. It must be shown that the expenses could not have been made from the income of the estate, that they were reasonable, and what they were . . . .

And this decision was upheld by the Judicial Committee.[15] In 1936 A.L.J. 755[16] Lord Roche, in delivering the judgment of the Board, observed as follows :

It was contended on behalf of the defendants that owing to the lapse of time, as a matter of law, necessity should be presumed and in support of the contention the case in 43 Mad. 541[13] was relied upon. The judgment in that case does not, in the opinion of their Lordships, support the contention of the respondents. Here, as in the case cited, regard must be had to the amount of evidence likely to be available after the lapse of a long time and presumptions should be allowed to fill in gaps disclosed in the evidence, but in this case there is evidence justifying the conclusions of the Courts below. Presumptions not to supplement but to contradict the evidence would be out of place.

We think that in transfers made by the Hindu widow which are being challenged after a long delay there is no hard and fast rule about presumptions which are to be made either with regard to recitals in the deed of transfer or with regard to the question whether necessity existed in fact or whether a representation of necessity was made and on bona fide enquiry was believed. Each case will have to be considered on its merits and presumptions may be made which are consistent with the evidence, the probabilities and the surrounding circumstances in the case. If the evidence, the probabilities and the circumstances warrant, the Court may find that necessity for the transfer existed in fact or the Court may find that a representation of necessity was made and it was believed and, for that reason, the transferee is protected, though the factum of necessity is not proved. A more difficult question then arises, when a deed is silent as to necessity in an old transaction, can a presumption be made that representation of necessity was made and was believed by the transferee on an enquiry? In A.I.R. 1932 Mad. 762[17] and in A.I.R. 1938 Mad. 300[18] it has been held that the rule that presumptions may be made to fill in the gaps is not only confined to a case where the alienee can point to recitals in the deed under which he claims, but the Court can presume on probabilities and evidence, even when the deed is silent, that there was necessity in fact. In our opinion when the recital in the deed is silent as to the necessity, in a proper case, having regard to probabilities, circumstances and evidence in the case, a presumption may be raised either with regard to the factum of the necessity or with regard to representation of the necessity which the circumstances of the case warrant.

It is now necessary to consider the facts of this case. Sheo Pragash Lal died in the year 1869. At the time of his death, accord-

13. ('20) 7 A.I.R. 1920 P.C. 64 : 55 I.C. 538 : 43 Mad. 541 : 47 I.A. 6 (P.C.), Venkata Reddi Pantulu v. Rani Saheba of Wadhwan.
14. ('11) 38 Cal. 721 : 12 I.C. 931, Ravaneshwar Prasad Singh v. Chandi Prasad Singh.
15. *Reported in* ('15) 2 A.I.R. 1915 P.C. 57 : 36 I.C. 499 : 43 Cal. 417 (P.C.), Ravaneshwar Prasad Singh v. Chandi Prasad Singh.
16. ('36) 23 A.I.R. 1936 P.C. 60 : 160 I.C. 45 : 1936 A.L.J. 755 (P.C.), Bhojraj v. Sita Ram.
17. ('32) 19 A.I.R. 1932 Mad. 762 : 139 I.C. 766, Kumarasami Mudaliar v. Narayansami.
18. ('38) 25 A.I.R. 1938 Mad. 300 : 179 I.C. 173, Thimmanna Bhatta v. Rama Bhatta.

ing to the evidence he was about 40 years old. His wife, Jasoda Kuer, was about 15 years old. He left no child and he left a real estate, most of it permanently settled, which was assessed to a Government revenue of Rupees 15,735-4-8. A chart was supplied to us at the hearing by Mr. Banerji which was prepared from khewats and other exhibits on the record which shows the quantum of the estate as it was between the years 1880-86, when the disputed transactions took place : and according to this chart, the estate consisted of 45 villages, whole or in part and it was assessed for revenue at the figure which we have given above. Sheo Pragash Lal left no child, and there is no evidence that the widow had any dependants to support. Mt. Jasoda Kuer was the daughter of a man named Mahesh Prasad and she had a brother by the name of Mathura Prasad. After the death of Sheo Pragash Lal the lady's father and brother acted as her attorneys and managers. There is no evidence to show what was the actual income of the estate, but from the fact that the estate was assessed to a revenue of over Rs. 15,000 and was permanently settled a presumption arises that the income of the estate should be considerable. In the year 1868 there was a famine in the Benares District, where the estate mainly lies, and in 1869, when Sheo Pragash Lal died, he left a debt of Rs. 3000. For what purpose this money was borrowed does not appear from the record, but it is not improbable that the money might have been borrowed for payment of Government revenue on account of famine, and, if so, it shows that there was some demand upon the income of the estate which left the proprietor in this difficulty that when he was faced with the demand of revenue in a famine year, he had no funds to fall back upon and he had to raise money by borrowing. It also appears that at the time of his death a sum of Rupees 6000 was due to Sheo Pragash Lal from other people for which a succession certificate was taken by his widow, but there is no evidence to show what the nature of these dues was for which succession certificate was taken and whether any money was in fact realised or not with regard to them.

Soon after her husband's death on 15th June 1871, Jasoda Kuer raised a sum of Rs. 3000 by making a mortgage in favour of Thakur Singh. The whole of this money was borrowed for payment of debts left by her husband, Sheo Pragash Lal. Six years later, on 30th August 1877, Jasoda Kuer made a usufructuary mortgage of portion of her property in favour of Jalal Uddin for Rs. 2200 and on 1st February 1878, she made a simple mortgage of her property in favour of Thakur Singh for Rs. 1240. As a result of this usufructuary mortgage and simple mortgage, the first mortgage of 1871 which was for payment of her husband's debt was paid off. It will thus appear that, for some reason or other, the husband died leaving a debt of Rs. 3000 and the widow could not manage to pay that amount by the income of the property or by her husband's funds and she borrowed the money for its payment, and that her inability to discharge this liability continued up to 1878 when she executed the usufructuary mortgage and the simple mortgage mentioned above. In 1878 there was another famine in the District of Benares. She again borrowed a sum of Rs. 3500 in August 1878 from a lady named Rani Makhandi Kuer by mortgaging her property. In this mortgage deed it was recited that the money was borrowed for payment of Government revenue. This is the previous history of the family before the transactions in dispute took place. On 22nd June 1881, Jasoda Kuer borrowed Rs. 1000 from Kamta Nath by mortgaging the house and as we have said before, it is not recited in the deed for what necessity this money was borrowed; but there is evidence to show that proceedings for realization of revenue were pending against her at that time and those proceedings terminated on 19th July 1881, when she paid a sum of Rs. 1003-8-0 as arrears of revenue. On 20th June 1882, Jasoda Kuer executed a simple mortgage in favour of Bhola Singh for Rs. 10,000 out of which a sum of Rs. 1100 was for payment of the instalment of Government revenue of May 1882. The rest of the consideration was for payment of some of the earlier debts mentioned above and some other debts. On 25th August 1884, Jasoda Kuer made a simple mortgage in favour of Gobind Das for Rs. 2500. Out of this consideration a sum of Rs. 2300 was for payment of Government revenue of May 1884. And lastly on 7th January 1886, Jasoda Kuer made a mortgage in favour of Gobardhan Das for a sum of Rs. 6000 the consideration of which was as follows :

	Rs. a. p.
(1) For payment of Gobind Das's decree...	3194-5-0
(2) For payment of Kamta Nath's decree...	1536-8-0
(3) Set off against the prior debt of Gobardhan Das	300-0-0
(4) Taken for stamp and registration costs	40-0-0
(5) Taken for household expenditure ...	929-3-0
Total ...	Rs. 6000-0-0.

As the auction sales which are challenged in this case took place in execution of a decree which was passed on the mortgage of 1886, in order to make the auction sales binding it is necessary for the transferees to establish that the mortgage of 1886 was binding upon the reversioners ; and as out of the consideration of the mortgage of 1886 a portion was for the satisfaction of the two mortgages of 1881 and 1884 in favour of Kamta Nath and Gobind Das, respectively on which decrees had been obtained, it becomes necessary for the transferees to establish necessity for these two mortgages of 1881 and 1884.

Mr. Banerji's contention is that in the mortgage of 1881 there is no recital of any necessity and, therefore, it cannot be presumed that the mortgage was for the payment of Government revenue and from the mere fact that near about that time Rs. 1000 odd was paid for Government revenue or that proceedings with regard to realization of Government revenue were pending against Jasoda Kuer an inference cannot be drawn that money was borrowed in fact for payment of Government revenue or on a representation made to Kamta Nath that money was required for the payment of Government revenue. Mr. Banerji contends that in 1878 three years earlier, when money was borrowed for payment of Government revenue that necessity was recited in the bond of Thakur Singh. Again, a year later, in 1882 when money was borrowed for payment of Government revenue in the bond of Bhola Singh that necessity was recited and again, in 1884, when money was borrowed from Gobind Das for payment of Government revenue, that necessity was recited. The fact that the necessity for payment of Government revenue was not recited in the bond of Kamta Nath and that the bond was silent as to all necessity shows that the money was not required for that purpose and that the transaction with Kamta Nath was without reference to a legal necessity and on the footing of a personal borrowing by the widow on her own personal credit and the creditor looked to payment from Jasoda Kuer and not from reversioners. The creditor was advancing a small sum of Rs. 1000 on a short term credit and he expected to realize it from the usufruct of the estate in the hands of Jasoda Kuer and he did not care to bind the estate.

Mr. Banerji further contends that the lady had an estate which was assessed to revenue of about Rs. 15,000 and it must be presumed that her income from the permanently settled estate might well be taken to be about Rs. 32,000 a year. She had no children and no dependants to support. There is no evidence as to what she did with the income, and the transferees have failed to prove that there was any necessity for her to borrow Rs. 2300 for payment of Government revenue from Gobind Das or to borrow a sum of Rs. 929-3-0 for household expenditure from Gobardhan Das and a further sum of Rs. 300 of which no particulars are given in the deed. Mr. Banerji further contends that the trial Judge has disbelieved the evidence led by the defence to prove legal necessity for Rs. 929 and Rs. 300 in other words, for Rs. 1229 out of the total consideration of Rs. 6000 in the bond of Gobardhan Das, and has held that the legal necessity to the extent of Rs. 1229 out of the consideration of Rs. 6000 in the bond of Gobardhan Das has not been proved but the learned Judge has wrongly applied the rule laid down in 25 A. L. J. 80[1] to the mortgage of Gobardhan Das on the findings which he has arrived at. If the consideration of the mortgage of Gobardhan Das for Rs. 6000 was justified by legal necessity to the extent of Rs. 4771 and was not justified to the extent of Rs. 1229, then Mr. Banerji contends, to the extent to which the mortgage was not justified it is not binding upon the reversioners and consequently the decree which has been passed on the basis of that mortgage and the sale which took place in execution of the decree are also not binding upon the reversioners and they are entitled to get possession of the property on payment of that portion of the consideration which is binding upon them.

These are serious contentions and we have given them our anxious consideration. The transactions which are being challenged took place about 50 years ago. The scribes, the attesting witnesses and the parties who took part in the transactions are all dead. The reversioners to the estate lived at Benares close-by, and they never challenged these transactions soon after they took place or at a time when they were fresh and when evidence justifying them could be available. This is not a case in which it is proved that the Hindu widow was extravagant or wasteful or improvident or was surrounded by unscrupulous persons. It is not shown to us that the transferees in any way acted unfairly or unscrupulously or did not pay full consideration. There is no evidence that the property was not sold for full price. Very different

considerations would have arisen if all or any of these things had been established or if there had been any reason to suspect the bona fides of the transferees or to suspect that the widow was over-reached or was a tool in the hands of unscrupulous persons. It appears that the lady was being assisted by her father and brother, and nothing has been proved to show that the father and the brother were out to serve their own interests and were not serving the interests of the lady. In the transactions of Gobardhan Das a leading lawyer of Benares, who is now dead, took part in attesting the deed. This lawyer belonged to the same community as the lady and there is every reason to think that he would know all the affairs of the lady and would not vouch for recitals which were incorrect or false or would take part in a transaction which was not justified.

It is true that there is no direct evidence to show as to what happened to the income which the lady had from the estate, but it is clear that the husband of the lady himself left a debt of Rs. 3000 and that the year before he died there was a famine. It is also a fact that in 1878 there was another famine and the lady borrowed the money from Rani Makhandi Kuer to pay Government revenue. The after effects of a famine continue for sometime and difficulties continue in making collections from tenants. In 1884 money was borrowed from Gobind Das. It was recited in the bond that

> on account of the arrears due by the tenants and other expenses it is not possible to pay the revenue without taking a loan, and this would mean a great loss to me, the executant.

In the bond of 1881 in favour of Kamta Nath, it is true that there is no recital, but it is a fact that money was due for Government revenue at that time and the sum of Rs. 1003 was actually paid in Government revenue soon after the sum of Rs. 1000 was borrowed from Kamta Nath. It is also a fact that in 1882 a sum of Rs. 1100 was borrowed from Bhola Singh for payment of revenue for the instalment of May 1882. It is not necessary for the purposes of this case to find as a fact that legal necessity existed, or in other words that the lady was not in a position to pay Government revenue or to maintain herself without borrowing money. It is sufficient if it can be found that a representation was made to the transferee that money was required for payment of Government revenue and for her maintenance which the transferee, after reasonable inquiry, in good faith believed and he advanced money on that basis. We think that, having regard to all the circumstances of the case, a presumption might well be raised that, when Rs. 1000 was borrowed from Kamta Nath, a representation was made that the money was required for payment of revenue and that there was no other way for its payment except by borrowing and Kamta Nath believed in good faith all this and after reasonable inquiry that necessity existed he advanced money on that basis. We may also presume that, when representation was made to Gobind Das that Rs. 2330 was required for payment of revenue, which could not be paid in any other way except by borrowing, Gobind Das, after due enquiry, believed in that representation and advanced the money; and we may further presume that a representation was made to Gobardhan Das that money was due to Kamta Nath and to Gobind Das on their decrees, which could not be paid in any other way except by borrowing, and the lady required a further sum of Rs. 900 odd and Rs. 300 for maintenance and other necessary expenses and Gobardhan, after due enquiry and in good faith, acted on the representation and found it justified.

The case is not free from difficulty and in all transactions of Hindu widows, which are challenged by reversioners after a great lapse of time and in which presumptions are raised to fill in the gaps of evidence, there is some risk of speculation; but, in the absence of evidence of waste and extravagance on the part of the widow, and unfairness on the part of the transferees, and inadequacy of the price or sale consideration and, having regard to the fact that the reversioners have allowed transactions to stand so long and the transferees have made improvements upon property transferred in good faith, we have come to the conclusion that the transfers need not be disturbed. The result is that the appeal is dismissed, but as the defendants falsely denied the plaintiff's pedigree and reversionary title and the decree of the trial Court is being affirmed upon other grounds than those adopted by the trial Court, we direct that the parties shall bear their own costs throughout.

G.N./R.K. *Appeal dismissed.*

Hindu Law —
(a) ('40) Mulla, S. 181B Pts. (o), (r) and (s).
('38) Gour, S. 341 N. 2494.
(b) ('40) Mulla, S. 182 Pts. (j), (l) and (m).
(c) ('40) Mulla, S. 189 Pts. (g) and (h).
('38) Gour, S. 135 N. 1201.
(d) ('40) Mulla, S. 182 Pt. (w).
('38) Gour, S. 346 N. 2526.

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FULL BENCH

IQBAL AHMAD C. J., GANGA NATH AND BRAUND JJ.

Messrs. Maheshwari Brothers, through Partners L. Chunni Lal Maheshwari and L. Pearey Lal — Appellant

v.

Official Liquidators, Indra Sugar Works Ltd. — Respondent.

Letters Patent Appeal No. 55 of 1938, Decided on 9th December 1941, against decision of Harries J., *Reported in ('38) 25 A.I.R. 1938 All. 574.*

(a) Companies Act (1913), S. 109 — Charge whether floating one—Tests — Agreement that amount paid to company will be second charge on machinery and other goods of company held created floating charge.

The principal tests as to whether a charge is a floating one or not are as follows: (1) Is it a charge upon all or a certain class of assets; present or future? (2) Would the assets charged in the ordinary course of business be charged from time to time? (3) Has the company creating the charge power until such step is taken by the chargees to carry on the business of the company in the ordinary way?: ('31) 18 A.I.R. 1931 P.C. 245, *Rel. on.* [P 120*a*, *b*]

An agreement between the parties that the amount paid to the company will be a second charge on the machinery and other goods of the company creates a floating charge, that is, a charge which would fasten on to the property that might exist when the time arrived for the charge to be enforced and would be void under S. 109 for non-registration. [P 120*b*]

(b) Company—Trust — Amount deposited by employee with company as security for discharge of his obligations — Whether trust is constituted—Test—Deposit of security held did not constitute trust.

A fair test of whether a sum of money deposited with a company by its employee as security for due discharge of his obligations is to be held as a trust fund or not is to see whether, in the circumstances, it was intended that it should remain a segregated fund, or whether it should on payment, become the property of the company and be compensated for by the company's express or implied covenant to repay it in exactly the same way as the customer's deposit in a bank creates the relationship of debtor and creditor. The circumstance that it passed into the general assets of the company and was utilised by them for their general purposes is a strong indication that the relationship of debtor and creditor was created and no trust was constituted as the first duty of a 'trustee' is to avoid mixing the trust funds with his own or to use them for other than trust purposes. [P 120*g*, *h*; P 121*a*]

The employee deposited in the general accounts of the company a certain amount as security for the due discharge of his obligations. It was agreed between the parties that the employee would get interest on this money and that the money would be a second charge on the machinery and other assets of the company:

Held that every case of the kind in question must be considered on its own facts and circumstances. The agreement clearly indicated that the parties to the transaction never intended that the security money should be treated as a segregated fund in trust for the employee or that it was not to be utilised by the company for any purpose: ('26) 13 A.I.R. 1926 All. 397; ('14) 1 A.I.R. 1914 Bom. 118 and ('32) 19 A.I.R. 1932 Bom. 311, *Rel. on*; ('38) 25 A.I.R. 1938 Mad. 651, *Disting.* [P 120*c*, *f*]

S. N. Sen, G. S. Pathak and M. B. Bhatnagar — for Appellant.

C. B. Agarwala — for Respondent.

Judgment. — This is an appeal against the order of the learned Company Judge. It arises out of an application made by the appellants under S. 183, Companies Act. The appellants were appointed managing agents by the Indra Sugar Works Ltd., under an agreement, dated 22nd December 1934. According to the agreement, the appellants deposited Rs. 50,000 with the company as security for the fulfilment of their obligations under the agreement. The company was ordered to be wound up by this Court on a petition of the appellants, and liquidators were appointed. The liquidators called on all creditors to establish their debts. The applicants claimed that the company were indebted to them to the extent of Rupees 50,437-8-0. They further claimed that in respect of this sum they were preferential creditors and held a charge on the machinery and other goods of the company. The Official Liquidators allowed the petitioners' claim for Rs. 52,694-8-0, but disallowed their claim that the sum of Rs. 50,000 which constituted the "security deposit" was held by the company as a trust fund and ought to be repaid in fact to the petitioners with interest in priority to the creditors. Against this order, the applicants made an application to this Court under Sec. 183, Companies Act. The learned Company Judge upheld the order of the Official Liquidators. It is against this order that the present appeal has been filed. It has been contended on behalf of the appellants that under cl. 14 of the agreement the amount of security money was a second charge on the machinery and other goods of the company. The agreement is not registered. It has been contended on behalf of the Official Liquidators that the charge is invalid for want of registration under S. 109 (1) (c). It is contended on behalf of the appellants that the machinery was not immovable property and therefore the charge was valid so far as the machinery was concerned. The following issue was remitted to the learned Company Judge for a finding:

Whether, and to what extent, the charge of the appellants on the machinery, though unregistered, is valid?

Advocate High Court
Jammu & Kashmir

The learned Company Judge's finding is "that the charge of the appellants on machinery is not valid at all." This finding has not been challenged before us. Clause 14 of the agreement "that the amount of security money will be the second charge on the machinery and other goods of the company" purported to create a charge, that is, a charge which would fasten on to the property that might exist when the time arrived for the charge to be enforced. In A.I.R. 1931 P.C. 245,[1] the principal tests as to whether a charge is a floating one or not were laid down by their Lordships of the Privy Council. They are :

(1) Is it a charge upon all or a certain class of assets. Present or future?

(2) Would the assets charged in the ordinary course of business be changed from time to time?

(3) Has the company power until such step is taken by the chargees to carry on the business of the company in the ordinary way?

If these tests are applied to the present charge, there can be no doubt that the charge was a floating one. This being so, the charge is void under S. 109 for non-registration. It was further contended for the appellants that the money deposited by the appellants with the company was trust money and, as such, was not part of the assets of the company and should be returned to them. It is not disputed that this money was deposited by the appellants themselves in the general accounts of the company. It was agreed between the parties that the appellants would get interest on this money and that the money would be a second charge on the machinery and other assets of the company. These circumstances clearly point to the intention of the parties at the time the money was deposited. They leave no room for doubt that the parties never intended that this money was to be kept aside in trust for the appellants or that it was not to be utilized by the company for any purpose.

A similar question arose in 24 A.L.J. 347.[2] There by an agreement entered into between Dr. Tug and the company the latter agreed to employ Dr. Tug's son. Dr. Tug and his son agreed to furnish security for Rs. 10,000, which money was to be repaid by the company on the expiry of the term of employment. It was further provided that, in case the company went into liquidation, Dr. Tug and his son would have the position of a preferential claimant. It was held there that the agreement in question did not create a trust or anything in the nature of a trust and that Dr. Tug was merely a creditor of the company, as the document contained no direction that the money handed over by him was to be kept aside in trust for him or was not to be utilized by the company for any purpose. The same view was taken by the Bomay High Court in 27 I. C. 343[3] and A. I. R. 1932 Bom. 311.[4] Learned counsel for the appellants relies on the case reported in A. I. R. 1938 Mad. 651.[5] This case is distinguishable inasmuch as there the money was placed in a fixed deposit account in the name of the employee, who deposited the money apart from the funds of the bank.

We think that every case of this kind will fall to be considered on its own facts and circumstances. In the one before us, we find two indications that it was not within the contemplation of the parties to the transaction that the sum of money in question should be treated as a segregated trust fund first, the provision contained in the agreement of 22nd December 1934 that its repayment should be secured by a charge on the company's assets and, secondly, the provision for the payment of interest by the company. The former, if not wholly inconsistent with the constitution of a trust fund, at least points to the view that the money was to be 'repaid' in the sense that it would constitute a 'debt' from the company to the petitioners. The latter provision also, in our view, points strongly in the same direction, as, if the fund had been a trust fund, the interest it earned would itself belong to the petitioners and no question of the payment of interest by the company would arise.

We think that a fair test of whether a sum of money of this kind is to be held as a trust fund or not is to ask whether, in the circumstances, it was intended that it should remain a segregated fund, or whether it should, on payment, become the property of the company and be compensated for by the company's express or implied covenant to repay it in exactly the same way as the customer's deposit in a bank creates the relationship of debtor and creditor. We think that the circumstance that it passed into the general assets of the company and was uti-

1. ('31) 18 A.I.R. 1931 P.C. 245 : 134 I.C. 651 : 59 Cal. 377 : 58 I. A. 323 (P. C.), Imperial Bank of India, Ltd. v. Bengal National Bank, Ltd.
2. ('26) 13 A. I. R. 1926 All. 397 : 93 I. C. 93 : 24 A.L.J. 347, In re Annapurna Co., Ltd.
3. ('14) 1 A.I.R. 1914 Bom. 118 : 27 I. C. 343 : 16 Bom.L.R. 733, G.K. Malvankar v. Credit Bank of India Ltd.
4. ('32) 19 A.I.R. 1932 Bom. 311: 140 I.C. 814: 34 Bom.L.R. 728, In re Manekji Petit Manufacturing Co., Ltd.
5. ('38) 25 A. I. R. 1938 Mad. 651 : 178 I. C. 428, In the matter of Hindustan Commercial Bank (India) Ltd.

lized by them for their general purposes is a strong indication that the latter view is the correct one, as the first duty of a 'trustee' is to avoid mixing the trust funds with his own or to use them for other than trust purposes. For these reasons, therefore, we find that the money deposited by the appellants was not trust money and the appellants have no preferential claim. There is no force in the appeal. It is therefore ordered that it be dismissed with costs.

G.N./R.K. *Appeal dismissed.*

T. P. Act —
(a) ('36) Mulla, Page 547 Pt. (o).

A. I. R. (29) 1942 Allahabad 121

GANGA NATH J.

Hafiz Nurul Hasan — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 686 of 1941, Decided on 5th November 1941, from order of Sess. Judge, Moradabad, D/- 26th April 1941.

Defence of India Act (1939), S. 2, Rules under, Rr. 38 (5), 121 and 34 (6) (k) and (p) — Communication of intention to shout anti-war slogan in letter to District Magistrate is no offence under Defence of India Rules.

The commission of an offence ordinarily involves four stages namely, intention, preparation, attempt and the final act constituting the offence. Intention per se is not ordinarily punishable at all. Preparation which consists in devising or arranging the means or measure for the commission of an offence is punishable in rare cases, as for example, S. 399, I. P. C. The communication of intention by letter to the District Magistrate to shout an anti-war slogan which undoubtedly is a prejudicial act within the meaning of the Act does not amount to preparation to commit an offence and does not constitute any offence under the Defence of India Rules. Consequently the arrest of the person on receipt of such a letter before he has shouted the slogan is illegal.

[P 121*e*,*f*,*g*,*h*]

M. A. Kazmi and Z. H. Lari — for Applicant.

Deputy Government Advocate — for the Crown.

Order.—This is an application in revision by Hafiz Nurul Hasan against his conviction and sentence under Rule 38 cl. (5) read with Rr. 121 and 34 (6) (k) and (p), Defence of India Rules. The applicant sent a letter on 3rd March 1941, to the learned District Magistrate, Moradabad, intimating to him that he would shout a certain slogan on 4th March 1941, at Sikandarpur at 11 A.M. Before he could do so, the applicant was arrested and prosecuted under the Defence of India Rules. He was convicted and sentenced to 18 months' rigorous imprisonment and a fine of Rs. 200. On appeal the learned Sessions Judge upheld the conviction and the sentence of imprisonment but reduced the sentence of fine to that of Rs. 50. As already stated, the applicant sent a letter Ex. P-1 to the learned District Magistrate informing him of his intention to shout the slogan which was also mentioned in the letter. It has been urged on behalf of the prosecution that the sending of this letter amounted to an act preparatory to a contravention of the provisions of the Defence of India Rules and so the applicant was rightly convicted under R. 121 read with Rr. 38 (5) and 34 (6) (K) and (P). There can be no doubt that the shouting of the slogan contained in the letter would have amounted to the commission of a prejudicial act and if this slogan had been shouted the applicant would have been rightly convicted under R. 38 (5) read with R. 121 and R. 34 (6) (K) and (P). The applicant was not allowed to shout the slogan but he was arrested before he could do so. The charge against him is that he sent a letter to the learned District Magistrate intimating to him his intention of shouting an anti-war slogan. An intention is not to be confused with preparation.

There are four stages ordinarily in the commission of an offence, namely, intention, preparation, attempt and the final act constituting the offence. Intention per se is not ordinarily punishable at all. Preparation is punishable in rare cases, as for example, S. 399, I. P. C. Attempt is punishable in a large majority of cases while the final act constituting the offence is always punishable. Preparation consists in devising or arranging the means or measure for the commission of an offence. In the present case, the communication of the letter to the learned District Magistrate does not come under preparation because the sending of the letter did not in any way devise or arrange any means or measure for the commission of the offence, that is, the shouting of the slogan. The applicant simply intimated his intention which he might have given up at any time before he could actually commit the offence. The applicant has, therefore, not committed any offence under the Defence of India Rules. It is, therefore, ordered that the application be allowed and the conviction and the sentence be set aside. The applicant will be released forthwith unless his detention is required in connexion with any other matter in accordance with law. The fine, if paid, will be refunded.

G.N./R.K. *Application allowed.*

A. I. R. (29) 1942 Allahabad 122

COLLISTER AND BAJPAI JJ.

Mohammad Khalil Khan and another — *Plaintiffs* — *Appellants*

v.

Mahboob Ali Mian and others — *Defendants* — *Respondents.*

First Appeals Nos. 134 and 99 of 1939, Decided on 28th October 1941, from decision of Civil Judge, Shahjahanpur, D/- 14th January 1939.

(a) Civil P. C. (1908), O. 2, R. 2 — Cause of action—Meaning of—Fact of some of plaintiffs and defendants not being parties to subsequent suit does not necessarily render it so different from first as to make O. 2, R. 2 inapplicable— Second suit held barred by O. 2, R. 2.

The expression "cause of action" means every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court, but it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. In the restricted sense, the expression means the circumstances forming the infringement of the right or the immediate occasion for the action. In its wider sense it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right but the infraction coupled with the right itself, in other words, in its wider sense it means the whole bundle of material and essential facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. If the several items which make up the claim are of the same nature and form part of the same course of dealing so as to pass under the same description and form part of one transaction, they must be considered as one cause of action and must be joined in one suit : *English and Indian case law reviewed.* [P 124*g*,*h*;P125*a*,*b*]

Where the title of the plaintiff is the same and the trespasser-defendant is the same defendant in both suits, the question whether the second suit is barred by the first, under O. 2, R. 2 depends upon whether the two trespasses took place in or about the same time and as part of the same transaction so that the two trespasses might be considered as a single transaction forming one and the same cause of action. If both trespasses had taken place before the first suit had been brought, O. 2, R. 2 might be a bar to the second suit : ('15) 2 A.I.R. 1915 Mad. 732, *Rel. on.* [P 125*e*]

The fact that some of the plaintiffs or defendants to the former suit are not parties to the subsequent suit does not necessarily render the second suit so different as to make O. 2, R. 2 inapplicable. [P126*b*,*c*]

On the death of *R* in 1927, various persons including the plaintiffs and the defendants tried to set up their claims to the properties left by her. All the parties were aware of the definite dispute arising on the death of *R*. The properties left by *R* consisted roughly of two sets, X the Oudh properties and Y the Shahjahanpur properties. The plaintiffs and defendants both applied for mutation of names in respect of the Y properties and though the names of the plaintiffs were mutated by the pargana officer on 12th May 1928 that order was reversed by the Collector on 20th June 1928 and the Collector's order was confirmed by the Commissioner on 29th October 1929 upto which date the plaintiffs continued in possession but thereafter the defendants' name was entered in the revenue papers and they entered into possession. On 14th September 1928 the plaintiffs instituted a suit in the Oudh Chief Court against the defendants and certain others for declaration of their title to the property X left by *R* and for possession and mesne profits. The plaintiffs laid no claim in respect of the properties Y. Subsequently in 1938 the plaintiffs as heirs of *R* brought a suit against the defendants for declaration of their title to the property Y and for possession and mesne profits :

Held that the trespasses on title or slander of title in the case so far as the Oudh suit was concerned was not distinct and different either in point of time or in point of character from the trespass on possession in the case of the property Y. The two trespasses were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs to prove, if they wanted the judgment in their favour, was the same and the bundle of essential facts was also the same. The second suit in respect of the properties *Y* was barred by the provisions of O. 2, R. 2 : 8 Mad. 520 (P.C.); 34 All. 172 and ('15) 2 A.I.R. 1915 Mad. 888, *Disting.* [P 125*f*;P 126*d*,*e*]

(b) Estoppel — Plaintiff pleading estoppel against defendant by reason of defendant's attitude in previous suit between parties—Mode of proving estoppel stated.

Where a plaintiff wants to show that the defendants are estopped from raising a certain plea by reason of their attitude in a previous suit between the parties, he should not be permitted to do so by merely producing a copy of the judgment in the earlier suit which might contain the summary of the pleadings in that suit, but the plaintiff must produce the written statement filed by the defendants in that suit in order to give the Court, where the plea of estoppel is raised, a full and clear idea of the attitude adopted by the defendants. [P 127*d*]

(c) Estoppel — Deed — Party suggesting one construction and succeeding — He cannot be allowed to win subsequent suit on diametrically opposite construction of same deed.

There would be monstrous injustice if a party, having suggested one construction of a deed in a previous suit and succeeded on that footing were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed; it would be playing fast and loose with justice if the Court allowed that, but the Court seized of the subsequent case must be in a position to know with certainty what the plea in the earlier suit was : (1885) 30 Ch.D. 57, *Rel. on.* [P 127*f*]

(d) Civil P. C. (1908), O. 1, R. 1—Plaintiffs—Interests of, in suit property.

It is not the law that every plaintiff should be interested in the entire subject-matter of the suit. [P 126*b*]

P. L. Banerji and Govind Das—for Appellants.

L. N. Gupta, S. P. Kumar and Mushtaq Ahmad — for Respondents.

Bajpai J.—This is an appeal by the plaintiffs, Mohammad Khalil Khan and Fida Ali Khan, (and after the latter's death by his legal representatives), whose suit for declaration and possession of certain zamindari property (which we shall, for the sake

of convenience, call the Shahjahanpur property) and for mesne profits was dismissed by the Court below on the legal plea that the suit was barred by O. 2, R. 2, Civil P. C., although the findings on the other issues and the merits of the case were entirely in favour of the plaintiffs. The defendants to the suit were Mahbub Ali Mian, Mahmud Ali Mian, Mahzuz Ali Mian and Mahfuz Ali Mian, sons of Khurshed Ali Khan, Mt. Saliha Begam, wife of Mahzuz Ali Mian, Mt. Badrunnisa Begam, wife of Mahbub Ali Mian, Mt. Nayab Begam, wife of Mahmud Ali Mian and Mt. Amir Begam, wife of Mahfuz Ali Mian. The four latter defendants are wives of the first four defendants and for convenience sake we shall describe the defendants as Mahbub brothers, omitting their wives who have been impleaded because a portion of the plaint property has been transferred by the husbands to their wives. It was contended on behalf of the defendants that as in an earlier suit (Suit No. 8 of 1928) filed in the Chief Court of Oudh by the present plaintiffs and one Buniyad Husain relief respecting the Shahjahanpur properties was omitted, they could not sue for the relief so omitted in the present suit, and this contention has been accepted by the Court below.

The question that we have got to decide is whether the plaintiffs' suit is barred by O. 2, R. 2, Civil P. C., and in this connexion we have also got to decide the plea taken by the plaintiffs that the defendants cannot be permitted to advance the plea of the bar of O. 2, R. 2, Civil P. C. The allegations of the plaintiffs in the present suit were as follows: Rani Barkatunnisa Begam, Talukdar, was the owner in possession of the property in district Shahjahanpur (detailed at the foot of the plaint) and of taluka Saadatnagar in district Sitapur and of taluka Deoria in district Hardoi. She belonged to the Sunni faith and died on 13th April 1927 leaving the plaintiffs as her heirs under the Hanafi school of the Mahommedan law. Defendants 1 to 4 who were the sons of the sister of Rani Barkatunnisa were not her heirs nor did any right of ownership devolve on them in respect of the properties left by Rani Barkatunnisa. The plaintiffs applied for mutation of names in the revenue Courts and although their names were mutated against the plaint property by the Court of the Pargana Officer on 12th May 1928, the order was reversed by the Collector on 20th June 1928 and the Collector's order was confirmed by the Commissioner on 29th October 1928, but the plaintiffs remained in possession in spite of the Collector's order up till 29th October 1928 when the final order was passed by the Commissioner.

There was litigation regarding the talukas of Saadatnagar in the district of Sitapur and Deoria in the district of Hardoi (we shall call this property as the Oudh property) between the present parties and certain others and the Oudh property was attached under S. 145, Criminal P. C., and was placed under the supervision of a receiver, and ultimately the Oudh properties were mutated in the name of Mt. Abadi Begam, the daughter of Raja Shamsher Bahadur the husband of Rani Barkatunnisa Begam, under the final order of the Commissioner of Lucknow dated 28th March 1928. The property was released from the possession of the receiver in favour of Mt. Abadi Begam and she and Mirza Mushtaq Ahmad, nephew of Abadi Begam, entered in possession of the same. At this stage Abdul Latif Khan, who is the daughter's son of Shamsher Bahadur, laid a claim to the Oudh property and, having sold half his interest to Mahbub brothers on 3rd April 1928, instituted suit No. 5 of 1928 along with Mahbub brothers on 12th May 1928 in the Chief Court of Oudh. The defendants to that suit were Mt. Abadi Begam, Mushtaq Ahmad and the present plaintiffs and one Ahmad Mirza. Suit No. 8 of 1928 was instituted in the Chief Court of Oudh on 14th September 1928 by the present plaintiffs, but they had sold a portion of their interest to one Buniyad Husain and he was plaintiff 3 in the litigation. The defendants to that suit were (1) Mt. Abadi Begam, (2) Mirza Mustaq Ahmad, (3) Abdul Latif, (4-7) Mahbub brothers and (8) one Moulvi Ghulam Jilani. That suit was for recovery of possession over the moveable and immovable properties in the districts of Sitapur and Hardoi. The Chief Court of Oudh dismissed suit No. 5 of 1928 and decreed suit No. 8 of 1928 holding the plaintiffs to be the heirs of Rani Barkatunnisa and this decision was upheld by their Lordships of the Privy Council. The Shahjahanpur property could not be included in Suit No. 8 of 1928 for a variety of reasons. The cause of action for the present suit was alleged to accrue on 29th October 1928 when the Commissioner passed the final mutation order and on 1st January 1938 when the defendants finally refused at Shahjahanpur to give possession to the plaintiffs.

At the present moment it is not necessary to notice the pleas taken in defence except-

ing the one which we have mentioned in the very beginning, namely, that the present suit was barred by O. 2, R. 2, Civil P. C. The Court below, as we said before, has held that the merits lay with the plaintiffs, but that their suit was barred by O. 2, Rule 2, Civil P. C., and therefore the plaintiffs' suit was dismissed and they have filed the present first appeal. Before we proceed to a discussion of this plea of O. 2, R. 2, Civil P. C., it is necessary to indicate the reliefs which were sought by the present plaintiffs in the earlier Suit No. 8 of 1928. They were:

(a) It be declared that plaintiffs 1 to 3 are the owners of the properties detailed in Schedules 'A' to 'D' attached to this plaint. (This relief was obviously claimed against all the defendants including Mahbub brothers.)

(b) A decree for the recovery of possession be passed in favour of the plaintiffs in respect of the villages specified in Sch. 'A' attached to the plaint against defendant 1 in favour of plaintiffs 1 to 3.

(c) A decree for recovery of possession of houses detailed in Sch. 'B' attached to the plaint be passed against defendants 1 and 2 or either of them in favour of plaintiffs 1 to 3.

(d) A decree for the recovery of moveables, detailed in Sch. 'C' attached to the plaint be passed in favour of plaintiffs 1 and 2 against defendants 1, 2 and 4 to 7 (defendants 4 to 7 are Mahbub brothers).

(e) A decree for the recovery of cash and corn detailed in Sch. 'D' attached to the plaint be passed against defendants 1, 2 and 4 to 7 in favour of plaintiffs 1 and 2.

(f) A decree for Rs. 12,638-8-6 be passed in favour of the plaintiffs against defendant 1. (This was the money which Abadi Begam realised from the receiver who was in possession when the property was attached by the Oudh Criminal Courts.)

(g) A decree for mesne profits amounting approximately to one lac of rupees be passed against defendant 1 in favour of plaintiffs 1 to 3.

(h) Costs of the suit may be awarded to plaintiff 3 against the defendants. (Plaintiff 3 was the financier, Buniyad Husain.)

(i) Such further relief be granted to the plaintiffs as the Court may under the circumstances of the case deem fit.

This suit was instituted on 14th September 1928, and it is argued on behalf of the defendants to the present suit, that on that date the plaintiffs were entitled to make a claim for the Shahjahanpur property also in respect of the cause of action according to O. 2, R. 2 (1), Civil P. C., and as they omitted to sue in respect of the Shahjahanpur property, they cannot be afterwards permitted to sue in respect of the property so omitted under O. 2, R. 2 (2), Civil P. C., and that they were further entitled to relief regarding the Shahjahanpur property in respect of the same cause of action and as they omitted without the leave of the Court to sue for a relief in respect of the Shahjahanpur property they cannot be permitted to sue for that relief under O. 2, R. 2 (3), Civil P. C. We are satisfied that the determining factor in this case is the situation at the date when Suit No. 8 of 1928 was filed in the Chief Court on 14th September 1928. Rani Barkatunnisa had died on 13th April 1927 and she was the owner of the Oudh property and the Shahjahanpur property and four sets of claimants had undoubtedly appeared on the scene by 14th September 1928. One set consisted of the plaintiffs, financed by Buniyad Husain, another set consisted of Mahbub brothers, financed by Abdul Latif, the third claimant was Abdul Latif himself and the fourth set may be described as Abadi Begam and Mushtaq Ahmad. The present plaintiffs and Mahbub brothers had applied for mutation of names in the revenue Courts at Shahjahanpur and they had also applied for mutation in the revenue Courts at Oudh. In Oudh Abadi Begam had also applied for mutation. Suit No. 5 of 1928 had been instituted by Abdul Latif and Mahbub brothers on 12th May 1928. There was thus a definite dispute and all the parties were aware of that definite dispute. Bearing these points in view we wish to discuss, what has been discussed so often, the meaning of the expression "cause of action" which has not been defined in any enactment, but its description as given in some English cases has been consistently adopted by the High Courts in India. Lord Esher M. R. in (1889) 22 Q.B.D. 128[1] quoted with approval the definition of that expression given in the earlier case in *Cook* v. *Gill*[2] as,

> every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, but it does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

The words "cause of action" are sometimes used in a restricted sense and sometimes in a wider sense. In the restricted sense it means the circumstances forming the infringement of the right or the immediate occasion for the action. In its wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with the right itself. This Court in the Full Bench case in 16 ALL. 165[3] interpreted the expression in its wider sense—in other words it means the whole bundle of material and essential facts which it is necessary for the

1. (1889) 22 Q.B.D. 128 : 60 L.T. 250: 58 L.J.Q.B. 120 : 37 W.R. 131, Read v. Brown.
2. (1873) 8 C.P. 107 : 42 L.J.C.P. 98 : 28 L.T. 32: 21 W. R. 334.
3. ('94) 16 All. 165 : 1894 A.W.N. 65 (FB), Murti v. Bhola Ram.

plaintiff to prove in order to entitle him to succeed in the suit. In 16 Cal. 98,[4] Lord Watson delivering the judgment of the Board observed as follows :

> Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the 'cause of action,' or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

In 12 Cal. 339,[5] Garth C. J. laid down as follows :

> The real principle .... which runs through all cases is that, if the several items which make up the claim are of the same nature and form part of the same course of dealing so as to pass under the same description and form part of one transaction, they must be considered as one cause of action and must be joined in one suit. ....
>
> But claims which are diverse in character, which do not answer the same description, and which would require a different class of evidence to support them, may be made the subject of different suits. ....

In 11 M.I.A. 551[6] at p. 605, their Lordships of the Privy Council observed :

> The correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. ....

Mr. P. L. Banerji on behalf of the plaintiffs contends that the cause of action for the Oudh suit, so far as the present defendants are concerned, was a denial of the plaintiffs' title, whereas the cause of action in the present suit was the wrongful possession of the defendants and, as such, the two causes of action were different. Mr. Mushtaq Ahmad on behalf of the respondents, however, contends that the mere fact that in the Oudh case the present defendants had not obtained possession but were attempting to obtain possession and were denying the present plaintiffs' title does not make the cause of action in the Oudh case distinct from the cause of action in the present suit. The dispute between the rival claimants started because all of them were laying a claim to the property left by Rani Barkatunnisa and each claimant was denying the right of the other party and it is a matter of no consequence that the present defendants in the Oudh case had not obtained possession of the Oudh properties when Suit No. 8 of 1928 was filed but had obtained possession of the Shahjahanpur property. The possession of the Shahjahanpur property was obtained out of the same course of dealing and formed part of the same transaction as the denial of the plaintiffs' rights regarding the Oudh property. In A. I. R. 1915 Mad. 732[7] their Lordships said :

> Where the title of the plaintiff is the same and the trespasser-defendant is the same defendant in both suits, the question whether the second suit is barred by the first, under O. 2, R. 2, depends upon the answer to the following question, namely: 'Did the two trespasses take place in or about the same time and as part of the same transaction so that the two trespasses might be considered (taking a commonsense view of the facts) as a single transaction forming one and the same cause of action?' If both trespasses had taken place before the first suit had been brought O. 2, R. 2 might be a bar to the second suit.

In the case before us, the trespasses on title or slander of title in the case so far as the Oudh suit was concerned was not distinct and different either in point of time or in point of character from the trespass on possession in the case of the Shahajahanpur property and the present plaintiffs therefore ought to have included the claim regarding the Shahajahanpur property in the earlier suit. In A. I. R. 1937 Rang. 324[8] at p. 329 Braund J. had emphasised the fact that there are three things in O. 2, R. 2, Civil P. C., which have got to be considered : first the 'cause of action,' secondly the 'claim which the plaintiff is entitled to make in respect of the cause of action' and thirdly the 'relief in respect of the cause of action.' He says that the claim which the plaintiff does make in the former suit cannot be material because what the rule makes the deciding factor is the claim which the plaintiff is entitled to make. The cause of action in the Oudh suit and in the present suit consisted of the facts that Rani Barkatunnisa was the owner of the disputed properties, that she died on 13th April 1927 that she was Sunni by faith (the defendants alleging in both cases that she was a Shia by faith), that the plaintiffs were the heirs of Rani Barkatunnisa and entitled to inherit, that in the Oudh case the defendants had denied the title of the plaintiffs and, in the other case, the defendants in pursuance of the denial of title had obtained possession of the property. Mutation of names had already been obtained by the defendants over the Shahjahanpur property by reason of the order of the Collector dated 20th June 1923

4. ('89) 16 Cal. 98 : 15 I.A. 156 : 5 Sar 243 (P.C.), Chand Kour v. Partab Singh.
5. ('86) 12 Cal 339, Anderson Wright & Co. v. Kalagarla Surjinarain.
6. ('66-67) 11 M.I.A. 551 : 8 W.R. 3 : 2 Suther 59 : 2 Sar 259 (P.C.), Moonshee Buzloor Ruheem v. Shumsoonnissa Begam.
7. ('15) 2 A. I. R. 1915 Mad. 732 : 25 I. C. 579, Jagathamba Ammal v. Ramaswami Iyengar.
8. ('37) 24 A. I. R. 1937 Rang. 324 : 170 I. C. 946, Ma Pwa Shin v. U Po Sin.

when the Oudh suit was filed on 14th September 1928 and the plaintiffs were entitled to make a claim in respect of the Shahjahnapur property when they filed Suit No. 8 of 1928 in the Oudh Chief Court. The plaintiffs themselves realised this and attempted to get an amendment of the plaint from the Chief Court, but they were opposed by the defendants and their application was dismissed. This also shows that the cause of action for the Oudh properties and the Shahjahanpur properties was the same. It is true that Buniyad Husain, who was a plaintiff in the Oudh suit, was not a plaintiff and could not be a plaintiff in the Shahjahanpur suit, but it is not the law that every plaintiff should be interested in the entire subject-matter of the suit. Under O. 1, R. 1, Civil P. C.

> all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

It is also true that all the defendants in the earlier suit are not defendants in the present suit, but Mahbub brothers, who were the principal defendants in the present suit, were also defendants in the Oudh suit and a relief was claimed against Mahbub brothers in the Oudh suit in respect of several items of property covered by the Oudh suit. It is not possible, therefore, to say that the plaintiffs of the former suit or the defendants of the former suit were so different that O. 2, R. 2, Civil P. C., cannot come into play. The mere fact that the properties were different is immaterial. In the majority of cases where O. 2, R. 2, Civil P. C., bars the subsequent suit the property in the subsequent suit would be different from the property in the earlier suit. Great reliance has been placed by learned counsel for the appellants on the case in 8 Mad. 520,[9] but in that case their Lordships held :

> The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the defendants having improperly turned the plaintiffs out of possession (of certain zamindari property). It was a distinct cause of action altogether, and did not arise at all out of the other.

Here in the present case we find that the two trespasses, one on the Shahjahanpur property and the other on the Oudh property, were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs to prove, if they wanted the judgment in their favour, was the same and the bundle of essential facts was also the same. It is then said that it has been held in several cases, 9 A.L.J. 111[10] and 38 Mad. 247,[11] that if a plaintiff at first sues only for a declaratory relief and his suit is dismissed on the ground that he is not in possession, a subsequent suit by him for possession is not barred by O. 2, R. 2, Civil P. C., and on the analogy of those decisions it is argued that the present suit for possession at Shahjahanpur is not barred by reason of the earlier suit at Oudh because the earlier suit was only for declaration. The analogy is not perfect nor even applicable. In the cases on which reliance is placed the plaintiff, after having alleged that he was in possession, could not with that allegation sue for possession and, when that allegation failed, the Courts have held that O. 2, R. 2, Civil P. C., does not bar the subsequent suit.

Another argument advanced on behalf of the plaintiffs was that by the time Suit No. 8 of 1928 was instituted on 14th September 1928 in the Oudh Chief Court, Mahbub brothers had given up their personal rights in the property of Rani Barkatunnisa and were only setting up their rights which they had obtained from Abdul Latif under a sale deed dated 3rd April 1928 and that this is clear from the claim made in Suit No. 5 of 1928 instituted on 12th May 1928; but it is clear from the judgment of Nanavutty J. in the two suits (Suit No. 5 of 1928 and Suit No. 8 of 1928, which were consolidated) that Mahbub brothers in Suit No. 5 of 1928 were not only seeking shelter under the title of Abdul Latif but were also setting up their personal rights on the ground of inheritance. There had been no relinquishment of claim on the ground of heirship by Mahbub brothers till Suit No. 8 of 1928 was instituted on 14th September 1928. For the reasons given above we are of the opinion that the plaintiffs' suit would be barred by O. 2, R. 2, Civil P. C., unless we hold that the defendants should not be permitted to raise this plea on any ground of justice or equity, and now we wish to discuss this aspect of the case. As we have already said, Suit No. 8 of 1928 was filed in the Chief Court of Oudh, but the property involved in it was Oudh property.

9. ('85) 8 Mad. 520 : 12 I.A. 116:4 Sar. 638 (P.C.), Pittapur Raja v. Suriya Row.

10. ('12) 34 All. 172 : 13 I.C. 154 : 9 A.L.J. 111, Bande Ali v. Gokul Misir.

11. ('15) 2 A. I. R. 1915 Mad. 888 : 20 I. C. 418 : 38 Mad. 247 : 25 M. L. J. 125, Siliman Saib v. Bontala Hamam Sahib.

An attempt was made by the plaintiffs to get their plaint amended by the inclusion of the Shahjahanpur property as well and it was sought to add a few paragraphs to the plaint. One of these paragraphs was :

> That the deceased Rani Barkatunnisa also left properties situate in District Shahjahanpur detailed in Sch. E attached to and forming part of this plaint which have been wrongly ordered to be mutated by the revenue Courts in favour of defendants 4 to 7.

The other paragraph was :

> Plaintiffs 1 and 2 are alone entitled to the same together with mesne profits amounting to Rs. 20,000,

and it was prayed :

> A decree for properties detailed in Sch. E together with mesne profits be passed in favour of plaintiffs 1 and 2 against defendants 4 to 7.

This application for amendment was made on 18th February 1929. The application was heard by Nanavutty J. on 20th February 1929 and on 21st February 1929 the application was dismissed. Learned counsel for defendants 4 to 7 contested the application, but no written objection seems to have been filed. It is, therefore, very difficult to say what exactly the nature of the objection was, but it is argued on behalf of the plaintiffs that there cannot be the slightest doubt that Mahbub brothers were the objectors and they were instrumental in getting the application rejected. Nanavutty J. rejected the application on four grounds—(1) that it was a belated application, (2) that it would be convenient to everybody concerned including the Court if the Shahjahanpur dispute was tried out in the Shahjahanpur Courts, (3) that the causes of action for the two properties were different, (4) that if the amendment were granted, the Oudh suit would involve multifariousness. In the absence of written objections by Mahbub brothers, we are left to infer from the judgment of Nanavutty J. what the nature of the objections was. Ordinarily, where a plaintiff wants to show that the defendants are estopped from raising a certain plea by reason of their attitude in a previous suit between the parties, he should not be permitted to do so by merely producing a copy of the judgment in the earlier suit which might contain the summary of the pleadings in that suit, but the plaintiff must produce the written statement filed by the defendants in that suit in order to give the Court, where the plea of estoppel is raised, a full and clear idea of the attitude adopted by the defendants. We may take it that no regular written objections were filed by Mahbub brothers in the Oudh suit, but it would be dangerous to come to the conclusion definitely that it was argued on behalf of Mahbub brothers that the second suit, if filed at Shahjahanpur, would be on a different cause of action or that the suit at Oudh would involve multifariousness if the amendment were granted. All that we can safely infer is that the application for amendment was opposed on the ground that it was a belated application ; and we shall not be far wrong if we infer that it was contended by Mahbub brothers that, when the suit in respect of the Shahjahanpur property was filed by Khalil Khan and Fida Ali Khan, it would be open to Mahbub Ali and his three brothers to take any plea under O. 2, R. 2, Civil P. C. This is the very opposite of saying that the suit, when filed at Shahjahanpur, will not be barred by O. 2, Rule 2, Civil P. C. As was held in (1885) 30 Ch. D. 57[12] and followed in Indian Courts,

> there would be monstrous injustice if a party, having suggested one construction of a deed in a previous suit and succeeded on that footing were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed; it would be playing fast and loose with justice if the Court allowed that,

but the Court seized of the subsequent case must be in a position to know with certainty what the plea in the earlier suit was. It is not permissible for a party to approbate and reprobate or to blow hot and cold, but we are of the opinion that in the present case the materials are not sufficient to enable us to hold that the defendants are estopped from raising the plea of O. 2, R. 2, Civil P. C. It was also argued in a half-hearted manner that the findings of Nanavutty J. on the application for amendment operated as res judicata in the present suit, but it is clear that the learned Judge gave liberty, if liberty was required to Mahbub brothers to plead O. 2, R. 2, Civil P. C., if a suit at Shahjahanpur were filed. The mere fact that the learned Judge held that the Oudh suit would involve multifariousness if the amendment was granted or that the causes of action for the two properties were different does not show that those findings were obtained by reason of the position taken up by Mahbub brothers. A perusal of the application for amendment shows that it was the case of the plaintiffs themselves that the title to the properties was different and that the causes of action for the properties were also different, and the former Court itself might have suo motu considered the question of multifariousness. We do not think that we shall be

12. (1885) 30 Ch. D. 57 : 54 L. J. Ch. 1154 : 53 L. T. 306 : 33 W. R. 803, Gandy v. Gandy.

justified in shutting out the defendants from raising the plea of O. 2, R. 2, Civil P. C., and since we have held that the plaintiffs' suit is barred by O. 2, R. 2, Civil P. C., we have no option but to decide the appeal against the plaintiffs. We accordingly dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

C. P. C. —
(a) ('40) Chitaley, S. 20 N. 14 Pts. 4 to 7 ; O. 2 R. 2 N. 7 Pt. 6.
('41) Mulla, P. 118 Pts. (o) to (r).
(d) ('40) Chitaley, O. 1 R. 1 N. 3.
('41) Mulla, P. 494 : Plaintiffs having different interests.

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IQBAL AHMAD C. J. AND DAR J.

Surendra Bahadur Singh — Defendant — Appellant

v.

Rajendra Bahadur Singh and others — Plaintiffs — Respondents.

Second Appeal No. 1527 of 1939, Decided on 1st December 1941, from decision of Civil Judge, Etawah, D/- 27th October 1939.

(a) Agra Pre-emption Act (11 of 1922), S. 20— "Indefeasible interest."

A person who has purchased a property at an auction sale in execution of a decree acquires an indefeasible interest in the property within the meaning of S. 20 only when the sale is confirmed. [P 129*a*]

(b) Agra Pre-emption Act (11 of 1922), S. 19— Date of trial Court's original decree is cardinal date for determination of right of pre-emption and not that of decree it has passed subsequently on remand by appellate Court.

The decree referred to in S. 19 is the decree originally passed by the trial Court in favour of the plaintiff and not the decree that may, in consequence of an order of remand by an appellate Court, have to be again passed by the trial Court in favour of the plaintiff. Once a decree in favour of the pre-emptor is passed by the trial Court, the subsequent loss of right of pre-emption by the plaintiff has no effect on his claim. The cardinal date for the determination of the rights of the parties is the date on which the trial Court originally passed the decree in the plaintiff's favour. [P 129*c*,*d*]

M. L. Chaturvedi — for Appellant.
Gopalji Mehrotra — for Respondents.

Iqbal Ahmad C. J. — This is a vendee's appeal arising out of a pre-emption suit. The sale sought to be pre-empted was effected by means of a registered instrument on 23rd June 1934. The suit for pre-emption giving rise to the present appeal was filed on 1st June 1935. The vendee appellant contested the suit. On the date fixed for the final hearing of the suit the vendee applied for adjournment but his application was refused and the trial Court then proceeded to record the plaintiff's evidence. The vendee's witnesses were not present with the result that the vendee could not produce the evidence that he wanted to produce. The trial Court decreed the suit on 15th January 1936. The vendee filed an appeal in the lower appellate Court. The lower appellate Court allowed the appeal and remanded the suit to the trial Court on 22nd February 1938 with the direction to record the evidence of the vendee's witnesses and then to decide the case. After the remand the trial Court again passed a decree in the plaintiff's favour on 11th July 1938 and this decree of the trial Court was affirmed by the lower appellate Court on 27th October 1939. The present second appeal is against the last mentioned decision of the lower appellate Court.

It appears that the vendee had, prior to the sale sought to be pre-empted, purchased a share in the mahal in which the pre-empted share is situated at an auction sale on 22nd August 1933. The confirmation of the sale was unduly delayed and it was eventually confirmed on 20th October 1936. After the remand by the lower appellate Court, the vendee contested the suit on the ground that as he had become a cosharer in the mahal by virtue of the auction purchase made by him the plaintiff was not entitled to a decree. This contention of the vendee was based on S. 65, Civil P. C., which runs as follows :

> Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

It was urged on behalf of the vendee that in view of S. 65 he must be deemed to have become a cosharer in the mahal on 22nd August 1933, that is, prior to the sale sought to be pre-empted by the plaintiff, and as such the suit for pre-emption was not maintainable. In the alternative it was contended on behalf of the vendee that even if his title to the property purchased by him at the auction sale be deemed to have accrued on 20th October 1936—the date of confirmation of sale—the plaintiff was not entitled to a decree inasmuch as the trial Court had not after the remand passed a decree in the plaintiff's favour till that date. Both these contentions of the vendee were overruled by the trial Court and by the lower appellate Court and, in our judgment, rightly. As already stated, the suit giving rise to the present appeal was filed on 1st June 1935, and the auction purchase made by the vendee had not been confirmed till that date. The

vendee had therefore not acquired an indefeasible interest in the mahal on the date of the institution of the suit. He could not therefore take advantage of the provisions of S. 20, Agra Pre-emption Act, which inter alia provides that

> no suit for pre-emption shall lie where, prior to the institution of such suit, the purchaser has. . . . . acquired an indefeasible interest in the mahal which, if existing at the date of the sale or foreclosure, would have barred the suit.

The rights of the parties were governed by S. 19 of the Act which runs as follows :

> No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre-emption at the time of the decree, but where a decree for pre-emption has been passed in favour of a plaintiff, whether by a Court of first instance or of appeal, the right of such plaintiff shall not be affected by any transfer or loss of his interest accruing after the date of such decree.

Now the original decree by the trial Court in favour of the plaintiff was passed on 15th January 1936. Till that date, the auction purchase made by the vendee had not been confirmed and, therefore, it could not be said on 15th January 1936, that the vendee had become a cosharer in the mahal. The auction purchase was no doubt confirmed subsequently, but the rights of the parties had to be determined with reference to the date on which the trial Court passed a decree in the plaintiff's favour and that date was, as already stated, 15th January 1936. As on that date the vendee had not acquired an indefeasible interest in the mahal the plaintiff was undoubtedly entitled to a decree. The mere fact that the decree of the trial Court dated 15th January 1936 was set aside by the lower appellate Court and the case was remanded to the trial Court did not, in our judgment, destroy the plaintiff's right of pre-emption. The decree referred to in S. 19 is the decree originally passed by the trial Court in favour of the plaintiff and not the decree that may, in consequence of an order of remand by an appellate Court, have to be again passed by the trial Court in favour of the plaintiff. It is clear from S. 19 that once a decree in favour of the pre-emptor is passed by the trial Court the subsequent loss of right of pre-emption by the plaintiff has no effect on his claim. The cardinal date for the determination of the rights of the parties was the date on which the trial Court originally passed the decree in the plaintiff's favour, and that date was 15th January 1936. Till that date the auction purchase made by the vendee had not been confirmed and therefore the plaintiff's right to pre-empt the sale was intact on that date. The Courts below were therefore right in decreeing the plaintiff's suit. We accordingly dismiss this appeal with costs.

K.S./R.K. *Appeal dismissed.*

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BRAUND J.

Mrs. Grete McGowen — Petitioner

v.

Mr. Thomas James McGowen — Respondent.

Matrimonial Suit No. 3 of 1941, Decided on 10th October 1941.

Government of India Act (1915), S. 109 (1) — Notification by Governor-General under S. 109 (1)—Word "occupied" in notification — Meaning of—It does not include building in compound of mill which is merely served by G. I. P. Railway in sense that it has siding running through mill premises.

The expression "the portions of the Gwalior State occupied by the Great Indian Peninsula Railway" in the Notification issued by the Governor-General under S. 109 (1) refers to those portions of the soil of the Gwalior State and of any buildings attached thereto which are in the possession or occupation of the G. I. P. Railway for whatever purpose and upon whatever form of tenure and includes all land and buildings which are strictly railway property and all land and buildings of which the railway are lessees or licensees or in or over which they have any other right or possession or occupancy. It would include any buildings of the railway in which it housed its employees. Members of the railway staff who lived on premises belonging to the railway, whether as owners or as lessees, would be residents in a part of Gwalior State, "occupied" by the railway, within the meaning of the notification. But the expression cannot be extended so as to include all land and buildings, which were "served" by the G. I. P. Railway in the sense that it catered for the needs of those who lived or worked there. The expression consequently does not include a building in the compound of a mill which is merely "served" by the G. I. P. Railway in the sense that it has a siding running into and through the mill premises.

[P 130*e,g*]

O. M. Chiene, K. B. Asthana and Kr. Vishnu Bahadur Singh — for Petitioner.

A. P. Bagchi — for Respondent.

ORDER. — This is an unfortunate matter. It is a suit by a lady against her husband for judicial separation brought under S. 22, Divorce Act. The petitioner's husband is, I understand, an employee of the Jivaji Rao Cotton Mills, which are known as the Birla Mills and are situated in Gwalior State. It was there that the petitioner and her husband last resided together prior to the presentation of this petition. Accordingly, in para. 22 of the petition it is stated :

> "That your petitioner and the respondent last resided together at Gwalior within the jurisdiction of this Hon'ble Court and this suit is therefore cognizable by this Hon'ble Court."

That paragraph provokes the question which I have now to decide. It occurred to me when the petition first came before me to ask whether this Court really has jurisdiction under the Divorce Act

in respect of residents of Gwalior State. It is pro-
a vided by S. 23, Divorce Act, that :

"Application for judicial separation . . . . may be made by either husband or wife by petition to the District Court or the High Court . . . ."

The definition of the words "the High Court" is to be found in S. 3 of the Act :

". . . . . and in any place in the dominion of the princes and States of India in alliance with Her Majesty the High Court or Chief Court to whose original criminal jurisdiction the petitioner is for the time being subject, or would be subject, if he or she were an European British subject of Her Majesty . . . . ."

We arrive therefore at the point at which we have to consider whether the petitioner, at the time she last resided with her husband at the Birla Mills in Gwalior, was then subject to the original criminal jurisdiction of the High Court of Judicature
b at Allahabad. By a notification by the Governor-General, made in pursuance of S. 109, sub-s. (1), Government of India Act, 1915, the Governor-General directed that the appellate criminal jurisdiction over European British subjects of His Majesty for the time being within the territories of the States of India which were named below—these included Gwalior—should be exercised by the respective Courts to which they were allocated by the notification. And, the notification proceeded to allot certain portions of Gwalior State to the High Court of judicature at Allahabad. It is the language of that particular passage of the notification which defines what is allocated to this High Court that is material for the present purpose. It runs :

". . . . the portions of the Gwalior and Khaniadhana States occupied by the G. I. P. Railway midland section (including the Scindia State Railway), north
c of Lalitpur . . . . ."

Residents of that portion of Gwalior State described in the words I have set out above, were therefore for the purpose of jurisdiction under the Divorce Act, allocated to this High Court. All the rest of Gwalior State was consigned to the Bombay High Court by a converse notification in almost identical language :

". . . . Gwalior and Khaniadhana States other than the portions of those States occupied by the G. I. P. Railway midland section (including the Scindia State Railway), north of Lalitpur . . . . ."

It came to this, that everything that was not given to Allahabad was bestowed on Bombay. It is impossible to pretend that the expression "the portions of the Gwalior . . . State occupied by the Great Indian Peninsula . . . . ." is a particularly happy one. It is not easy to see what territory a railway can be said
d to "occupy." On the narrowest possible construction of the word, a railway could be said to "occupy" no more than the actual soil on which its railway lines run. Returning now to the facts, it is common ground that the house in which the petitioner and her husband lived belonged to the mill owners and was within the compound of the Birla Mills. It is also admitted that the G. I. P. Railway line ran close to the Birla Mills and that a siding actually ran into and through the mills themselves and, no doubt, served the purpose of bringing materials to, and taking goods away from the mills. There is no doubt therefore that the petitioner lived within the mill compound and that the mill was "served" in a commercial sense by the G. I. P. Railway.

The question I have to decide is whether, in those circumstances, the petitioner can be said to have resided in a portion of the Gwalior State which was "occupied" by the G. I. P. Railway. In my view, she cannot. Looking at the words as they stand and putting on them a reasonable construction, I think they refer to those portions of the soil of the Gwalior State and of any buildings attached thereto which are in the possession or occupation of the G. I. P. Railway for whatever purpose and upon whatever form of tenure. That would include all land and buildings which were strictly railway property. It would include all land and buildings of which the railway were lessees or licensees or in or over which they had any other right or possession or occupancy. It would include any buildings of the railway in which it housed its employees. Members of the railway staff who lived on premises belonging to the Railway, whether as owners or as lessees, would be residents in a part of Gwalior State, "occupied" by the Railway. But I cannot in any reasonable use of the English language, extend the words so as to include all land and buildings, which were "served" by the G. I. P. Railway in the sense that it catered for the needs of those who lived or worked there. The mere circumstance that the railway serves a particular place, a particular factory or a particular town or village, does not, in the common parlance of language, make the railway the "occupant" of that place, factory, town or village. It may "serve" it certainly; but it does not "occupy" it. If one were to hold that the mere fact that a particular place or a particular group of buildings was "served" by the railway was sufficient to constitute the railway the "occupant" of that place or of those buildings, it would, to my mind, be impossible, in relation to a question of jurisdiction under the Divorce Act, to know where to draw the line. For instance, the railway line passes through and "serves" the countryside at large. If it is to be held that for that reason it "occupied" the countryside, then it may fairly be asked what distance on either g
side of the railway line does it "serve" and so "occupy." Is a house within one mile, or five miles or twenty miles, to be said in that case, to be "served" and "occupied" by the railway? Where is the line to be drawn? I think that we should arrive at an altogether impossible position.

For these reasons, in my opinion, there is no alternative but to give to the word "occupy" its ordinary, and as it seems to me, grammatical meaning. That, to my mind, certainly does not include a building in the compound of a mill which is merely "served" by the G. I. P. Railway in the sense that it has a siding running into and through the mill premises. I regret therefore that I am bound to come to the conclusion that this petition does not lie in this Court and I must therefore direct that it be returned to the petitioner to be filed in the proper Court. The respondent has asked for his costs. h
But I feel, in all the circumstances, that the proper order in this case is to make no order for costs.

G.N./R.K. *Order accordingly.*

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BRAUND J.

Latu — Plaintiff — Appellant

v.

Smt. Rani Maha Laxmi Bai and another — Defendants — Respondents.

First Appeals Nos. 203 of 1940 and 37 of 1941, Decided on 29th October 1941, from order of Civil Judge, Etawah, D/- 15th May 1940.

(a) Agra Tenancy Act (3 of 1926), Ss. 230 and 3 (6) — Suit for declaration that land was rent-

free land and not service land and that it was free from any encumbrances so far as any mortgage to defendant was concerned — Further prayer for possession if plaintiff held proprietor by rent-free grant and found not in possession —Also prayer for redemption if mortgage found to subsist — First two reliefs held distinct and within civil Court's jurisdiction — Last two reliefs held cognizable by revenue Court only.

The plaintiff in his suit asked for a declaration that the land referred to in the plaint was held by the plaintiff from the zamindar who was the first defendant by a rent free grant technically known as a "Muafi Dada Zamindar" grant (that is to say a rent-free grant from the zamindar) and not by a "Muafi Chakrana" grant (that is to say a grant free of any money rent but in consideration of services), and that the land was free from any encumbrances, so far as any mortgage to the first defendant was concerned. There was also a prayer for redemption in case it should be found that there was a subsisting mortgage on the land in favour of defendant 1. The plaintiff further prayed that if he was found to be the proprietor of the land by a rent-free grant from the zamindar and was found not to be in possession thereof then defendant 1 may be ejected and the plaintiff put into possession :

Held that (1) in view of the provisions of Ss. 3 (6) and 230 the giving of a declaration that the nature of the plaintiff's interest in the land was that of a "Muafi Dada Zamindar" grantee and not that of "Muafi Chakrana" grantee was within the jurisdiction of the Civil Court. That issue, as such, had nothing whatever to do with the mortgage. It was a distinct issue affecting the nature and quality of the plaintiff's title ; [P 132*h*]

(2) that Chap. 3, U. P. Agriculturists' Relief Act, dealt with mortgages as such and did not affect a case in which a person was endeavouring to establish, or to escape from a character as mortgagee or mortgagor. In asking for a declaration that the land was free from an encumbrance, the plaintiff was not instituting a suit for redemption of a mortgage within S. 12, U. P. Agriculturists' Relief Act, and therefore the relief as to declaration in respect of the mortgage was within the jurisdiction of the Civil Court; [P 133*b*]

(3) the prayer for redemption clearly was within S. 12, U. P. Agriculturists' Relief Act, and accordingly, under S. 25 of the same Act, was a matter over which the revenue Court alone had jurisdiction; [P 133*b*]

(4) so far as the claim made by the plaintiff was one simply for possession of the property, that too was a matter within the exclusive jurisdiction of the revenue Court. [P 133*b*]

(b) Civil P. C. (1908), O. 7, R. 10 — Whole plaint outside jurisdiction — Court must not dismiss plaint but should return it for presentation to proper Court.

Where the whole plaint is outside the jurisdiction of a particular Court and no part of the plaint is within its jurisdiction the Court must not dismiss the plaint but is bound to return it for presentation to proper Court: ('22) 9 A.I.R. 1922 All. 424, *Rel. on.* [P 133*d*]

(c) Civil P. C. (1908), O. 6, R. 16 and O. 7, R. 10— Part of plaint within jurisdiction and part outside — Court should ask plaintiff to delete part beyond jurisdiction or should dismiss it at once under O. 6, R. 16 and proceed with suit — It is incorrect to return plaint for presentation to proper Court.

Where part of a plaint is within the jurisdiction of a Court and part is outside its jurisdiction O. 7, R. 10 does not apply and therefore it is incorrect to return the plaint for presentation to the proper Court. The Court in such a case should either call upon the plaintiff to amend his plaint by striking out what is beyond jurisdiction and so leaving the remainder unobjectionable, or that failing, should wait till it delivers its judgment upon those parts that are within its jurisdiction and then at the same time dismiss what is beyond it: ('25) 12 A.I.R. 1925 All. 683, *Rel. on;* ('21) 8 A. I. R. 1921 All. 193 and ('27) 14 A.I.R. 1927 Pat. 254, *Not approved*; ('32) 19 A. I. R. 1932 Lah. 595, *Expl.* [P 134*d*,*e*]

But the necessity of waiting until the judgment is delivered to dismiss the suit as regards that part which is beyond jurisdiction can be obviated by applying O. 6, R. 16 and dismissing that part at once as tending to prejudice, embarrass or delay the fair trial of the suit. [P 134*b*,*e*]

G. S. Pathak—for Appellant.

S. N. Misra—for Respondents.

JUDGMENT.—This is an appeal from an order of the Civil Judge of Etawah which raises a not uninteresting point. I should perhaps have said that there are two appeals before me, both by the same appellant against the same respondents, and that the judgment I am about to deliver covers both. The point is a short one and is really one of practice. It is however very important in this, as in most other practice points, to follow exactly the course that events have taken The appellant was the plaintiff in the suit and, to all intents and purposes, respondent 1, Shrimati Rani Maha Laxmi Bai, was the only defendant. It will perhaps be best, in view of the question at issue to relate what it is that the suit claims by setting out verbatim the reliefs it asks for. The prayer for relief is in this language :

"(a) On establishment of the fact that the plots of rent-free holding granted by the zamindar and specified below did not stand mortgaged to defendant 1 by the plaintiff or his ancestor, and that the entry relating thereto in the public papers as a rent-free grant held in consideration of the rendering of services is altogether wrong, and that it may be declared that the plaintiff is the owner in possession of the said rent-free holding.

(b) If for any reason the plaintiff may not be found entitled to relief (a), then, in the alternative, he prays for the following reliefs :

(1) If, in the opinion of the Court, the plaintiff is found to be the proprietor of the land by a rent-free grant from the zamindar and is found not to be in possession thereof then defendant 1 may be ejected and the plaintiff put into possession.

(2) If it is proved that any mortgage deed was executed in respect of the said rent-free holding in favour of defendant 1 and is binding on the plaintiff then an order for redemption may be granted."

It is important to grasp what that relief is. I have analyzed it with great care and it appears to me to amount, in reality, to four distinct things. First, under heading (a), it appears to ask for a declaration that the land referred to in the plaint is held by the plaintiff from the zamindar, who, by the way is defendant 1 herself, by a rent-free grant technically known as a "muafi Dada Zamindar" grant (that is to say a rent-free grant from the zamindar) and not by a "muafi chakrana" grant (that is to say a grant free of any money rent but in consideration of services). That seems to be the first relief asked for. Next—also included in heading (a) — there seems to

be a declaration prayed that the land is free from any encumbrances, so far as any mortgage to defendant 1 is concerned. Then, thirdly, in the first part of para. (b) comes a claim for possession by the plaintiff; and, fourthly, as an alternative to the declaration of the land as being free from encumbrances, there is a prayer for redemption in case it should be found that there is a subsisting mortgage on the land in favour of defendant 1. Thus, the plaint, speaking generally, asks for two things, first the establishment of the nature of the plaintiff's interest in the land, and secondly, either a declaration that there is no mortgage in favour of defendant 1, or that, if there is, there may be redemption.

I do not think I need say very much about the defence except that the defendant denied that the land was held by a rent-free grant from the zamindar and alleged that, at the most, it was held on some terms of services to be rendered. He further alleged various grounds upon which even that form of grant had come to an end, while, in the alternative, he set up a claim to a usufructuary mortgage over the property in consideration of a loan made in about 1896 for Rs. 300 in favour of defendant 1. Finally, there is the usual string of "make-weight" defences, involving questions of adverse possession, estoppel, limitation and so forth. In that condition of things the suit came before the Munsif of Etawah. I have forgotten to mention that there was another defence raised which was that the civil Court had no jurisdiction to entertain the suit. That issue—the issue as to jurisdiction—was made issue 1 in the suit by the Munsif and there followed after that a number of other issues dealing with the other questions raised and among them an issue (No. 2) whether the land was "muafi Dada Zamindar" or "muafi chakrana" land. There was also another issue (No. 3) whether there was any mortgage in favour of defendant 1's mother and if so, how much was secured by it.

It will be sufficient for the present purpose if I say that the Munsif, having been into the issue of jurisdiction, came to the conclusion that, because the plaint raised an alternative claim of redemption, the jurisdiction of the civil Court remained intact and covered every issue in the suit. He therefore went on and tried the suit and in the course of his judgment came to the conclusion, and held, that the land was "Muafi Dada Zamindar" land i. e., rent-free land, and not "Muafi Chakrana" or service land. He also came to the conclusion on issue 3 that there was a subsisting mortgage for Rs. 300 originally created in favour of defendant 1's mother, but now vested in defendant 1 and, finally, he ordered redemption on the footing of that mortgage. The Munsif, however, seems, when he came to his actual order at the end of his judgment to have forgotten that he had held that he had in effect decided in the plaintiff's favour as regards the quality of his title to the land and, so far as the actual order he dictated went, it only referred to redemption. All that the Munsif says is: "Claim for redemption of the mortgage in suit is decreed ....." Then followed certain directions as regards redemption. The inevitable result of this was that, in the usual careless way in which decrees are drawn up, the only actual decree which the plaintiff got was a decree for redemption and he never got at all any decree declaring his title, which, after all, had been one of the main purposes—if not the main purpose—of his suit.

The next step was that there were two cross-appeals from the decree of the Munsif to the Civil Judge of Etawah. The plaintiff appealed against the decree for redemption that had been passed against him, while the defendant appealed against the declaration which had in effect been made, but had not found its way into decree, and also upon the ground that the Munsif had been wrong in entertaining the suit at all, because he had had no jurisdiction to do so. Now, on these two cross-appeals, the learned Civil Judge seems to have taken just as firm a view that the Munsif had no jurisdiction to try any part of the suit, as the Munsif himself had taken the view that he was entitled to try the whole of it. The learned Civil Judge pointed out a fallacy in the Munsif's reasoning that, because there was a plea of redemption, therefore the civil Court was clothed with jurisdiction, by referring to the Ss. 12 and 25, U. P. Agriculturists' Relief Act, and showing that redemption proceedings in this case were not within the jurisdiction of the civil Court. In the result, as I have said, the learned Civil Judge came to the conclusion that the civil Court had no jurisdiction and he took the course—which is the course now complained of—of ordering the whole plaint to be returned to the plaintiff for presentation in the right Court, that is to say, in the revenue Court. He did that, presumably, under O. 7, R. 10 of Sch. 1, Civil P. C. He actually says:

"Having come to this conclusion (that was the conclusion that the civil Court had no jurisdiction to order redemption)—I have no jurisdiction myself to dismiss the suit, and all that I can do is to allow the appeal with costs and direct that the plaint be returned to the plaintiff and Appeal No. 46 of 1939 be dismissed with costs with the same order of returning of the plaint."

From that the plaintiff has launched two appeals to me inasmuch as the order which I have just indicated in the Court below was made in each of the two cross-appeals, and therefore it has been necessary that there should be two appeals to me. They raise, however, precisely the same point. Now, as I see it, there are really only two questions for me to consider—first, whether the the civil Court or the revenue Court or partly one and partly the other had jurisdiction over the matters in issue in this suit, and, secondly,—and this is far the more difficult question—what as a matter of practice ought to be done having regard to the answer to the first question. Now, I have come to the conclusion that, quite obviously there were some issues raised by the pleadings in respect of which the civil Court had jurisdiction and that there were other issues in respect of which the civil Court had no jurisdiction, but in respect of which an exclusive jurisdiction was vested in the revenue Court. I shall take the various issues by reference to the headings of the relief which I have already set out earlier in this judgment. As regards the declaration that the nature of the plaintiff's interest in the land was that of a "Muafi Dada Zamindar" grantee and not that of "Muafi Chakrana" grantee, I feel no doubt that the giving of a declaration in that respect was within the jurisdiction of the civil Court. That issue, as such, has nothing whatever to do with the mortgage. As I pointed out earlier in this judgment, it is a distinct issue affecting the nature and quality of the plaintiff's title. By S. 3 (6), Agra Tenancy Act, 1926, it is made quite clear that the word "tenant" does not include a rent-free grantee. By S. 230, Agra Tenancy Act, certain suits and applications of the kind specified in Sch. 4 are consigned to revenue Courts and altogether withdrawn from the jurisdiction of other Courts.

I have looked carefully through Sch. 4 but, having regard to the definition of a tenant in the Act and

to the circumstance that it does not include a rent-free grantee, I cannot find that there is anything in it to cover a suit which claims a declaration by a person that he is a rent-free grantee. On the other hand, S. 99, Agra Tenancy Act, expressly refers to a rent-free grantee as something quite distinct from a tenant and indicates the manner in which he may enforce his rights. I think, therefore, that so far as the declaration of the nature and quality of the plaintiff's title is concerned, it was within the jurisdiction of the civil Court. The same thing in my opinion, applies to the declaration in the abstract whether or not it was free from any encumbrances. It is true that in Chapter 3, U. P. Agriculturists' Relief Act, certain express provisions are to be found relating to mortgages and their redemption and the manner in which such mortgages can be enforced. I shall deal with that chapter in a moment but it seems to me that it deals with these mortgages as such and does not affect a case in which a person is endeavouring to establish, or to escape from, a character as mortgagee or mortgagor. In asking for a declaration that the land is free from an encumbrance, a man is not instituting a suit for redemption of a mortgage within S. 12 of the Act.

On the other hand, it appears to me to be equally clear that in so far as the plaint in this case asked for redemption of the mortgage, should it be found to exist, that was clearly a matter which was within S. 12, U. P. Agriculturists' Relief Act, and accordingly, under S. 25 of the same Act, was a matter over which the revenue Court alone had jurisdiction. I think also that so far as the claim made by the plaintiff was one simply for possession of the property, that too was a matter within the exclusive jurisdiction of the revenue Court. I have said enough to indicate that, in my opinion, neither the relief for redemption nor the relief by way of possession was within the jurisdiction of the civil Court, whereas the relief by way of a declaration as to the nature and quality of the plaintiff's rent-free interest and its freedom from the encumbrance was within the jurisdiction of the civil Court. It follows, therefore, that this was a suit instituted in the civil Court in which part of the relief was within its jurisdiction and part was not. There, therefore, emerges the second question which I have to deal with namely what, as a matter of practice is the proper course to take. Now, the learned Civil Judge of Etawah, who, I hope, would not greatly disagree with my conclusions up to this point, has come to the conclusion that the proper thing to do is to apply O. 7, R. 10 and to return the plaint lock, stock and barrel, to the plaintiff for presentation to the revenue Court. I venture to think that that is not the right course. Order 7, Rule 10 reads in this way :

"(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted."

Now, in a case in which the whole plaint is outside the jurisdiction of a particular Court and no part of the plaint is within the jurisdiction of that Court, no difficulty presents itself, because what the Court has to do is to return the plaint to be taken to the proper Court. It must not dismiss the plaint. It is bound to return it for presentation to the proper Court : *see* 44 All. 686.[1] A greater difficulty, however, presents itself in a case in which part of the plaint is—in order to use a simple expression "bad" and part is "good". In that case it is not so easy to say what the proper course to take is. There are, I think, two alternatives. I exclude the possibility of merely giving the plaintiff an opportunity to amend by removing the part that is bad and so leaving the remainder entirely within the jurisdiction of that Court. I exclude that because it goes without saying that it is always possible for the Court to allow the plaintiff to do that in a proper case. I am not, therefore, treating that as a distinct alternative. Nor do I think that it is possible, notwithstanding what was said by two learned Judges of this Court in a case to which I shall refer in a moment, to apply O. 7, R. 10 literally, because, when O. 7, R. 10 speaks of a "plaint," I think it means the entire plaint and not merely part of the plaint and still less a certified copy of a plaint or part of it. The two alternatives which have been suggested to me are, first that the Court (i. e., the civil Court in which the irregular plaint is presented) should keep the suit pending before it for the purpose of trying, and granting, relief in respect of, so much of the subject-matter of the suit as is within its jurisdiction, while to the extent to which such subject-matter is not within its jurisdiction, it should allow a certified copy of the plaint to be taken and filed in the revenue Court, or whatever the proper Court may be which can grant relief in respect of that part. That is one alternative. The other alternative is that the civil Court in which the plaint is first presented should simply dismiss the suit in respect of that part which is "bad" and proceed to try the remaining part of the issue in the suit which is within its jurisdiction. I venture to suggest that there may be a possible third alternative, which however, is, perhaps hardly more than a variation of the second, namely that instead of dismissing the suit, the Court might exercise its powers under O. 6, R. 16 and strike out the bad part of the plaint as tending to prejudice, embarrass or delay the fair trial of that part which is good.

In a case of this Court, A. I. R. 1921 All. 193,[2] Walsh and Wallach JJ. appear to me to favour the former alternative. That was a case in which there was a suit in which the plaint consisted of one claim which was within the jurisdiction of the civil Court and one which was not within its jurisdiction. The learned Judges had before them, therefore, precisely the same point as I have now before me. They said in reference to O. 7, R. 10 :

"The rule does not specifically state what is to be done when a plaint consists of a claim within the jurisdiction and also a claim outside the jurisdiction, but it obviously means that that portion of such a plaint which is outside the jurisdiction shall be treated as though it was a distinct plaint by itself. The rule would be unworkable if it were not to be construed in this way. . . . . ."

By that the learned Judges presumably meant that the proper thing to do was to treat so much of the plaint as related to matters beyond the jurisdiction of the Court as being a plaint on its own and presumably that that part should be returned to the plaintiff to be presented elsewhere. It would be unbecoming of me to discuss this at length, as with great respect I have some difficulty in agreeing either that that view of the matter is obvious or that, having regard to ordinarily good practice, it is even possible. I do not see how, having regard, for instance, to O. 4, R. 1 any proceedings in a different Court could be begun merely by the presentation to it an off-shoot of a suit already in existence in another Court and a copy of that.

1. ('22) 9 A. I. R. 1922 All. 424 : 70 I. C. 98 : 44 All. 686, Ramjas Singh v. Babu Nandan Singh.

2. ('21) 8 A.I.R. 1921 All. 193 : 64 I. C. 688 : 19 A.L.J. 822, Kishori Lal v. Ram Sundar.

In a later case, 47 All. 770,[3] Sir Shah Sulaiman and Boys J., in this Court took quite a different view and one with which, if I may say so with great respect, I entirely agree. These learned Judges held that in a case in which some reliefs were within the jurisdiction of the Court to which the plaint was presented, it was not correct to return the plaint "for presentation to the proper Court"—indeed, as I have already pointed out, it is extremely difficult to see how that could be done—but that the Court should either call upon the plaintiff to amend his plaint by striking out what was beyond jurisdiction and so leaving the remainder unobjectionable, or, that failing, should wait till it delivers its judgment upon those parts that are within its jurisdiction and then at the same time dismiss what is beyond it. This recognises what, with great respect to the learned Judges who decided the earlier case, seems to me to be the impossibility of applying O. 7, R. 10 to such a case and also the impossibility, except where under some statutory provision it is allowed, of sending part of a plaint from one Court to another so as to split it up into several suits. I would, however, myself suggest that there is possibly a third course which, though amounting to very much the same thing, might obviate the necessity of waiting until the judgment is delivered to dismiss the suit as regards that part which is beyond jurisdiction. That course would be to apply O. 6, R. 16 of Sch. 1, Civil P. C., and to dismiss that part at once as tending to prejudice, embarrass or delay the fair trial of the suit. Ex-hypothesi that part will have become merely "dead wood" and it seems to me that obviously it must embarrass, prejudice or delay the fair trial of the suit to leave it there. I only venture to throw it out as a suggestion. I regret that, upon this view of the matter, supported as it is by the view of two other learned Judges of this Court in the case I have just referred to, I find myself unable to agree with the view taken by two learned Judges of the Patna High Court in 6 Pat. 358,[4] and I think that the case in the Lahore High Court, A.I.R. 1932 Lah. 595,[5] hardly covers the point, as it leaves it merely to the option of the plaintiff whether he will amend his plaint or not. As I said, it is always possible for the Court to give the plaintiff that option, but the real question arises only if and when he has declined to make the amendment. The view which therefore, in my opinion, is the right view is the one expressed by Sir Shah Sulaiman and Boys J., in the case in 47 All. 770[3] which I have referred to above.

Now, applying that to the present case, what must be done; the suit plainly raises issues, some of which were within the jurisdiction of the civil Court and others of which were within the jurisdiction only of the revenue Court. I think that the learned Civil Judge of Etawah was wrong, for the reasons which I have explained, in applying O. 7, R. 10 in its entirety to a case like that, because it is quite impossible to do so. What should have been done was that, following the rule laid down by Sir Shah Sulaiman and Boys J., the plaint should have been dismissed by the Munsif so far as it contained matters exceeding the jurisdiction of his Court. As I have already pointed out, I am inclined myself to think that the Munsif need not have waited until the stage of delivering judgment to do that but might, instead of dismissing them, have struck them out at a far earlier stage under O. 6, R. 16. That, however, is an academic matter as that stage has long passed. The proper order for the Munsif to have made in the circumstances was, therefore, to have dismissed the suit so far as it related to an order for possession and to redemption of the mortgage and to have decreed the suit, accepting for this purpose as right the findings he has actually arrived at, in respect to the declaration that the land was "Maufi Dada Zamindar" land and not "Muafi Chakrana" land and also in respect of the declaration that it was subject to an encumbrance in favour of defendant 1.

What I must do now, therefore, is first to set aside the decree of the Civil Judge of Etawah. That I do. I have already pointed out that the decree which was originally passed by the Munsif was defective in so far as it never contained the declaration of title which the plaintiff was entitled to have. It should have done so. The only actual order that I can now make, except an order as to costs, is to set aside the decree of the Court below and to direct that the two cross-appeals in the Court below now be restored to be heard upon the issues other than the issue as to jurisdiction which I have now decided. As regards the costs, the plaintiff was bound to come here because the order of the Civil Judge was wrong. On the other hand, this trouble is primarily due to the state in which he launched his own plaint. I think the proper order as to the costs of this appeal is that both parties should bear their own costs. As regards the costs of the two hearings in the Courts below I think the proper order is that those costs shall abide the event in the now pending appeals. They will, accordingly, be dealt with by the Civil Judge of Etawah when he hears those appeals.

G.N./R.K. *Order accordingly.*

C. P. C.—
(a) ('40) Chitaley, S. 9 N. 51 Pt. 12.
(b) ('40) Chitaley, O. 7 R. 10 N. 1 Pt. 4.
('41) Mulla, Page 610 Pt. (h).
(c) ('40) Chitaley, O. 7 R. 10 N. 1 Pts. 13, 14.
('41) Mulla, Page 610 Pt. (i).

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FULL BENCH

COLLISTER, BAJPAI AND BRAUND JJ.

Ghulam Din & Co. — *Applicants*

v.

Commissioner of Income-tax, U. P. & C. P. — *Opposite Party.*

Application in case No. 74 of 1938, Decided on 19th January 1942.

Income-tax Act (1922), S. 66 (3)—Application under S. 66 (3) lies only when application under S. 66 (2) is dismissed on ground that no question of law arises.

An application under S. 66 (3) is maintainable only when the application under S. 66 (2) is dismissed on the ground that no question of law arises. Consequently, where an application under S. 66 (2) is dismissed as withdrawn and the objection that the Act did not authorize the withdrawal of the application is also dismissed, the dismissal of the applica-

3. ('25) 12 A.I.R. 1925 All. 683 : 89 I. C. 40 : 47 All. 770 : 23 A. L. J. 601, Ramrup Goshain v. Ramdhari Bhagat.
4. ('27) 14 A.I.R. 1927 Pat. 254 : 103 I. C. 435 : 6 Pat. 358, Secy. of State v. Natabar Mangraj.
5. ('32) 19 A.I.R. 1932 Lah. 595 : 138 I. C. 755 : 33 P. L. R. 766, Ruknuddaulah v. Mohd. Umardaraz Ali Khan.

tion cannot be said to be on the ground that no question of law arose and hence an application under S. 66 (3) is not maintainable. [P 135*d*]

Mansur Alam — for Applicants.

N. P. Asthana — for Opposite Party.

COLLISTER J.—This is an application under S. 66 (3), Income-tax Act, praying that the Commissioner of Income-tax be required to state a case to this Court. It appears that for the assessment year 1933-34 the applicants were assessed to tax on an income of Rs. 7414. We are informed that there was an appeal to the Assistant Commissioner and that the assessment was reduced. On 17th July 1934 a notice was served upon the applicants under S. 34 of the Act requiring them to submit a fresh return in respect to escaped income; and in reply the applicants filed a return on 12th October 1934 showing the same income as they had shown in their original return, namely Rs. 5944. Ultimately on 8th January 1936 the Income-tax Officer re-assessed the applicants upon an income of Rs. 47,707 under S. 23 (4) and he also called upon them to show cause why a penalty should not be imposed upon them under the provisions of S. 28 of the Act. On 11th January 1936 a notice was served upon the applicants to pay income-tax amounting to Rs. 7000 odd; and this was duly paid. On 13th July 1936 a penalty of Rs. 1000 was imposed upon the applicants under S. 28; and presumably this also was paid.

Thereafter the applicants appealed both against the assessment and also against the imposition of a penalty; but on 27th October 1936, both appeals were dismissed by the Assistant Commissioner. On 3rd February 1937 the applicants applied to the Commissioner for review under S. 33 and at the same time applied for a reference to this Court under S. 66 (2) of the Act. The 22nd June 1937 was fixed for the hearing of these applications, but on that date the applicants' agent applied to the Commissioner of Income-tax withdrawing the two applications which had been preferred under S. 66 (2). On 22nd June 1937, the Commissioner declined to exercise his powers of review under S. 33. The matter rested here until 3rd July 1937, on which date the applicants objected that there was no authority in the Act for withdrawing an application which had been preferred under S. 66 (2). This objection was rejected by the Commissioner on 23rd July 1937. On 1st November 1937, the applicants moved the Commissioner to make a reference to this Court suo motu under S. 66 (1); but, this application was rejected on 13th November 1937. On 24th January 1938 the application under S. 66 (3) of the Act was preferred to this Court. A preliminary objection is taken on behalf of the department that this application does not lie; and we are of opinion that the objection must be sustained. Section 66 (3) of the Act provides:

"If, on any application being made under subsection (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply."

Learned counsel for the applicants admits that their application of 3rd July 1937 was not dismissed by the Commissioner on the ground that no question of law arose; and since this is the only ground upon which an application lies under S. 66 (3) of the Act, we are clearly of opinion that the application is incompetent. We accordingly dismiss this application with costs. The Advocate-General is entitled to a fee of Rs. 75.

G.N./R.K. *Application dismissed.*

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VERMA J.

Dhanraji Kuer—Defendant—Appellant

v.

Ram Raj Chaube and others —

Plaintiffs — Respondents.

Second Appeal No. 361 of 1938, Decided on 2nd December 1941, from decision of Civil Judge, Azamgarh, D/- 17th December 1937.

(a) Hindu law—Maintenance—Suit by reversioner for possession—Defendant found entitled to maintenance can be given decree in the suit and need not be asked to seek remedy by separate suit.

Where in a suit for possession of the estate by a reversioner, it is found that the defendant is entitled to maintenance out of the estate, the plaintiff should not be given an unconditional decree but should be given a decree subject to the obligation to pay to the defendant her maintenance. The defendant can be given a decree in the same suit for her maintenance without forcing her to seek her remedy by a separate suit : 18 Bom. 452 and ('32) 19 A.I.R. 1932 All. 37, *Rel. on.* [P 136*b*]

(b) Hindu law — Maintenance — Amount is finding of fact.

The finding of the lower appellate Court as to the proper amount of maintenance is a finding of fact and must be accepted in second appeal. [P 136*c*]

Shiva Prasad Sinha — for Appellant.

Inam-ullah — for Respondents.

JUDGMENT. — This is a second appeal by the defendant in a suit for possession of certain property. The claim was based on the allegation that plaintiff 1 was the nearest reversioner to the estate of one Kalpu deceased and that the defendant, being a step-mother of Kalpu, was not an heir of Kalpu under the law. The defendant did not deny that she was the step-mother of Kalpu. Her defence was that the pedigree set up by the plaintiffs was not correct and that none of the plaintiffs was a reversioner of Kalpu. The Court of first instance held that the pedigree put forward by the plaintiffs was not proved and that therefore the plaintiffs were not the reversioners of Kalpu, and dismissed the suit on that finding. On appeal by the plaintiffs, the lower appellate Court held that the pedigree set up by the plaintiffs had been proved and that, according to that pedigree, plaintiff 1 was nearest reversioner of Kalpu deceased. That Court, accordingly, reversed the decree of the trial Court and passed a decree for possession in favour of plaintiff 1. The defendant filed this second appeal against that decree. The appeal came up for hearing before the late Chief Justice on 26th November 1940 and he held that plaintiff 1 was entitled to succeed to the property on the death of Kalpu and that he was, therefore, entitled to possession. It was however urged before him by learned counsel for defendant-appellant that the defendant being entitled to maintenance under the law, the Court below was wrong in passing an unconditional decree for possession. The late Chief Justice observed that the question of maintenance had not been investigated in the Courts below and remitted the following issue to the lower appellate Court: "To what maintenance is the defendant entitled?" The Court below has sent up a finding on the issue so remitted and has held that the defendant is entitled to the sum of Rs. 2-8-0 per month as maintenance.

Learned counsel for the defendant-appellant urges that a decree for possession should not be passed in favour of the reversioner without making provision for the maintenance of the defendant. That the defendant is entitled to be maintained out of the estate cannot be denied. The only question that has been raised is whether it would be right to pass a decree in respect of the defendant's maintenance in this suit. Learned counsel for the plaintiffs-respondents has urged that no decree can be passed in favour of the defendant in this suit and that the only course open to the Court is to leave the defendant to seek her remedy by means of a suit if the reversioner does not pay the amount found by the Court below to be the proper amount of money which she is entitled to get from the estate for her maintenance. Learned counsel for the defendant-appellant has invited my attention to the case in 18 Bom. 452.[1] That case goes the whole length of the appellant's argument. There also the question as to the maintenance of the defendant was raised for the first time in second appeal. It is true that the learned Judges referred to an earlier decision of their own Court and observed that it was the settled practice of that Court not to allow the heir to recover the family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her out of the property. I see, however, no valid reason why this Court should not follow such a practice. As was observed by the late Chief Justice, it is in the interests of justice that, instead of forcing the defendant to file a suit for maintenance, the question be disposed of in the present suit. Reference may also be made to the type of cases of which 1931 A.L.J. 603,[2] is an example. The finding of the lower appellate Court that the proper amount of maintenance for the defendant-appellant is Rs. 2-8-0 per month is a finding of fact and must be accepted in second appeal. The decree passed by the lower appellate Court must therefore be varied.

For the reasons given above, I modify the decree of the lower appellate Court by directing that to the decree for possession over the property passed by that Court in favour of plaintiff 1, the following clause be added : "It is declared hereby that the said plaintiff 1 takes the property awarded to him subject to the obligation to pay to the defendant, Mt. Dhanraji Kunwar, the sum of Rs. 30 per annum on account of the latter's maintenance, the same being payable in four equal instalments of Rs. 7-8-0 each, which shall be payable by the said plaintiff to the said defendant, during the latter's life-time, on 31st March, on 30th June, on 30th September and on 31st December, every year. It is further declared that the amount of maintenance, mentioned above, is a charge on the property over which possession has been decreed to the said plaintiff." I further direct that the parties shall bear their own costs throughout.

K.S./R.K. *Decree modified.*

1. ('94) 18 Bom. 452, Yellawa v. Bhimangavda.
2. ('32) 19 A.I.R. 1932 All. 37 : 133 I.C.473 : 1931 A. L. J. 603, Jagarnath Singh v. Damodar Singh.

Hindu Law —
(a) ('40) Mulla, Page 601 See Pt. (c).
C. P. C. —
(b) ('40) Chitaley, Ss. 100 and 101, N. 51.
('41) Mulla, Page 367 Note "No second appeal lies on the ground of an erroneous finding of fact."

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BRAUND J.

J. C. Chandiok, Liquidator of Public Benefit Provident Insurance Society Ltd. — Applicant

v.

Pearey Lal and others—Opposite Party.

Misc. Case No. 182 of 1941, Decided on 5th September 1941.

*** (a) Insurance Act (1938), Ss. 91 (2), 90 and 92 (12) — Liquidator appointed under S. 90 has same powers as those of Official Liquidator under Companies Act — Making of call is integral part of realisation of contribution and falls under S. 91 (2) — Liquidator cannot make call without Court's intervention as provided by S. 187, Companies Act.**

Sections 91 (2) and 92 (12) make it clear that a Liquidator of a Provident Society in liquidation appointed under S. 90 has the same powers as those of an Official Liquidator under the Companies Act. Since the Official Liquidator can realise the contribution payable by the contributories only through the intervention of the Court, it is not open to the liquidator appointed under S. 90 to ignore that procedure and realise the contribution himself. [P 138*b*]

The contributions referred to in S. 91 (2) must mean what is due from the contributories in their capacity as contributories that is what is due from them in respect of their shares. The making of a call is an integral part of the process of "realising" the contributions and for that reason it clearly falls within S. 91 (2). Consequently, the liquidator appointed under S. 90 has no power to make a call on the contributories otherwise than through the intervention of the Court as provided by S. 187, Companies Act. [P 138*a*]

(b) Companies Act (1913), S. 186 — Contributory cannot claim set off in respect of amount due from him in respect of calls.

The Court will not allow a person to whom the company is indebted to set off that indebtedness against what is due from him as a contributory in respect of calls. It is otherwise where the two debts are of a purely commercial nature. But where the debt to the company is in respect of calls the set off is never available to a contributory : ('40) 27 A.I.R. 1940 All. 544, *Rel. on.* [P 138*e*, *f*]

(c) Companies Act (1913), Ss. 186 and 187 — Calls validly made by Directors prior to liquidation—Date for payment passed—Call becomes debt due from share-holder to company which liquidator can realise — Under S. 186, Court cannot question liquidator as to purpose for which debt is being realised or withhold payment thereof though under S. 187 Court can consider whether liquidator really needs money.

A call, once it has been validly made by the Directors prior to liquidation and once the date for its payment has passed, becomes a debt due from the share-holder to the company and is indistinguishable from any other debt. When subsequently the company goes into liquidation, that debt, or those debts become assets of the company which have to be realised by the liquidator. They lose their character as calls and become debts, and as such, are realisable by the liquidator just as any other debt or asset is realised. Under S. 186, the Court has not even any jurisdiction to ask the liquidator what he

wants it for and still less to withhold the payment of it from him. When, of course, a liquidator comes to the Court under S. 187 and asks for leave to make a call after the liquidation has intervened, the position is quite different. There the Court has jurisdiction and indeed it is the very object of its being brought to the Court at all to consider whether the liquidator really needs the money he says he needs it or not. [P 138*h*; P 139*a*]

(d) Companies Act (1913), S. 186 — Under S. 186 Court will not go into validity of liquidation.

In proceedings under S. 186 the Court will not go into the question of validity of the liquidation. That question should be raised in proper proceedings. [P 138*f*]

Sri Narain Sahai and Raj Narain — for Applicant.

M. N. Agarwala, L. N. Gupta, H. P. Sen, Jagnandan Lal and B. N. Misra — for Opposite Party.

ORDER. — This is an application made by the Voluntary Liquidator of the Public Benefit Insurance Society Ltd., under S. 186 (1), Companies Act, in circumstances which I shall describe in a moment. The petition was filed on 5th March exactly six months ago—and I have already had occasion to comment on the dilatory way in which the matter has proceeded. It has however now come before the Court for the fourth or fifth time and fortunately I am at least in a position to dispose of it as against most of the respondents. The petition raises a point which is not altogether uninteresting as it seems to be one which has not been raised before. The company was incorporated in December 1929 with a capital of a lac of rupees divided into a thousand shares of a nominal value of Rs. 100 each. The company was incorporated for the purpose of carrying on an insurance business and it may be taken for granted that it is a "Provident Society" within the meaning of S. 65, Insurance Act (Act 4 of 1938). On 25th October 1939, the company went into voluntary liquidation and on 10th April 1940, Mr. J. C. Chandiok, the present applicant, was appointed liquidator. At that stage, I desire to refer to S. 90, Insurance Act, which provides that where a provident society is wound up whether under the Companies Act, 1913, or under the Insurance Act, a report has to be made within seven days from the passing of the winding up resolution to the Superintendent of Insurance and, except where the winding up is done by an order of the Court, the Superintendent of Insurance then appoints a liquidator. There is no doubt in this case that the company fell within that section and, accordingly, Mr. Chandiok was the nominee of the Superintendent of Insurance under S. 90 of the Act.

At that point it is necessary to say that, prior to its going into liquidation, the Directors of the company had made four calls in pursuance of Arts. 12 to 17 of table *A*, which applied to the company. Rs. 10 had been originally payable on allotment and by a resolution passed in August 1930 a further call of Rs. 10 was made. By another resolution passed in April 1931 a further sum of Rs. 5 was called up, while by resolutions of June 1931 and July 1938 sums of Rs. 12-8-0 and Rs. 6-4-0 respectively were called. All that happened before the liquidation, with the result that, in addition to the Rs. 10 payable on allotment, a further Rs. 33-12-0 had been called altogether. That left Rs. 56-4-0 to represent the outstanding liability which had not been called at the date of the liquidation. The list of contributories was settled by the liquidator on 5th June 1940 and it may be taken that all the present respondents are on the list of contributories. The liquidator had power to settle the list of contributories himself by virtue of S. 91 (2) read with the company winding-up rules of this Court, Rr. 56 to 58. At that stage, the liquidator was minded to call up the whole of the outstanding liability of Rupees 56-4-0 per share. At the same time there were some comparatively small sums due from share-holders which still remained unpaid from the previous four calls which had been made. The liquidator in making his call of the remaining Rs. 56-4-0 per share did not come to the Court, but assumed that he had jurisdiction to make the call without the Court's assistance. Having done so, and having failed to obtain payment from a number of contributories, he launched the present petition. The present petition may therefore be divided into two parts—the first to enforce the call of Rs. 56-4-0 per share made by the liquidator since the liquidation and the other to enforce those comparatively small amounts which at the date of the liquidation were still outstanding and represented previous calls made by the Directors. I propose to deal with the liquidator's call—that is the one made since the date of the liquidation — first, as it represents far the larger sum of money and affects every one of the respondents. I have already described how the liquidator came to be appointed. His powers are to be found in S. 91, Insurance Act. By that section:

"(1) A liquidator appointed to wind up a society shall have power— . . . . . (b) to determine the contribution to be made by the members of the society respectively to the assets of the society . . . . . .

(2) The liquidator shall, for settling the list of contributories and realising the amount of contributions, have the same powers as an official liquidator appointed by the Court for the winding up of a company under the Companies Act, 1913."

Then follows S. 92 which indicates the procedure that the liquidator has to adopt. After dealing with a number of specific matters with none of which we are at present concerned, the section goes on by subs. (12) to provide:

"So far as is not otherwise provided herein or is not otherwise prescribed under this Act, the liquidator shall so far as practicable follow the procedure to be followed by an official liquidator appointed by the Court for the winding up of a company under the Companies Act, 1913."

Now, the question which obviously presents itself, is whether the voluntary liquidator, in the peculiar position in which this liquidator stood, had any power to make a call himself without the intervention of the Court. We may concede at once that, had he been just an ordinary voluntary liquidator, Mr. Chandiok could probably have made this call. He was not however in that position. It is true that this provident society was in voluntary liquidation and that Mr. Chandiok became by virtue of his appointment by the Superintendent of Insurance the Voluntary Liquidator. But in that liquidation he was, I think, bound by the special provisions applied by the Insurance Act to liquidators appointed to wind up a society. It is to my mind as plain as it can possibly be that by S. 91 (2) of the Act the liquidator has no powers of "realising the amount of contributions," except such powers as an official liquidator has in a winding up order by the Court. Moreover, by S. 92 (12) he is bound, as far as practicable and so far as the Act itself does not otherwise expressly provide, to follow the same procedure as

that which is prescribed by the Companies Act for an official liquidator.

It has been argued that what this liquidator has done in making the call is not within the description of "realizing the amount of contributions." The contributions there referred to must mean, I think, what is due from the contributories in their capacity as contributories or, in other words, what is due from them in respect of their shares. It seems to me that the making of a call is an integral part of the process of 'realizing" the contributions. The liquidator, when he is appointed, finds that the contributories whom he has settled on the list are liable for certain sums in certain contingencies. What does he do as the first step to get those sums ? He is, of course, to make a call, in other words, he has to tell the contributories that he needs the money and that they have got to pay. An official liquidator can only do that by having resort to S. 187, Companies Act, which gives the power, not to him, but to the Court to make calls and to order payment of them. It seems to me that the making of the call is a first and inseparable part of the process of the "realization" of the monies due from the contributories and for that reason, I think, it clearly falls within S. 91 (2), Insurance Act, and is one of those things that the liquidator of a provident society can only do by exercising the same powers as an official liquidator would exercise under the Companies Act. Moreover, under S. 92 (12) not only can he exercise those powers as the official liquidator but he should follow the same procedure which applies to an official liquidator. An official liquidator could have only realized what was due from the contributories by coming to the Court and asking the Court to make a call. Hence, in my opinion, the present Liquidator has no greater power. I do not think it can be argued successfully that the making of a call is merely the determination of the contribution to be made by the members" within the meaning of S. 91 (1) (b) of the Act,

For these reasons, I have been compelled to come to the conclusion that no call has been validly made by the present liquidator in respect of any of those sums which represent the calls made since the date of the winding up and, accordingly, I am not able to give him any order in respect of those sums. I desire to say that in respect of those sums, I am not dismissing his claim upon the ground that ultimately and after the right procedure has been taken they may not become due. All I say is that, for technical reasons and as matters stand at present, they are not due because no valid call has been made. I do not wholly blame the Liquidator for having omitted to notice this point as it is not altogether an obvious one. There remain to be dealt with the claims against various respondents in respect of the other sums, that is to say the balances of the calls made prior to the liquidation. In order to simplify the matter, I may say at once that one of respondents (No. 21) has died and that no order is now sought as against him. Five other respondents (Nos. 3, 6, 17, 22 and 23) have not yet been served and I cannot accordingly deal with the petition as against them to-day. That leaves respondents 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 24, 25 and 26 against whom the petition can be effective to-day.

Respondents 1, 2 4, 5, 7, 8 and 10 have all appeared by Mr. B. N. Misra and have admitted that the sums stated to be due from them are actually due. The last mentioned, however, Anurudh Kumar has by para. 20 of his affidavit in reply taken a point that, even though the sum of Rs. 156-4-0 is due from him in respect of the calls made prior to the liquidation, he is entitled to liquidate that sum by setting it off against a sum of Rs. 720 which he claims the company owes him on a loan account. I understand that the liquidator does not admit that that sum is due from the company. Apart, however, from that there is another reason why that claim to a set-off cannot succeed. The present application by the Liquidator is clearly one under S. 186 (1), Companies Act. He seeks to recover payment of money due from a contributory exclusive of money due from him by virtue of a call in pursuance of the Act. Obviously, the call made by the Directors was not one made "in pursuance of the Companies Act." By virtue of sub-s. (2) of S. 186, it is wholly discretionary in a Court whether any set-off can be allowed and it is now clear beyond any doubt and as a fixed judicial principle that the Court never allows a person to whom the company is indebted to set off that indebtedness against what is due from him as a contributory in respect of calls. It is otherwise where the two debts are of a purely commercial nature. But where the debt to the company is in respect of calls the set-off is never available to a contributory. That was finally settled, so far as this Court is concerned in the Full Bench case in 1940 A. L. J. 826.[1] I ought perhaps to have mentioned that all these seven respondents challenge the validity of the liquidation upon other grounds; but on this application I am not prepared to go into that question. That can be raised in proper proceedings at their instance, if they are minded to. For these reasons, so far as the respondents 1, 2, 4, 5 and 10 are concerned, I shall make orders for payment by them to the liquidator on or before 15th October of this year of the respective sums of Rs. 156-4-0, Rs. 233-2-9, Rs. 174-14-6, Rs. 156-4-0 and Rs. 156-4-0. As regards respondents 7 and 8, nothing is due from them in respect of calls made prior to the liquidation and I shall, accordingly, dismiss the petition as against them.

I now come to respondents 11, 14, 15, 18 and 9. They all raise the same point, which I understand to be this. They say that, if the matter be inquired into, it will be found that the Liquidator has no occasion to levy these sums from them because, to put it shortly, he has over-estimated the liabilities of the company. To my mind, that is a wholly irrelevant argument as far as this application is concerned. A call, once it has been validly made by the Directors prior to liquidation and once the date for its payment has passed, becomes a debt due from the share-holder to the company and is indistinguishable from any other debt. When subsequently the company goes into liquidation, that debt, or those debts, become assets of the company which have to be realised by the liquidator. They have lost their character as calls and have become debts and, as such, are realisable by the liquidator just as any other debt or asset is realised. This Court is not in the least concerned with what he wants it for and, in my view, this Court has not even any jurisdiction to ask the liquidator what he wants it for and still less to withhold the payment of it from him. When, of course, a liquidator comes to the Court under S. 187 and asks for leave to make a call after the liquidation has intervened, the position is quite different. There the Court has jurisdiction and indeed it is the very object of its being brought to the Court at all to consider whether the liquidator really needs the money he says he needs it or not. In that case the liquidator is making a call himself and that

1. ('40) 27 A.I.R. 1940 All. 544 : 192 I. C. 357 : I.L.R. (1941) All. 153 : 1940 A. L. J. 826, Shri Nath Sah v. Official Liquidator.

is a step in the liquidation over which the Court has control. I think, therefore, that I have no jurisdiction at all to question the propriety of a liquidator seeking to get in a debt due to the company prior to the liquidation under S 186. For these reasons I shall make orders as against respondents 11, 14, 15, 18 and 9 respectively for payment of the sums of Rs. 31-4-0, Rs. 337-8-0, Rs. 13-12-0, Rs. 212-8-0 and Rs. 118-12-0.

As regards respondent 16, nothing is due from him beyond such sum if any, as may be payable in respect of any call ultimately validly made by the liquidator. The petition will have to be dismissed as against him. As regards respondent 26, there has been a slight clerical error and only Rs. 6-4-0 is in reality due from him. There will be an order for payment against him for that small sum. All these sums will be made payable by 15th October 1941. As regards respondents 12, 13, 19, 20, 24 and 25, they have not appeared, nor have they filed any affidavits and I shall, accordingly, make an order for payment as against them by 15th October 1941 of the following sums respectively, Rupees 31-4-0, Rs. 6-4-0, Rs. 12-8-0, Rs. 793-12-0, Rs. 32-8-0 and Rs. 33-12-0. As regards the remaining respondents (No. 3, 6, 17, 22 and 23), the petition will stand over to be heard as soon as they can be served. As regards respondent 21, there will be no order. As regards those respondents against whom the petition has wholly failed namely Nos. 7, 8 and 16, I think that they are entitled to their costs and the petition will be dismissed with costs. As regards all the other respondents except those against whom it has been stood over, I shall make no order as to costs.

G.N./R.K. *Order accordingly.*

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GANGA NATH J.

Kishan Lal — Applicant

v.

Ram Singh — Opposite Party.

Civil Revn. Appln. No. 6 of 1941, Decided on 19th November 1941, against order of Judge, Small Cause Court, Agra, D/- 15th July 1940.

U. P. Agriculturists' Relief Act (27 of 1934), S. 7 (a) — Agriculturist defendant in Government service stationed at Mainpuri—Ancestral home in Agra district — Defendant must be deemed to be actually and voluntarily residing at Mainpuri.

The agriculturist defendant's ancestral home was in the Agra district within the jurisdiction of the Agra Court, but he was in Government service and, at the time the suit was brought, was stationed in Mainpuri outside the jurisdiction of the Agra Court in which the suit was instituted :

Held that since the defendant actually resided at Mainpuri at the time the suit was brought, the Court at Agra had no jurisdiction. Merely because the defendant had his ancestral home in the Agra district he could not be deemed to be actually and voluntarily residing in the Agra district: 1892 A.W.N. 115; ('21) 8 A.I.R. 1921 All. 193 and 11 I.C. 851 (L.B.), *Rel. on*; ('37) 24 A.I.R. 1937 All. 761, *Expl.* [P 139*f*;P 140*a*]

B. S. Darbari — for Applicant.

Gopal Behari — for Opposite Party.

ORDER. — This is an application in revision by Kishan Lal plaintiff against the order of the learned Judge, Small Cause Court, Agra, returning the applicant's plaint for presentation to the proper Court. The applicant brought a suit against Ram Singh the opposite party, on the basis of a bond in the Small Cause Court, Agra. The defendant contended that he was actually residing in Mainpuri and therefore the Court had no jurisdiction. The learned Judge has found in his favour and, as already stated, ordered the return of the plaint for presentation to the proper Court. There is no doubt that the defendant's ancestral home is in the Agra district, but he is in Government service and, at the time the suit was brought, was stationed in Mainpuri. The defendant is an agriculturist and he relied on the provisions of S. 7 (a), U. P. Agriculturists' Relief Act. Section 7 (a) lays down :

"Notwithstanding anything contained in any other enactment for the time being in force, every suit for recovering an unsecured loan in which the defendant, or, where there are several defendants, any of the defendants, is an agriculturist, shall be instituted and tried in a Court within the local limits of whose jurisdiction —

(a) the agriculturist defendant, or any of the agriculturist defendants, where there are more than one such defendants, actually and voluntarily resides."

It has been contended on behalf of the applicant that as the defendant has his ancestral home in Agra district, he should be deemed to be "actually and voluntarily" residing in the Agra district. This argument is without force. The defendant is stationed in Mainpuri, and is actually residing there. He is not residing in his ancestral home in the Agra district. In 1892 A.W.N. 115[1] one A. R. was Kotwal at Mirzapur and, for purposes of his duty in Mirzapur, had hired a house there in which he and his wife lived. His home or family residence however was in Bhadohi, a pargana within the Family Domains of the Maharaja of Benares It was held :

"In our opinion a man who hires a house and lives in it so as to be able to attend to his duties as a police officer must be said to be actually residing in the place where the house is."

In 19 A.L.J. 822[2] it was observed :

"The learned Judge was clearly right in holding (indeed, there is no objection taken to it) that the mere fact that the ancestral home of persons who are really residing outside the jurisdiction was within the jurisdiction did not give jurisdiction."

A similar view was taken in 11 I.C. 851.[3] Learned counsel for the applicant relies on A.I.R. 1937 All. 761.[4] There the defendants carried on business in Cawnpore. They were agriculturists and residents of Barabanki district. It was held :

"The fact that the defendants carried on some business in Cawnpore or did some trade could not affect the mandatory provisions of S. 7, Agriculturists' Relief Act. The cardinal question for the decision of the point of jurisdiction raised by the defendants was, where did the defendants actually and voluntarily reside. On this point there was no conflict of testimony and it was admitted on all hands that the defendants who were agriculturists were residents of Barabanki district."

There was nothing to show that the defendants resided in Cawnpore in connexion with their business

1. ('92) 1892 A. W. N. 115, Abdul Rahman v. Ajodhya.
2. ('21) 8 A.I.R. 1921 All. 193 : 64 I.C. 688 : 19 A.L.J. 822, Kishori Lal v. Ram Sunder.
3. ('11) 11 I.C. 851 (L.B.), Sobramonian Chetty v. Maung Po Tha.
4. ('37) 24 A.I.R. 1937 All. 761 : 172 I.C. 288 : 1937 A.L.J. 843, Abdul Hasan v. Khalil Ullah.

or trade. This case, therefore, does not help the applicant. As already stated, the defendant actually resided in Mainpuri at the time the suit was brought and therefore the Agra Court had no jurisdiction. There is no force in the application. It is therefore ordered that it be dismissed with costs.

G.N./R.K. *Application dismissed.*

C. P. C. —

('40) Chitaley, S. 20, N. 3 and S. 20, N. 4 Pt. 9.

('41) Mulla, Page 115 Notes "Actually and voluntarily resides" and "'Dwells' within the meaning of Cl. 12 of Letters Patent."

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IQBAL AHMAD C. J. AND DAR J.

Sipattar Singh — Appellant

v.

Emperor.

Criminal Appeal No. 869 of 1941, Decided on 3rd December 1941, from order of Temporary Sessions Judge, Moradabad, D/- 6th October 1941.

Criminal P. C. (1898), Ss. 284 and 285 (1) — Applicability—S. 285 (1) is exception to S. 284 —Trial commencing with three assessors—One of them discharged while evidence of very first prosecution witness was being recorded—Trial with aid of remaining two assessors held irregular under S. 284 — S. 285 (1) does not apply — Retrial ordered.

Section 285 (1) constitutes an exception to S. 284 and is confined in its operation only to cases where the assessor himself is prevented from attending the trial by reason of infirmity or some other physical disability. [P 140*g*]

The trial in the case started with the minimum number of assessors, that is three, but one of them was discharged by the Judge, while the evidence of the very first witness for the prosecution was being recorded, on the ground that the assessor concerned was disqualified from acting as an assessor because of the knowledge that he had concerning the facts in issue in the case :

Held that it was not competent to the trial Judge to proceed with the trial without having a third assessor. The trial with the aid of two assessors only being irregular in view of the provisions of S. 284, the proceedings ought to be set aside and a retrial ordered : 21 All. 106, *Rel. on.* [P 140*h*]

Held further that S. 285 (1) had no application to the case. [P 140*g*]

K. D. Malaviya — for Appellant.

Government-Advocate — for the Crown.

IQBAL AHMAD C. J. — This is an appeal by Sipattar Singh alias Ghilandra Singh against his conviction by the temporary Sessions Judge of Moradabad under S. 302, Penal Code, and the sentence of death passed on him. The charge against the appellant was that on 13th June 1941, at about noon in village Gadi Khera at the house of Sundar Singh he committed the murder of Mt. Tirbeni by strangulating her with a lathi which he put and pressed on her neck and fractured her thyroid cartilage. As we are satisfied that the trial was vitiated by an irregularity committed by the learned Judge we have decided to send the case back with the direction that the appellant be retried according to law. It is, therefore, unnecessary to state the facts of the case. The trial before the learned Judge commenced with the aid of three assessors, viz. (1) M. Mohammad Noor, (2) Th. Tej Singh, and (3) L. Bhagwat Sahai. The first witness examined for the prosecution was one Sundar Singh and, while Sundar Singh was being cross-examined, the third assessor, L. Bhagwat Sahai informed the Judge that he had personal knowledge about one of the facts which was deposed to by Sundar Singh. The learned Judge then recorded the following note :

"At this stage Lala Bhagwat Sahai assessor said that on 13th June or thereabouts one morning at 8 A. M. while he was standing at the door of his kothi this witness passing on the way asked him where the kothi of Babu Gayendra Kumar was and he pointed out to him that the Kothi adjoining his was the one which the vakil occupied. Babu Gayendra Kumar is his tenant of the Kothi. In view of this personal knowledge possessed by Lala Bhagwat Sahai, I discharge him from the array of the assessors and shall record his evidence, if necessary."

After the discharge of L. Bhagwat Sahai the trial proceeded with the aid of the remaining two assessors one of whom expressed the opinion that the charge was brought home to the appellant, whereas the other found the appellant not guilty. The learned Judge accepted the opinion of the assessor who found the appellant guilty and accordingly convicted the appellant. Now in view of the provisions of S. 284, Criminal P. C., the minimum number of assessors with whose aid the trial is to be held is three. The trial in this case, therefore, started with the minimum number of assessors, but one of them was, as already stated, discharged by the learned Judge while the evidence of the very first witness for the prosecution was being recorded. As the number of assessors was reduced to two after the discharge of L. Bhagwat Sahai, it was not competent to the learned Judge to proceed with the trial without having a third assessor. In arriving at this conclusion we have not overlooked the provisions of S. 285 (1) of the Code which runs as follows :

"If, in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors."

This sub-section in our opinion has no application to the present case. It constitutes an exception to S. 284 and is confined in its operation only to cases where the assessor himself is prevented from attending the trial by reason of infirmity or some other physical disability. The sub-section, in our view, does not contemplate a case where the trial Judge himself discharges one of the assessors on the ground that the assessor concerned is disqualified from acting as an assessor because of the knowledge that he has concerning the facts in issue in the case. In view of the provisions of S. 284, it is imperative that a sessions trial must start with three assessors who are qualified to act as such. As in the case before us L. Bhagwat Sahai had personal knowledge about a matter relevant to the case he was not qualified to act as an assessor. The result was that in substance, if not in fact, the trial commenced with the aid of only two assessors who were qualified to act as such. The trial was, therefore, vitiated. The view taken by us is supported by the decision in 21 All. 106.[1] We accordingly allow this appeal, set aside the conviction of and sentence passed on the appellant and

1. ('98) 21 All. 106 : 1898 A. W. N. 185, Queen-Empress v. Babu Lal.

send the case back to the Sessions Judge of Moradabad with the direction to keep the case on his own file and try the appellant according to law. The case will not be tried by Mr. Zamirul Islam Khan. The decision of the case must be expedited by the learned Sessions Judge.

G.N./R.K. *Case remanded.*

Cr. P. C. —
('41) Chitaley, S. 284 N. 9 Pt. 1; S. 285 N. 2 Pt. 1.
('41) Mitra, Page 981 N. 890; "Number of assessors;" Page 982 N. 892.

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BRAUND J.

Ram Lal — Applicant

v.

Official Liquidator, Benares Bank Ltd. — Opposite Party.

Misc. Case No. 416 of 1941, Decided on 26th September 1941.

Companies Act (1913), S. 227 (2)—S. 227 (2) is discretionary—Test for exercise of discretion indicated — Transaction held amounted to disposition of its property by bank within S. 227 (2) —Case held unfit for exercise of discretion under S. 227 (2).

Section 227 (2) is a discretionary section by virtue of the words "unless the Court otherwise orders." That gives the Court discretion at any time to make an order in a proper case validating a disposition, notwithstanding that it is one made after the commencement of the winding-up. The reason why the Court is given a discretion under S. 227 (2) is that a company may not be completely paralysed by the presentation of a petition. In exercising the discretion under S. 227 (2) the Court, must have in mind the fundamental principle which runs through the whole of the administration of an insolvent company's winding up that the assets of the company shall be, so far as is possible and subject to certain well-recognized exceptions, distributed *pari passu* between the creditors and, subject as aforesaid, no creditors shall obtain an advantage over any other creditor. The test for the exercise of discretion under S. 227 (2) is whether the Court would have sanctioned the transaction on an application in that behalf : ('31) 18 A. I. R. 1931 Bom. 2; ('40) 27 A.I.R. 1940 All. 514 and (1926) 1 Ch. 828, *Rel. on.* [P 143*b*,*c*; P 144*a*]

T the treasurer of the bank employed *C* as cashier. *C* had a deposit of Rs. 1000 with the bank and on being required by *T* to furnish security *C* charged the deposit account of his own in favour of *T* as security to answer for his good behaviour. Some time after, *T*'s own employment as treasurer came to an end with the result that he ceased to employ *C*. Thereupon *C* applied to the bank for employment as cashier and got the appointment but was required to furnish security to the extent of Rs. 1000. For that purpose, *C* who had still standing in his own name the deposit account Rs. 1000 with the bank which had been charged to *T*, obtained from *T* a release of his charge over the fund with the result that the deposit account reverted to *C* in his own name free from the charge of *T*. *C* therefore satisfied his obligation to furnish security deposit of a Rs. 1000 by offering the bank the deposit account in his own name which had been released by *T*. This was effected by certain alterations being made in the ledger account and in the pass book. The whole transaction took place between the date of the application for winding up the bank and before the passing of the winding up order. *C* had entered into the transaction with the full knowledge that a winding up petition had been presented. The question was whether the transaction amounted to a disposition within S. 227 (2) and was therefore void :

Held that the transaction amounted to a "disposition" by the company of its property. After the release by *T* of his charge the deposit account became the personal property of *C*. The bank, whether it was regarded as a notional repayment to *C* and a re-deposit by him or as a mere transfer, disposed of it in the sense that they put an end to the old rights relating to him and created an entirely new set of rights. The bank extinguished its existing debt by paying it off and took it back in the form of a trust fund. That being so, and the transaction having taken place after the commencement of the winding up, was prima facie void as being disposition of its property by the bank within S. 227 (2). [P 143*a*,*b*]

Held further that although no question of fraud or fraudulent preference arose the case was not fit for the exercise of discretion under S. 227 (2) inasmuch as if the bank had applied to the Court for sanction to employ *C* as its cashier upon the terms that it should convert his ordinary unsecured deposit account into a deposit security account, the Court would knowing the facts not have given that sanction, and therefore the principle of pari passu distribution among the creditors must prevail, the case not being one of salvage, of real necessity or of the transaction having been the only means of keeping the company going. [P 144*e*,*g*,*h*]

Gopalji Mehrotra — for Applicant.

I. B. Banerji — for Opposite Party.

ORDER. — This is an appeal arising in the winding up of the Benares Bank, Ltd. from an order by the Official Liquidator rejecting the appellant's claim. The question is one which is not entirely free from difficulty. The facts of the matter are these. The appellant B. Ram Lal, whom for convenience I shall hereinafter refer to as the "cashier", had for a number of years been employed at the Saharanpur Branch of the Benares Bank. But until 1939 he had not been so employed as the servant of the bank, but as the employee of one L. Revti Raman. That possibly was a curious arrangement, but it is accepted on both sides that that was the position. In his capacity as the employee of L. Revti Raman, the cashier had been required by the latter to give him security. That was done in this way. The cashier had maintained a personal deposit account in the Saharanpur Branch of the bank for a Rs. 1000 in his own name and had, in effect, charged that deposit account of his own in favour of his employer, L. Revti Raman, as security to answer for his good behaviour. That is made clear if one looks at the pass book of this account in the name of the cashier. A note is found there in these words :

"This account is pledged with L. Revti Raman Saheb. . . . . as security and the principal deposit will be paid to the depositor on his written permission. . . . . ."

In June 1939 some re-organization took place in the bank among its staff with the effect that the cashier ceased to be employed by L. Revti Raman in connexion with the bank's affairs. I am told that

L. Revti Raman was himself the treasurer of the bank and that at this point his own employment as treasurer came to an end with the result that he ceased to employ the cashier. On 23rd August 1939, the cashier, that is L. Ram Lal, applied to the Bank's Agent at Saharanpur for the post of cashier at the Saharanpur Branch directly under the bank and in that application he offered to make a security deposit of a thousand rupees. On 3rd November 1939 L. Ram Lal was appointed cashier of the Saharanpur Branch. We have a letter from the Bank's Agent of that date in which he says :

"....I hereby appoint you as cashier for our Saharanpur office on a salary of Rs. 35 p. m. from today. Please arrange to place at the disposal of the bank a sum of Rs. 1000 (Rupees one thousand only) as security deposit."

Now at that point it is necessary to see in what way the cashier fulfilled his obligation to furnish the security deposit of a thousand rupees he had been asked for. It is out of that transaction that the present question arises. It will be remembered that he had still standing in his own name the deposit account which had been charged to L. Revti Raman as security so long as the cashier's employment under him lasted. What the cashier did therefore was first to obtain from L. Revti Raman a release of his charge over the fund. I have a copy of that letter before me and no objection has been taken merely on the ground that it is a copy. It is in these words:

"The Agent

Benares Bank, Saharanpur.

Dear Sir,

With reference to the amount of Rs. 1000 (Rupees one thousand only) in fixed deposit account with you in the name of L. Ram Lal and assigned in my favour as security deposit, I hereby release the said deposit and I authorise you to make payment of the amount direct to L. Ram Lal as he is no longer in my service. I have now no concern with the said deposit. The relative pass book is also handed over to L. Ram Lal.

Yours faithfully

Sd. Revti Raman, Treasurer."

The effect of that was that the deposit account reverted to the cashier in his own name and free from the charge of Revti Raman. I do not know the date of that letter from L. Revti Raman to the bank releasing the security, but it has been accepted by both sides for the purposes of argument that it was written on or about 3rd November at the time of the appointment of the cashier as the servant of the bank. The cashier therefore satisfied his obligation to furnish a security deposit of a thousand rupees by offering the bank the deposit account in his own name which had been released by L. Revti Raman in the manner in which I have described. This was effected by certain alterations being made in the ledger account and in the pass book. Up till December 1939 the deposit account continued to stand in the name of the cashier, but all reference to the charge in favour of L. Revti Raman was deleted in red ink both in the ledger folio and in the pass book and instead the words "security deposit" were added to the account in both places. Then, on 30th December 1939, the whole account was closed and we find an entry in the ledger "account transferred to H.O.A/C," that is to the Head Office account. I do not doubt that the effect of these transactions in form at least, was that the bank had taken over the cashier's personal deposit account as the security which it had required from him on his appointment as cashier.

The question at issue in this case is what was the legal effect of the transaction in the form in which it took place. Before dealing with the law, it is necessary to analyse the transaction a little further. At the instant of time at which L. Revti Raman released his own security over the fund, it no doubt reverted to the cashier as his own unencumbered property. At that instant of time the, relationship between him and the bank was one simply of banker and customer, or, in other words, of debtor and creditor. He was, in short a mere depositor in the bank. The effect of what followed was that the bank took the cashier's own personal and private deposit as the security which it had demanded and, in the way I have pointed out, it was actually transferred out of the cashier's name into the Head Office account, where presumably all the security deposits were kept. I do not think that the actual form of the transaction matters very much. It is the substance and effect of the transaction which we have to look at. It can be treated either as a notional repayment by the bank to the cashier of the thousand rupees standing to his credit on the deposit account and the immediate re-deposit of that sum by the cashier by way of security; or it can be regarded merely as a transfer by the cashier of the money standing to the credit of his personal deposit account to another account to be held by way of security. Whatever the actual form of the transaction was, the substantial effect of it was that the relationship between the bank and the cashier was materially altered. The cashier ceased to be a mere creditor of the bank in the sense of an ordinary depositor and he became an employee of the bank who had deposited a security deposit. Obviously there is a great difference between the rights of a mere unsecured depositor and the rights of an employee in respect of his security deposit when it comes to a question of winding-up. If the transaction is to be sustained, the effect will have been that by this arrangement the bank will have converted the account in question from an unsecured deposit account carrying with it the rights merely of an unsecured creditor to a security deposit account carrying with it the rights of a beneficiary in relation to a trust fund. Or, to put that in another way, the cashier will have, in effect, received back his deposit account in full and will have re-deposited it with the bank in a different capacity and moreover in a capacity in which he is no longer a mere creditor but is in the position of a cestui que trust.

It is that transaction which is attacked. There are two or three relevant dates. On 3rd May 1939 the company had suspended payment. On 3rd August 1939, the winding-up petition had been presented and, in view of the winding-up order which was made subsequently, 3rd August 1939 became the date of the commencement of the winding-up. Ultimately the winding-up order was made on 1st March 1940. It will be observed therefore from these dates that the transaction I have been discussing took place after the date of the commencement of the winding-up. but before the date of the winding-up order. In those circumstances, the cashier preferred a claim to the official liquidator to be paid the amount of his so-called security deposit in full upon the footing that it was a trust fund and, as such, never formed part of the assets of the bank available for distribution among the creditors. The official liquidator however took the view that the whole transaction was void under S. 227 (2). Companies Act, as a disposition by the company of its property made after the commencement of the winding-up. If that is true, then, unless the Court should think fit otherwise to order, the transaction will be wholly

void ab initio and the result would be that the money in question will still be standing as an ordinary deposit account and the cashier will still be an ordinary unsecured creditor in respect of it. That is what the official liquidator has decided.

This is a matter which is governed by S. 227 (2), Companies Act, I have no doubt. I have already at some length set out the details of the transaction. It seems to me that, when examined, it amounted in fact to a "disposition" by the company of its property. At the moment after the release by L. Revti Raman of his charge the deposit account became the personal property of cashier. The bank, whether we regard it as a notional repayment to the cashier and a re-deposit by him or as a mere transfer, disposed of it in the sense that they put an end to the old rights relating to him and created an entirely new set of rights. I have not the least doubt that it was a 'disposition' by the company of the money which they utilised in discharging their unsecured debt to the cashier on the deposit account as the prelude to creating the trust fund held on the security deposit account. It extinguished its existing debt by paying it off and took it back in the form of a trust fund. That being so, and there being no doubt that it took place after the commencement of the winding-up, it was prima facie void in the sense that it was of no effect at all.

But S. 227 (2) is a discretionary section by virtue of the words 'unless the Court otherwise orders." That gives the Court discretion at any time to make an order in a proper case validating a disposition, notwithstanding that it is one made after the commencement of the winding-up. The real difficulty in this case consists to my mind, in deciding whether it is one in which the Court ought to exercise its discretion in favour of the appellant. Now, there are certain authorities which have been decided in relation to the principles by which the Court ought to be guided on this question. But before coming to those cases, I think it is right to refer to the underlying and fundamental principle which runs through the whole of the administration of an insolvent company's winding-up. The fundamental principle is that the assets of the company shall be, so far as is possible and subject to certain well recognized exceptions, distributed pari passu between the creditors and, subject as aforesaid, that no creditors shall obtain an advantage over any other creditor. That is the fundamental principle underlying all winding-up and insolvency administration and I feel that, in dealing with every question of this kind, it is right to approach it with that in mind. I do not mean to suggest that there are not statutory exceptions and that there are not cases in which in the exercise of a judicial discretion the principle may be departed from.

It is, nevertheless, important that the principle should be borne in mind. It has also to be noticed that in this particular case it is impossible to believe – and indeed, it has not been alleged — that the appellant entered into the transaction in ignorance of the fact that a winding up petition had been presented. We start, therefore, apart from the question of principle, with the circumstance that the cashier must be taken to have known at all material times that a winding-up petition had been presented and, on well-known principles, he must be taken to have known that any disposition by the company of its property was liable to be void. There is no suggestion from first to last that there was any ulterior motive in the mind of the appellant and I think it is fair to say that no question of any conscious fraud on the creditors has been raised in the case. It is simply a matter in which one of two innocent parties have to suffer, the appellant on the one hand or the general body of creditors on the other. Nor, in my view, does any question of fraudulent preference arise, because the whole foundation of the transaction is admitted to have been that it was entered into for the purpose of enabling the appellant to be employed as a cashier and in order that he might give security to the Company for his good behaviour. I cannot possibly, therefore, find any "view to prefer." Now coming to the authorities, I only propose to deal with three of them. The whole question of the discretion of the Court under S. 227 (2) was discussed very fully by three Judges of the Bombay High Court in 54 Bom. 718.[1] No useful purpose will be served by referring to the particular facts of that case. The learned Chief Justice in the course of his judgment also took as his point of departure the fundamental principle of the distribution of assets pari passu in all insolvency administration. He says at p. 738 :

"Mr. Munshi for the Liquidator has rightly laid stress on these questions of principle, and he has indeed urged that if dispositions of this character of a company's assets are to be allowed on the mere pretext of giving time, this would undermine the main principle hitherto governing the distribution of assets in the winding-up of a Company or the insolvency of an individual or firm. This fundamental principle is that in a winding-up or insolvency all unsecured creditors are to be paid pari passu, and further that the appropriate date for ascertaining their legal position is in the case of a company the date of the commencement of the winding-up . . . ."

The learned Chief Justice then at p. 753 goes on to point out that, even in the ordinary course of business, there is a sharp distinction between what is permissible after the presentation of a petition and before. There is no doubt that the reason why the Court is given a discretion under S. 227 (2) of the Act is that a company may not be completely paralysed by the presentation of a petition. There are obviously cases and occasions in and on which it is not only legitimate but useful and necessary for a company to undertake business transactions even after a petition against it has been presented. There are, however, differences between what may be done before and after the presentation of the petition. The learned Chief Justice says :

"There is, I think, a dividing line between what is the ordinary course of business before a winding-up petition is presented, and what is the ordinary course afterwards. Before a petition is presented, it is in the ordinary course of business for a company to pay all its debts, and incidentally to give security to its bankers for any overdraft or loan it may arrange. But after a petition is presented, the situation is different. Prima facie all debts will have to be paid pari passu. Therefore it is no longer in the ordinary course of business to pay one creditor in full to the detriment of his fellow creditors . . . ."

That does not, of course, refer to the conscious payment of one creditor to the detriment of his fellow creditors. That is covered by the fraudulent preference doctrines of insolvency law. What I venture to think the learned Chief Justice meant was that, even in carrying on its ordinary business

1. ('31) 18 A.I.R. 1931 Bom. 2 : 127 I.C. 82 : 54 Bom. 718 : 32 Bom.L.R. 953, Tulsidas Jusraj v. Industrial Bank of Western India.

in the interval between the presentation of a petition and the making of a winding-up order, the company must never forget that the principle of pari passu distribution among the creditors must prevail in the absence of most exceptional circumstances. And finally at p. 728 the learned Chief Justice applied a test. He said :

" The real point then to my mind is to determine what was right and fair between 24th and 31st July when these securities were given. And as the Court's sanction is now asked for ex post facto, I think it a fair test to consider whether the Court would have sanctioned the giving of these securities, supposing it had been asked to do so at the time . . ."

The learned Chief Justice, therefore, applied his mind to what would have been the view of the Court had it been applied to for sanction at the time. If I may say so, that is the right test. That case in the Bombay High Court has been approved of and followed in our own Court very recently in 1940 A.L.J. 739.[2] The facts of that case are not identical with the one (*sic*) and it is sufficient for me to point out that the principles of the Bombay case were accepted and followed. Finally, I desire to refer to an English case, (1926) 1 Ch. 828,[3] under S. 205, Companies (Consolidation) Act, 1908, which was the section of that Act corresponding to S. 227, Companies Act. Unlike the two cases to which I have already referred, this is a case in which the Court allowed a disposition of property to stand. In this case a petition had been presented against the company for winding up; but, notwithstanding that, the company borrowed money wherewith to pay its servants and gave a security over the company's assets to secure the sum borrowed. It turned out that the company was thereby able to continue its business until the winding up order intervened and then in the winding-up the business was sold as a going concern. Romer J., as he then was, in the course of his judgment referred to a passage from Lord Cairns's judgment in (1868) 3 Ch. 443.[4] At p. 446, Lord Cairns said :

" Section 153—that is the equivalent section of the English Act of 1862—no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the Court otherwise orders, be void. This is a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. But where a company actually trading, which it is the interest of every one to preserve and ultimately to sell, as a going concern, is made the object of a winding-up petition, which may fail or may succeed, if it were to be supposed that transactions in the ordinary course of its current trade bona fide entered into and completed, would be avoided, and would not, in the discretion given to the Court, be maintained, the result would be that the presentation of a petition groundless or well-founded, would ipso facto, paralyze the trade of the company, and great injury, without any counterbalance of advantage, would be done to those interested in the assets of the company."

Romer J., in the case before him applied that principle and he decided that the borrowing of the money was, in effect, a matter both of necessity and of prudence and that, in the result, it had been justified by the eventual sale of the business as a going concern. Now, I have to try to apply those principles to this case and I shall begin by applying that test which the learned Chief Justice of the Bombay High Court himself applied. I bear in mind that this is a case in which no question of fraud arises and I ask myself whether, if the Bank had applied to the Court for sanction to employ the appellant as its cashier upon the terms that it should convert his ordinary unsecured deposit account into a deposit security account, the Court would knowing the facts have given that sanction. I am compelled to think that it would not have done so. Inevitably the Court would have had in mind the result of that transaction, namely that its effect was to pay to the cashier the amount of his deposit account in full at a time when it was known that a petition was pending against the company and when it was certain that, if a winding up order was made, the creditors would not be paid in full. As I have already pointed out, that knowledge was equally available to the parties to this transaction as it would have been to the Court. I have no doubt that there are hundreds of unemployed cashiers whose qualifications are almost as good as those of this appellant.

It is true that he had been employed in dealing with the company's affairs for some years and to that extent he may have had a special value but I cannot think that the Court would have so far departed from fundamental principle as to have allowed a payment to be made to an unsecured creditor in full at the expense of the other creditors, merely because he was known to be a suitable cashier. This application is an 'ex post facto' application, and I regret that I can see no ground upon which I can sanction now a transaction which, in my opinion, the Court would not have sanctioned at the time. I have not come to this view upon the ground that there was in any way any sharp practice or unfair dealing on the part of L. Ram Lal. As I have said before, it is one of those unfortunate cases in which one of two innocent parties must suffer. In the result I have come to the conclusion that the principle must prevail—that is the principle of pari passu distribution among the creditors. It was not a case of salvage, of real necessity nor of the transaction having been the only means of keeping the company going. It was a very ordinary transaction in which unfortunately the company chose as their cashier a man who had a deposit account with it and was in that respect an unsecured creditor. In the result the applicant obtained an undue advantage over his fellow creditors and, for the reasons which I have given at some length, I feel unable to sanction it. For all these reasons, this application must be dismissed.

G.N./R.K. *Application dismissed.*

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2. ('40) 27 A.I.R. 1940 All. 514 : I.L.R. (1940) All. 730 : 1940 A. L. J. 739, Gorakhpur Electric Supply Co. Ltd. v. Siemens (India) Limited, Calcutta.

3. (1926) 1 Ch. 828 : 95 L. J. Ch. 584 : 135 L. T. 575 : 70 S. J. 670 : 1926 B. & C. R. 94, In re Park Ward Co. Ltd.

4. (1868) 3 Ch. 443 : 18 L. T. 40 : 16 W. R. 444, In re Wiltshire Iron Co.

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A. I. R. (29) 1942 Allahabad 145
FULL BENCH

COLLISTER, BAJPAI AND BRAUND JJ.

Dular Koeri and others — Plaintiffs— Appellants

v.

Payag Koeri—Defendant—Respondent.

Appeal No. 285 of 1940, Decided on 22nd January 1942, against order of Civil Judge, Jaunpur, D/- 6th September 1940.

(a) Practice — Reference to Full Bench *(Per Braund J., in Order of Reference).*

References to Full Benches should be made only in cases of real necessity. [P 145*f*]

(b) Civil P. C. (1908), O. 23, R. 3—Suit pending — Reference to arbitration out of Court — b **Award can be treated as compromise within O. 23, R. 3 and recorded as such.**

An award made during the pendency of a suit between the parties and concerning the matters or some of the matters in that suit as a result of an arbitration out of Court may constitute an adjustment by lawful agreement or compromise within the meaning of O. 23, R. 3 and can be recorded as such: ('25) 12 A. I. R. 1925 All. 503 (F. B.) and ('27) 14 A.I.R. 1927 Bom. 565 (F.B.), *Rel. on.* [P 147*b*]

Kedar Nath Sinha — for Appellants.

Gopalji Mehrotra — for Respondent.

ORDER OF REFERENCE

BRAUND J. — This is an appeal from an order of the Civil Judge of Jaunpur remanding a case for retrial. The matter is one which has caused me a good deal of trouble. The facts, however, are very c short. It appears that the three plaintiffs, who are the appellants, brought a suit against the defendant who is the respondent. It is quite immaterial for the present purpose what the suit was about. During its pendency before the Munsif of Jaunpur, the plaintiffs on 11th September 1939, made an application to the Munsif by which they said in effect that they had submitted the disputed matter to certain arbitrators to be decided by a majority and asking that the majority decision of these gentlemen might be "filed and the case decided in accordance with it." It is worthwhile, for the sake of exactness, to set out that application in full. It says :

". . . It is submitted that we the parties have appointed — several persons — as arbitrators for the decision of the dispute in this case. We had appointed the same persons for the decision of certain other disputes by executing an agreement dated 31st d August 1939, and we had agreed that whatever should be decided by the majority of votes of the said persons would be accepted by us. Consequently, the said arbitrators made an inquiry and some of them decided the matter on 7th September 1939 and read it out to the parties. As two of the arbitrators were partial to the defendant, they declined to sign the award. It is therefore prayed that the said agreement and the arbitration award which are in the possession of the arbitrators may be summoned and ordered to be filed and that this case may be decided in accordance with it."

Now, I inquired exactly what that application was intended to be, and I desire to make it quite clear that the plaintiffs both in the Courts below and here have expressly disclaimed any intention to have complied by that application under para. 20 of Sch. 2, Civil P. C. In fact, they went so far that, upon the application itself, an endorsement was written by the pleader who appeared for the plaintiffs before the Munsif to the effect that it was an application under e O. 23, R. 3, Civil P. C. It is very important, therefore, to observe that the questions which have arisen have not been considered with reference to para. 20 of Sch. 2 at all, but have been considered solely with reference to O. 23, R. 3. In other words, the only contention has been that the document which I have set out, in the circumstances in which it was come to, constituted an "adjustment" by way of "lawful agreement or compromise" and as such ought to be recorded under O. 23, R. 3. The Munsif came to the conclusion that it should be so accepted and recorded and he, in effect, passed a decree in accordance with it. The Civil Judge of Jaunpur however came to the opposite conclusion and he held that it could not be so recorded and remanded the suit back to the Munsif for retrial.

This is a case in which, in my view, the authorities as they exist in this province are not altogether f satisfactory. I have come to the conclusion that the matter is one which I ought to refer to the Chief Justice with a recommendation to constitute a Full Bench to deal with it. In the somewhat peculiar circumstances of the case, however, I think I ought to explain my reasons for taking this course, particularly as I am on principle averse to multiplying references to Full Benches except in cases of real necessity. I have already pointed out that the case is one involving only O. 23, R. 3, and not para. 20 of Sch. 2, Civil P. C. Had the latter paragraph been involved, it might have been difficult for me at any rate as a Single Judge to have overcome a two Judge decision of this Court in 1937 A.L.J. 1133.[1] It is for that reason that I have particularly pointed out that the plaintiffs have disclaimed all intention of endeavouring to treat the matter as one of an award to be made an order of the Court under Sch. 2. g Order 23, Rule 3 provides the machinery for giving effect to a case in which "a suit has been adjusted wholly or in part by any lawful agreement or compromise. . . . . ." The sole question, therefore, is whether, in the circumstances of the case what happened here constituted "an adjustment by any lawful agreement or compromise."

This is a matter which has given rise to considerable controversy among the High Courts in India. On one side, the Calcutta High Court, the Patna High Court, the Punjab High Court and the Burma High Court take a very decided view that on the true construction of O. 23, R. 3 a decision by arbitrators come to as a result of a reference out of Court by the parties to a pending suit cannot constitute "an adjustment by way of a lawful agreement or compromise;" while this High Court, the Madras High Court and certain other decisions of h the Bombay High Court appear to indicate a view that they can. Whatever the views of the other High Courts may have been however, and however much I may have entertained a personal inclination to agree with them I should not have been justified in referring this case to the Chief Justice for the constitution of a Full Bench if the law, as settled in this Court, were altogether clear. I cannot, however, think that the law in this Court in this respect is altogether satisfactorily settled.

There is in 47 All. 637[2] a decision by a majority

1. ('38) 25 A.I.R. 1938 All. 46: 172 I. C. 967: 1937 A. L. J. 1133, Ganga Prasad Singh v. Bindeshwari Singh.
2. ('25) 12 A.I.R. 1925 All. 503 : 88 I. C. 768 : 47 All. 637 : 23 A. L. J. 561 (F.B.), Gajendra Singh v. Durga Kunwar.

of three Judges sitting in this Court in Full Bench in the sense that an agreement by arbitrators arrived at during the pendency of a current suit can be treated as an adjustment by agreement or compromise within the meaning of O. 23, R. 3. That Full Bench case,[2] it is right to say, seems to have raised precisely the same point as is in issue here. Two of the learned Judges, Walsh and Kanhaiya Lal JJ. came to the conclusion that O. 23, R. 3 did apply, while Mukerji J., if I may say so with respect, in a powerful dissenting judgment thought that it did not. It is, however, noticeable that, of the two concurring judgments, that of Walsh J. dealt less with the construction of O. 23, R. 3 than with a supposed inherent power of the Court to prevent a dishonest advantage being taken by litigants of an opportunity to escape from a concluded agreement. Though it is true that the learned Judge does say that if he had been asked to decide whether O. 23, R. 3 applied, he would have been compelled to say that it did, nevertheless the main ground for his decision is that it was inherently improper for the Court to permit a party to escape from his own agreement. The judgment of Kanhaiya Lal J. is a clear-cut judgment in the sense that O. 23, R. 3 did apply, while the judgment of Mukerji J. is equally clear-cut that it did not. That was followed almost immediately by a two Judge case (one of the Judges being again Walsh J.) to the same effect (48 All. 475.[3]) The only other authority of our own Court is a very recent decision by a Letters Patent Bench in L. P. A. No. 96 of 1939. The same question, with certain additional features, arose before my learned brother Collister J. in Second Appeal No. 39 of 1937.

The learned Judge appears from his judgment to have taken the view that it was unnecessary for him to decide whether the award constituted an adjustment of the suit under O. 23, R. 3, Civil P. C., for the reason that, upon no view of the so-called "award" did it appear to conclude anything. Nevertheless, at the end of his judgment he does observe: "I do not think that the award can be said to effect an adjustment of the suit between the parties within the meaning of O. 23, R. 3, Civil P. C." I am not sure whether that can be taken as an indication of the learned Judge's own preference for the view expressed by Mukerji J. in the Full Bench case.[2] The learned Judge, however, granted leave to appeal under the Letters Patent. Before the late Chief Justice and my learned brother Ganga Nath J. the view was again taken that whether it was capable of being an "adjustment" within the meaning of O. 23, R. 3 or not, there was nothing in the particular award before the Court in that case which justified the conclusion that there was any concluded adjustment of any sort or kind. It must be conceded that that was the main ground of the learned Judges' decision and that, therefore, the Letters Patent appeal did not primarily turn upon the abstract question whether an award arrived at in the course of subsisting litigation could qualify as an adjustment under O. 23, R. 3. Nevertheless, there is again a passage in their Lordships' judgment which appears to me once more to throw considerable doubt upon the majority decision of the Full Bench case in 47 All. 637.[2] The learned Judges say:

"An adjustment is always made with the consent of the parties. In the present case the parties did not know what was going to be the decision of the persons to whom the settlement had been left and from the very beginning there has been a dispute between the parties. The suit cannot, therefore, be disposed of in accordance with the terms of the settlement."

As I read that, this Letters Patent Bench did have it in mind to question the majority decision in the Full Bench case.[2] In addition to this, there is as I have already pointed out, a considerable volume of powerful authority in other Courts of India adopting the same view. It may also be that something still remains to be said upon S. 89, Civil P. C. In all the circumstances, I have felt it right, in view of the somewhat unsatisfactory position in our own Court and in view of the very decided conflict of authorities in other High Courts, to refer this matter to the learned Chief Justice and to ask him, if he is so advised to appoint a Bench of Judges to deal with it. The question which I suggest should be referred is this:

"Whether 'an award' made during the pendency of a suit between the parties and concerning the matters or some of the matters in issue in that suit as a result of an arbitration out of Court (assuming that such arbitration can lawfully be made) constitutes 'an adjustment by any lawful agreement or compromise' within the meaning of O. 23, R. 3 of Sch. 1, Civil P. C., and can be recorded as such?"

OPINION

This is a reference to this Full Bench which has raised a difficult question. The circumstances are fully set out in the referring order dated 27th October 1941. Shortly put, what has happened is that the parties to the suit during its pendency agreed, or are alleged to have agreed, to refer their dispute to six named persons. Those six named persons on 7th September 1939 produced what is called an 'award.' On 11th September 1939, that is four days later, the plaintiffs in the suit made an application under Order 23, Rule 3 of Schedule 1, Civil P. C., to have that 'award' recorded as an 'adjustment' of the suit by "a lawful agreement or compromise." Before the Munsif, it was held that it might be so accepted and recorded, and at the same time the Munsif disposed of an objection taken by the defendant that the 'award' itself was invalid because of certain alleged misconduct on the part of the arbitrators. In first appeal before the Civil Judge, he took the view, relying on a number of authorities, that in no circumstances could an 'award' produced as a result of an arbitration wholly outside of the provisions of Sch. 2 to the Code be recorded as an adjustment by agreement or by compromise and he disposed of the appeal on that ground only, not finding it necessary, therefore, to go into any other question. When the matter came in second appeal before this Court, it became apparent that an extremely difficult question of law was involved in the question whether an award arrived at in these circumstances, and challenged when it was presented to be recorded, could be found to be an adjustment by way of agreement or compromise. It was in those circumstances that the matter was referred to this Full Bench.

We have heard carefully and with considerable patience all the authorities which have been produced before us. It now transpires, however, that, whatever may be the correct solution to the serious conflict of opinion over this matter among the Courts of India, the question is now one which has become almost wholly academic. The rock on which Indian legal opinion has split in this matter is S. 89, Civil P. C. In view of the course we are proposing to take, we need not go into the merits of the dispute because it is sufficient for us to say that for all future

3. ('26) 13 A.I.R. 1926 All. 501 : 95 I. C. 416 : 48 All. 475 : 24 A.L.J. 480, Ram Devi v. Ganeshi Lal.

practical purposes the difficulty has now been removed by S. 47 of new Arbitration Act of 1940, which not only repeals S. 89 of the Code, but replaces it by a new section which makes the matter quite clear. In these circumstances the practical importance of the reference to this Full Bench has largely disappeared. Apart, however from that, we have, as we have said, very carefully considered all the authorities. We find, among others, that there is already a Full Bench decision of our own Court in 47 All. 637[2] which does consitute an authoritative decision of this Court and it is in accordance with the view which has also been expressed by an exceedingly strong Full Bench of the Bombay High Court in 51 Bom. 908.[4] Though there are decisions in other High Courts in the opposite sense, we feel, upon the principle of *stare decisis*, that it would not be proper for us in the special circumstances of this case to re-open the question in this Court and possibly to have to overrule a Full Bench of our own Court. As we have pointed out, the matter is not one of practical importance for the future.

For these reasons, without in any way indicating any reasoned view whether the decisions of those High Courts which do not agree with our own are right or wrong, we feel it right to follow the existing Full Bench decision of our own Court. For these reasons, we shall record a formal answer to the reference to us by saying that an award made during the pendency of a suit between the parties and concerning the matters or some of the matters in that suit as a result of an arbitration out of Court may constitute an adjustment by lawful agreement or compromise within the meaning of O. 23, R. 3 of Sch. 1, Civil P. C., and can be recorded as such. That leaves to be dealt with the question which was decided by the Munsif, but was not dealt with by learned Civil Judge, whether upon the facts of this case there has been any award at all in sense of an award properly pronounced by the arbitrators and procured without any such fraud as would vitiate it. The appellant was, we think, entitled to have that question dealt with by the learned Civil Judge in first appeal and, accordingly, the proper course for us to take is to direct that the first appeal shall now be sent back to the Civil Judge and he shall be directed to deal with it according to law upon the footing of the answer which we have now given to the reference before us. We shall, therefore, formally set aside the order made by the Civil Judge and remand the first appeal to him to be dealt with as we have indicated. Costs will abide the result before the Civil Judge.

G.N./R.K. *Order accordingly.*

4. ('27) 14 A.I.R. 1927 Bom. 565 : 105 I. C. 516 : 51 Bom. 908 : 29 Bom. L. R. 1254 (F.B.), Chanbasappa Gurushantappa v. Basalingayya Gokurnaya.

C. P. C.—
(b) ('40) Chitaley, O. 23 R. 3, N. 9 Pt. 6.
('41) Mulla, Page 967 Pt. (f).

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FULL BENCH

BAJPAI, BRAUND AND DAR JJ.

Firm Shyam Lal Bidhi Chand

v.

Mukund Lal.

Misc. Case No. 947 of 1939, Decided on 20th November 1941.

Stamp Act (1899), S. 61 (1) and (2)—Collector can move Court under S. 61 (1) by letter — Formal revision application is not necessary.

As a matter of practice in U. P., the Collector can move the Court under S. 61 (1) by a letter which can be treated as a reference and a declaration can be given under S. 61 (2). The Collector need not make a formal revision application under S. 61 (1) for the purpose of obtaining a declaration under Section 61 (2). [P 148*c*,*d*,*e*]

A. M. Khwaja — for the Crown.

ORDER OF REFERENCE

BAJPAI AND DAR JJ.—This purports to be a reference under S. 61, Stamp Act. It appears that a document was filed in Miscellaneous Case No. 254 of 1938, Firm Shyam Lal Bidhi Chand v. Mukund Lal, in the Court of the Civil Judge of Agra. One of the Inspectors of Stamps brought to the notice of the Civil Judge that the document was a security bond mortgaging immovable property and requested the learned Judge to examine the document in the light of the ruling given by the High Court in 52 All. 844.[1] The Civil Judge held that the document was liable to be stamped with a court-fee of annas eight only which the decree-holder paid subsequently. The Chief Inspector of Stamps is of the opinion that the decision of the Civil Judge is wrong and has, therefore, by means of a letter dated 1st November 1939 written to the Registrar of this Court requested that a declaration may be made by the High Court under S. 61 (2), Stamp Act. When this matter came before a Bench of this Court on 1st December 1939 notice was ordered to be issued to the standing counsel. The matter then came again before the same Bench on 8th May 1940 when the Stamp Reporter was directed to furnish a report because there was some doubt entertained by the Bench as to the competence of the reference. The stamp reporter submitted his report on 15th October 1940 when the case was put up again before a different Bench. On 17th October 1940 the learned junior standing counsel asked for some time in order to examine the report of the Stamp Reporter.

The case has now been put before this Bench and we have heard the junior standing counsel and perused the report of the Stamp Reporter. One of us was a member on every occasion when the matter came before this Court and one of us was also a member of the Bench which decided Misc. Case No. 828 of 1939.[2] In that case the reference purported to be under S. 6B (1), Court-fees Act, 1870, as amended up to date in its application to United Provinces by the U. P. Court-fees (Amendment) Act, 1938, and the Bench agreed with the report of Stamp Reporter and the learned junior standing counsel conceded that the proceedings had not been submitted to the High Court in a proper form. He prayed for time to convert the letter of the Chief Inspector into a proper duly stamped application in revision in conformity with the provisions of Chap. 3 of the Rules of this Court and the Bench acceded to his request and gave time to take proper steps.

The Stamp Reporter in the present case has again reported that the proceedings have not been submitted to this Court in proper form. He has drawn

1. ('31) 18 A.I.R. 1931 All. 189 : 131 I.C. 675 : 52 All. 844 : 1931 A. L. J. 41 (F. B.), In re Stamp Reference of the Board of Revenue.
2. *Reported in* ('41) 28 A.I.R. 1941 All. 369: I.L.R. (1941) All. 585: 1941 A. L. J. 487, Kallu Singh v. Mt. Mir Kunwar.

our attention to the heading of Chap. 6, Stamp Act, a which is "References and Revision" and to the marginal note of S. 61 which is "revision of certain decisions of Courts regarding the sufficiency of stamps" and to the fact that this Court can be asked to take the order of the Civil Judge into consideration on the application of the Collector. It is further said that the letter of the Chief Inspector of Stamps is not in the form of an application as provided by the High Court Rules, Chap. 3, and that the letter is further not stamped with the proper court-fee under Sch. 2, Art. 1 (e) (3), Court-fees Act, and the Collector or the Chief Inspector of Stamps is nowhere exempt from court-fees duty. Two other objections as to the competence of the letter are mentioned, namely that the letter contains a statement of the opinion of the Chief Inspector of Stamps which is not contemplated by S. 61, Stamp Act, and secondly, that it does not ask for any particular relief. The b learned junior standing counsel has drawn our attention to the difference between the phraseology of S. 6B Court-fees Act, and S. 61 Stamp Act, and submits that whereas in the former case he conceded the point he was not prepared to do the same in the present case. The words in S. 6B are :

"... the Chief Inspector of Stamps may, within three months from the date of receipt of such order, move, by an application in writing, the Court to which an appeal lies from a decree in the suit or appeal in which such order has been passed, for revision of such order."

The words in S. 61 (1) of the Stamp Act are —
"... the Court may of its own motion or on the application of the Collector take such order into consideration."

It is submitted that no time limit is given that c the application is not enjoined to be in writing and further that there is nothing about the revision of the order and all that this Court can do under S. 61 (2) is that it may record a declaration may determine the amount of duty with which such instrument is chargeable, may require any person in whose possession or power, such instrument then is to produce the same and may impound the same when produced. The submission is that although the heading of the Chapter is "References and Revision" and although the term "Revision" can apply only to S. 61 in that chapter and although the marginal note of S. 61 is "Revision of certain decisions of Courts" yet the intention of the Legislature was not that there should be a regular application in writing in the form of revision by the Collector and the letter of the Chief Inspector of Stamps is a sufficient compliance with all that is d required by the Legislature. It is also pointed out that in this Court as well as in all other Courts in India the practice has been that letters by the Collector (and the Inspector of Stamps has been invested with the powers of a Collector) have been treated as references and declarations have been given without any protest or demur. Certain practical difficulties have also been pointed out, but it is not necessary to mention them at this stage.

One of us is committed to the view that under S. 6B, Court-fees Act, the Chief Inspector of Stamps has got to move this Court by means of a formal application in revision. There is some force in the argument that there is nothing in S. 61 of the Stamp Act which necessarily differentiates it from S. 6B, Court fees Act. At the same time there is a long course of practice in support of the contention of the Government and we are assured by the learned junior standing counsel that the matter is considered to be very important so far as the Government is concerned. We have also come to the same conclusion, and we think that the matter is of sufficient importance to be decided by a stronger Bench. We therefore direct that the matter be laid before the Hon'ble the Chief Justice for the constitution of a Full Bench. The question that is being referred to the Full Bench is :

"Has the matter been brought to this Court by the Chief Inspector of stamps in a proper form ?"

OPINION

BAJPAI J.—The facts under which the present reference has been made to the Full Bench are stated at length in the referring order and it is not necessary to detail them again. We are not prepared to interfere with the long practice that has prevailed in this Court and in other Courts to entertain similar applications in the form in which the present matter has been submitted to us and accordingly we f answer the question in the affirmative.

G.N./R.K. *Answer accordingly.*

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FULL BENCH

IQBAL AHMAD C. J., BRAUND AND DAR JJ.

Kanhaiya Lal — Accused — Applicant

v.

Emperor through Mohan Sarogi — Complainant.

Criminal Revn. Appln. No. 769 of 1940, Decided on 6th January 1942, from order of Dist. Magistrate, Benares, D/- 16th August 1940. g

(a) Criminal P. C. (1898), S. 181 (2) — Complainant alleging deposit of ornaments with accused as mere bailment for safe custody—Accused alleging deposit as one to secure loan — Jurisdiction—Questions of fact to be considered stated.

Where the complainant alleges that he deposited certain ornaments with the accused merely as bailment for safe custody while the accused alleges the deposit to be one to secure loan, in determining the question of jurisdiction, the questions of fact that arise for consideration are as to what precisely constituted the act of receiving the goods in question and where and in what circumstances that act took place; whether both accused, or only one of them, took part in that act ; where and by whom, the ornaments were retained ; where the duty of returning the goods (if they ought to have been returned) h ought to have been performed and where the criminal act (if there was one) and its various component parts took place. [P 149 *f*]

(b) Criminal P. C. (1898), Ss. 439 and 181 (2) — High Court will not take evidence in revision—Revision should not be filed before facts are ascertained by the trial Court — Especially in cases under S. 181 it is desirable that facts should be fully ascertained and question of law involved should be dealt with in first instance as part of trial before revision is filed.

It is not the practice of the High Court to take evidence in revision applications and therefore the parties should not in the anxiety to quash proceedings at the earliest possible stage, bring revision applications before the High Court before the facts have been fully ascertained. Especially in cases

involving the question of jurisdiction under S. 181, Criminal P. C., it is desirable that facts should be fully ascertained and the question of law involved should be dealt with in the regular way in the first instance as part of the trial, before the remedy by way of revision is resorted to. [P 149*g*; P 150*a*]

K. D. Malaviya — for Applicant.

L. Chandra and Jagdish Prasad — for Opposite Party.

Deputy Government-Advocate — for the Crown.

BRAUND J. — This is a case received by this Court in revision from the District Magistrate of Benares and referred to a Full Bench by the late Chief Justice. The facts, to the extent to which they have so far been ascertained, are comparatively simple. The complainant, Mohan Lal, is a resident of Benares. Accused 1, who is the applicant in revision, is the brother-in-law of the complainant and is a resident of Ramgarh, in Jaipur State. Accused 2 is the munib of accused 1. It appears that at the end of April 1937 the complainant wrote to accused 1 at Ramgarh to ask him to meet his wife (the sister of accused 1) at Benares and to receive from her a quantity of gold ornaments which he (the complainant) wanted to deposit with accused 1. The complainant has alleged that this deposit of the ornaments was to be a mere bailment for safe custody, while accused 1 has asserted that it was really a deposit to secure a loan. However that may be, accused 1 acknowledged the letter from Ramgarh on 30th April and said that he was sending his munib (accused 2) to Benares on the same day to meet his sister and to receive the ornaments. This arrangement was apparently carried out and there is a letter dated 5th May 1937 from accused 1 to the complainant informing him that his wife had arrived safely and acknowledging receipt of the gold ornaments. He added that they would be "sent on to you whenever you need them and demand them back."

Nothing more seems to have happened until early in 1940 when the complainant did in fact ask for the valuables to be returned. To this demand a letter was returned on 1st February 1940 by the Bombay advocate of accused 1 repudiating the story of a deposit for safe custody and setting up a claim that the transaction was one of mortgage. On this, criminal proceedings were started by the complainant by a complaint dated 14th February 1940 against both his brother-in-law and the munib under S. 406, Penal Code. That is the whole history of the matter except that the preliminary objection of accused 1 that he is not amenable to the criminal jurisdiction of the Courts at Benares has been rejected both by a First Class Magistrate and by the District Magistrate. It therefore, comes before us upon the question of jurisdiction. The only other matter of fact to notice at this stage is that accused 1 voluntarily appeared before the Magistrate of Benares and, indeed, has himself filed a revision application before the District Magistrate and before us, and has, in that sense, surrendered to the jurisdiction. There appear to be two sections of Criminal Procedure Code with which we are concerned and we shall take the second of them first. Section 188, Criminal P. C. provides :

"*188.* When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found : . . . . . ."

There is nothing before us to show that accused 1 is a "Native Indian subject of Her Majesty" or a "British subject" or a "servant of the Queen," and in our view therefore upon the facts as they are at present before us, there is no reason to suppose that S. 188, Criminal P. C., has any application. That brings us to S. 181 (2) of the same Code which provides that :

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

We agree that this section is material to the inquiry which the criminal Court will be called on to make in this case. It will involve an exact consideration, on the facts of the case as they come out in evidence, of what precisely constituted the act of receiving the goods in question and where and in what circumstances that act took place; whether both accused, or only one of them, took part in that act; where, and by whom, the ornaments were retained; where the duty of returning the goods (if they ought to have been returned) ought to have been performed and where the criminal act (if there was one) and its various component parts took place. These and other questions of fact will arise, which at present have not been fully explained and which, in any case, it would not be right for us to assume on the scanty material now before us and in the absence of the evidence which will be taken in the course of the hearing of the case.

Mr. Malaviya has referred us to a number of authorities, 5 Mad. 23,[1] 3 A.L.J. 146,[2] 1936 A.L.J. 33 and 1939 A.L.J. 1060[4] relevant to S. 181, Criminal P. C. The view however which we take is that it would be premature and improper for us at this stage to entertain this revision any further than to direct that the trial of the criminal case should now proceed, but without prejudice to all questions both of fact and law and whether as to jurisdiction or otherwise which the accused or either of them may at the trial be advised to take. At the trial which will now take place, every question, including those raised on this revision, will remain open and will in the first instance be dealt with by the trial Court on the full facts as they emerge in evidence at the trial. In the meantime, lest any question should arise to the prejudice of the accused in consequence of our having been supposed to have finally disposed of this revision application, we shall in dismissing it reserve liberty to the applicant to file a fresh application, if he is so advised. We may perhaps add that there is, in the anxiety shown to quash proceedings at the earliest possible stage, a tendency to bring revision applications such as this before the Court before the

1. ('82) 5 Mad. 23 : 1 Weir 1, Bapu Daldi v. The Queen.
2. ('06) 28 All. 372 : 3 A.L.J. 146 : 1906 A.W.N. 52 : 3 Cr.L.J. 247, Emperor v. Baldewa.
3. ('36) 23 A.I.R. 1936 All. 193 : 160 I.C. 356 : 37 Cr.L.J. 284 : 58 All. 644 : 1936 A.L.J. 3, Mohru Lal v. Emperor.
4. ('40) 27 A.I.R. 1940 All. 92 : 186 I.C. 481 : 41 Cr.L.J. 325 : I.L.R. (1940) All. 43 : 1939 A.L.J. 1060, Fateh Singh v. Emperor.

facts have been fully ascertained. We point out that it is not the practice of this Court to take evidence in revision applications and that in many cases, of which class this is one, it is desirable that the trial should proceed and the question of law involved be dealt with in the regular way in the first instance as part of the trial.

G.N./R.K. *Order accordingly.*

Cr. P. C. —
(a) ('41) Chitaley, S. 181, N. 7.
('41) Mitra, Page 582 Note "Criminal misappropriation, etc."
(b) ('41) Chitaley, S. 439, N. 1.
('41) Mitra, Page 1432, N. 1208.

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BRAUND J.

Amar Chand (minor) through Mt. Kauli — Decree-holder — Appellant

v.

Nem Chand — Judgment-debtor — Respondent.

First Appeal No. 207 of 1940, Decided on 6th November 1941, from order of Small Cause Court Judge, Meerut, D/- 3rd July 1940.

(a) Civil P. C. (1908), O. 21, R. 16 — R. 16 does not contemplate any actual substitution.

Order 21, Rule 16 does not in strictness contemplate any actual substitution at all. All that it provides for is that the transferee may make an application for execution of the decree and that the decree may be executed "in the same manner and subject to the same conditions as if the application" —i. e., the application for execution—"were made by such decree-holder." Technically speaking it does not amount to a "substitution" at all. [P 150*h*; P 151*a*]

(b) Civil P. C. (1908), O. 32, R. 1 — "Next friend"—Meaning and object of, explained.

The expression "a next friend" originally denoted the person through whom an infant acts without any necessary reference to litigation but in modern times it has come to assume a technical meaning of the person by whom a minor or an infant, as the case may be, is represented as a plaintiff in litigation. The real object of having a next friend is that there may be somebody to whom the defendant or the opposite party may be able to look for costs. The next friend himself does not actually become a party to the litigation. It is the minor who is the party and the next friend is a person—so to speak in the back ground—who can act on the minor's behalf and to whom the opposite party can look for costs. [P 151*g*,*h*]

(c) Civil P. C. (1908), O. 32, Rr. 1, 2, 3—Next friend and guardian ad litem—Difference between, explained.

There is this difference between a guardian ad litem and a next friend that, whereas a guardian ad litem is constituted by an order of the Court, a next friend automatically constitutes himself by taking steps in the suit. [P 151*h* ; P 152*a*]

(d) Civil P. C. (1908), O. 32, R. 7—"For the suit."

The words "for the suit" qualify guardian and not next friend. [P 152*a*]

*** (e) Civil P. C. (1908), O. 32, Rr. 1 and 7 and O. 21, R. 16—"Next friend"—Institution of suit by presentation of plaint is not the only way in which person becomes next friend—Application by person under O. 21, R. 16 for minor to be substituted—Such person becomes next friend and compromise by such person without leave of Court is voidable at instance of minor.**

Though O. 32, R. 1 provides how a suit is to be instituted on a minors' behalf, it does not say that that is the only way in which a person can become a next friend. It says that the result of presenting a plaint in a minor's name is to make the person presenting it a next friend. But it does not say that nobody can become a next friend unless he institutes a suit on the minor's behalf. Therefore, the expression "next friend" in O. 32, R. 7 is not confined to a person who is acting on behalf of a minor who has already assumed the position of a plaintiff. It applies to any person who makes an application to the Court on a minor's behalf in relation to a suit. And in particular, it applies to a person who makes such an application with a view to the minor assuming the position either of a plaintiff or a person in the position of a plaintiff. Hence a person who applies under O. 21, R. 16 for substitution of the minor's name for that of the decree-holder becomes a next friend and a compromise by him on behalf of the minor without the leave of the Court is voidable at the instance of the minor. [P 152*b*,*f*,*g*,*h*]

(f) Civil P. C. (1908), O. 32, R. 1 and S. 151—Person becoming next friend cannot repudiate that position afterwards — Court will exercise inherent jurisdiction to prevent it.

Where the Court finds a person making an application on behalf of the minor, which, if granted, will result in his becoming a next friend, the Court will exercise its inherent jurisdiction to prevent that person from repudiating the position of a next friend at any time after he has taken upon himself to make the application. If it were otherwise, it would amount to a form of approbation and reprobation. [P 152*d*,*e*]

Shah Habeeb — for Appellant.

B. Mukerji — for Respondent.

JUDGMENT.—This is an appeal from an order made by the Judge of the Small Cause Court of Meerut which raises a point which to my mind is one of some difficulty. The facts are very simple. It seems that a certain person called Mutsaddi Lal and some others had a decree against one Nem Chand, as the judgment-debtor. There was a minor named Amar Chand—who is the present appellant—whose mother was called Mt. Koli. On 1st August 1939 Mutsaddi Lal and the other decree-holders transferred the decree in writing to the minor, Amar Chand in consideration of Rs. 400. No doubt this was a purchase arranged by the mother in her capacity as the natural guardian. On 22nd August 1939, an application was made to the Court in which the decree was being executed purporting to be under O. 21, R. 16 of Sch. 1, Civil P. C. It was, I think, in form an application by Mt. Koli on behalf of the minor and it seems to have asked, in effect, to have the minor's name substituted for the names of the decree-holders in the execution proceedings so as to be able to carry them on. I point out in passing, because it may be of some materiality later, that O. 21, R. 16 does not in strictness contemplate any actual substitution at all. All that it provides for is

that the transferee may make an application for execution of the decree and that the decree may be executed "in the same manner and subject to the same conditions as if the application"—i. e. the application for execution — "were made by such decree-holder." Technically speaking it does not amount to a "substitution" at all.

On 14th September 1939 an event took place which has given rise to the present question. The mother, Mt. Koli, compromised the judgment debt with the judgment-debtor and accepted a sum of Rs. 200 in full satisfaction of it. In what capacity she did that is really the question which is now in dispute. It has to be noticed that it happened between 22nd August 1939, on which date she had made the "substitution" application—I use that expression for want of a better one—and 23rd September which was the date on which the "substitution" application came on for hearing and on which an order was made which, in effect, allowed the substitution. On that date the Munsif of Ghaziabad on the "substitution" application said :

"The judgment-debtor does not oppose the applicant's name being substituted in place of the original decree-holder. The applicant prays *(sic)* against the opposite parties 2 to 4."

ORDER.

"Let the applicant's name be substituted in place of the original decree-holder."

On the same date an application appears to have been made by the judgment-debtor, Nem Chand, under O. 21, R. 2, bringing into Court the compromise which he claimed to have effected with the minor and asking to have such payment or adjustment certified to the Court. That was opposed by Amar Chand, presumably acting through his mother, upon the ground that the bargain had been made, if it was made at all, by the judgment-debtor with a person purporting to act as the Mukhtar-e-am of Mt. Koli but who in fact had ceased to be her agent and actually had no authority to enter into any such compromise. The question which is now in dispute between the parties is, apart altogether from the facts of the case, whether, even assuming that the compromise was effected by Mt. Koli on the minor's behalf, it can bind the minor. The Munsif took the view, as I understand it, that it was beyond the powers, in any case, of Mt. Koli to have entered into an effective compromise at that stage and he accordingly declined to certify the payment as being a satisfaction of the decree. In due course that came before the Judge of the Small Cause Court of Meerut and he took an opposite view, holding that there was nothing in law to have prevented Mt. Koli on 14th September 1939 from effectively binding the minor's interest by a compromise and he accordingly held that the only question to be decided was whether, in the events which had happened, she had, in fact, done so. In that view of the matter, he sent the case back to the Munsif with directions to him to hear the case on the facts and to decide under O. 21, R. 2 whether the compromise, assuming there was one, should be certified as a satisfaction or not. From that the case has come on appeal to me. It turns, as I see it on O. 32, R. 7 of Sch. 1, Civil P. C. That rule says :

"(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as a next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

I accept it for the present purpose, though I do not so decide, that, but for complication of her having become a next friend, it was within the competence of Mt. Koli in her capacity as the natural guardian to enter into a valid compromise of the execution proceedings on the minor's behalf. That, of course, is without reference to the particular facts of this case. The whole question therefore is whether in the circumstances Mt. Koli, by virtue of the application for substitution dated 22nd August 1939, had become the "next friend" of the minor so as to bring herself within O. 32, R. 7 and thereby to have put it out of her power without the leave of the Court to enter into an agreement or compromise on the minor's behalf, which apart from that capacity she would have a right to do. That raises a point which is, I think, by no means easy. As far as I am aware, the point has not before arisen—certainly in this Court. I find a case in 1939 A.L.J. 1019[1] decided by a Bench of this Court in which a question arose as to the power of a guardian to compromise in a case where, a minor being an original party to the suit, an arrangement was come to after the decree had been obtained but before the execution proceedings had been started. The learned Judge held—and if I may say so with respect I can see no other answer—that O. 32, R. 7 applied just as much to a case before the execution proceeding was begun as afterwards. They say :

"If the proposition be sound then clearly it would be a matter of a difficulty to defeat the provisions of O. 32, R. 7 and deprive the minor of the protection thereby provided; all that would be necessary would be to delay formally concluding the compromise till the decree in suit had been passed. We are satisfied that where a decree is adjusted before execution by means of a compromise and one of the parties to the litigation is a minor the consent of the Court is necessary, if the minor is to be bound thereby."

That really does not apply to this case, because the minor was there a party to the suit ab initio and ex hypothesi had a next friend. The whole difficulty arises in the present case from the circumstance that the minor was not an original party to the suit and did not become associated with it—I use a neutral word—until the application of 22nd August 1939 was made by Mt. Koli. I only refer to this decision for the purpose of showing that the Court does not readily surrender its inherent jurisdiction to safeguard the interests of minors. The expression "a next friend" originally denoted the person through whom an infant acts without any necessary reference to litigation but in modern times it has come to assume a technical meaning of the person by whom a minor or an infant, as the case may be, is represented as a plaintiff in litigation. The real object of having a next friend is that there may be somebody to whom the defendant or the opposite party may be able to look for costs. The next friend himself does not actually become a party to the litigation. It is the minor who is the party and the next friend is a person—so to speak in the back ground—who can act on the minor's behalf and to whom the opposite party can look for costs. Now there is one other peculiarity to notice in the position of a next friend. As every one knows, a minor who is a defendant to a suit is represented by a guardian ad litem. There is this difference between a guardian ad litem and a

1. ('40) 27 A.I.R. 1940 All. 16: 186 I.C. 68 : I.L.R. (1940) All. 1 : 1939 A.L.J. 1019, Kastori Singh v. Pati Ram.

next friend that, whereas a guardian ad litem is
a constituted by an order of the Court, a next friend automatically constitutes himself by taking steps in the suit. That will be found to be so from comparing O. 32, Rr. 1 and 2 with O. 32, R. 3. There is, therefore no difficulty at all in telling whether or not a person is a guardian ad litem, because it depends upon the question whether there has been an order of the Court putting him into that position. But in the case of a next friend there is no such convenient way of ascertaining when he has assumed that position. That, again, is I think, the origin of the distinction which is drawn throughout O. 32 between a "next friend" and "the guardian for the suit." It has to be noticed that the words "for the suit" qualify guardian and not next friend.

Now **O. 32, R. 1** provides for the manner in which a suit is to be instituted by a minor. It says that every suit by a minor shall be instituted in his
b name by a person who in that suit shall be called his next friend. From that it is quite clear that a person who does, in fact, institute a suit in the name of a minor becomes his next friend and, according to the Code, that would apparently happen at the instant a plaint is presented on a minor's behalf. I draw attention to this that though **O. 32, R. 1** provides how a suit is to be instituted on a minor's behalf, it does not say that that is the only way in which a person can become a next friend. It says that the result of presenting a plaint in a minor's name is to make the person presenting it a next friend. But it does not say that nobody can become a next friend unless he institutes a suit on the minor's behalf. Mr. Mukerji has conceded that immediately after the substitution order of 23rd September was made Mt. Koli became the minor's next friend. That, of course, in itself amounts to an
c admission that, in order to qualify as a next friend, it is not necessary for the minor to occupy the technical position of a plaintiff, because, as I have already pointed out, the minor in this case never became the plaintiff and, indeed, on the actual wording of O. 21, R. 16 it is difficult to see that he actually became a party to the execution proceedings at all. All that O. 21, R. 16 says is that the execution proceedings shall be carried on as if he were a party.

It is necessary, however, to go a step further and to inquire whether, assuming that Mt. Koli would, in any case, have become a next friend when the "substitution" order was made, she did not actually become a next friend by virtue of her mere application for the minor to be substituted. In my judgment she did. I do not think that there is to be found any
d hard and fast definition in the Civil Procedure Code of a next friend as being a person—and no one less than a person—who presents a plaint on behalf of a minor under **O. 32, R. 1.** Undoubtedly such a person does become a next friend, but, as I see it, the actual character of a next friend rests upon a far wider principle than that.

The Court as I have said, has a special inherent jurisdiction, derived from the Crown as *parens patriæ* to protect the interests of minors. And it will exercise that jurisdiction wherever it finds it necessary in the interests of a minor. That, of course, is a very wide proposition; but coupled with the most ordinary equitable principles, I think it is sufficient to meet a case such as this, in which the Court finds a person making an application on behalf of the minor, which, if granted, will result in his becoming a next friend, and to prevent that person from repudiating the position of a next friend at any
e time after he has taken upon himself to make the application. If it were otherwise, it would amount to a form of approbation and reprobation. The person acting on behalf of the minor would have accepted that capacity by making the application, and in that sense would have submitted to the jurisdiction of the Court—but at the same time would be claiming for all other purposes to be free from the restrictions attaching to a next friend. In other words, he would be denying the right of the Court to exercise any jurisdiction over him in relation to the minor's affairs. That can be put in many ways. One of them is to consider what would be the position as to costs in case the application was refused. I do not doubt that the person making it on the minor's behalf would be liable for costs and, in that sense, would be occupying the position of a next friend.

Rule 5 of **O. 32** is in much more general terms. It says that "every application to the Court on be-
f half of a minor" with one exception shall be made by his next friend or his guardian ad litem. It does not limit that to an application in which he has already become the plaintiff or the defendant, as the case may be. It appears to me to imply that wherever you find an application to the Court by a person on a minor's behalf and in relation to a suit, that application must ex hypothesi be made by the person making it as a next friend. Looking at the matter as a whole and applying principles of equity which I think I am entitled to apply, I cannot take so narrow a view of the expression "next friend" in **O. 32, R. 7** as to confine it to a person who is acting on behalf of a minor who has already assumed the position of a plaintiff. I think that it applies to any person who makes an application to the Court on a minor's behalf in relation to a suit. And in particular, it applies to a person who makes such an
g application with a view to the minor assuming the position either of a plaintiff or a person in the position of a plaintiff. It seems to me to be opposed to fundamental principles that such a person should be allowed to assume what in fact is the position of a next friend and to repudiate that position in form. To put that in other words, I can see no justification for allowing a person in that position to do something which is inconsistent with the very position which he applies to be allowed to assume. It seems to me that it would defeat the whole object of the provision of **O. 32, R. 7** if a guardian, having once applied on the minor's behalf for the minor to be put into a position which would constitute the applicant a next friend in the fullest sense, were to be permitted to exercise powers which no next friend could exercise. The only solution to the difficulty that I can see is that such an applicant must be treated as having
h surrendered himself to the jurisdiction of the Court and to have assumed the responsibilities of an actual next friend.

If that is the true view, then I do not think that it was open to Mt. Koli to enter into this compromise on the minor's behalf, even assuming that, apart from **O. 32, R. 7,** it was validly entered into. I think that the view taken by the Munsif of Ghaziabad in his judgment of 4th November 1939 was the right view and that under **O. 32, R. 7** the compromise so entered into—if it was entered into at all—was voidable at the instance of the minor. He avoided it and that, I think is the end of the matter. Nevertheless it does not preclude a fresh compromise being entered into and sanctioned by the Court in a proper way if the parties so desire. The result is that I allow this appeal and set aside the order of the Judge of the Small Cause Court and restore the Munsif's order dated 4th November 1939. The appellant is entitled

to his costs of this appeal and of the appeal in the Small Cause Courts.

K.S./R.K. *Appeal allowed.*

C. P. C.—
(a) ('40) Chitaley, O. 21 R. 16, N. 19 Pts. 2, 3.
('41) Mulla, Page 766, Note "Scope of the rule."
(b) ('40) Chitaley, O. 32 R. 1, N. 1 Pt. 3.
('41) Mulla, Page 1015 Pt. (r).
(c) ('41) Mulla, Page 1019, Note "Guardian ad litem."
(f) ('40) Chitaley, S. 151, N. 2 Pt. 53 and O. 32 R. 1, N. 1.
('41) Mulla, Page 475, Note "Inherent powers of Court."

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FULL BENCH

IQBAL AHMAD C. J., BRAUND AND DAR JJ.

Lal Girjesh Bahadur Pal — Applicant

v.

Chaudhari Bhagwati Prasad —

Opposite Party.

Civil Revn. Appln. No. 95 of 1939 (connected with C. R. No. 121 of 1941), Decided on 2nd December 1941, against order of Munsif, Basti, D/- 21st February 1939.

(a) Interpretation of Statutes—Rule of interpreting statute stated and explained.

The rule that the dominant purpose in construing a statute is to ascertain the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject, is subject to the cardinal rule of interpretation that "the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just or expedient. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning may be, it must receive its full effect. When once the meaning is plain, "it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words." [P 155 C 2]

(b) U. P. Encumbered Estates Act (25 of 1934), S. 4—U. P. Agriculturists Relief Act—From fact that the two Acts were passed to provide relief to debtors and encumbered estates of landlords it does not follow that they do not contain provisions to safeguard interest of creditors—Nor does it follow that remedies under two Acts could not be alternative.

The U. P. Encumbered Estates Act and the U. P. Agriculturists' Relief Act which came into force on the same date were passed with a view to provide relief to debtors and for the relief of the encumbered estates of landlords, but it does not necessarily follow from this that provisions to safeguard the interest of the creditors in certain respects were not enacted by the Legislature in either of the two Acts. Nor does it necessarily follow that the remedies under the two Acts could not be in the alternative. [P 155 C 2]

(c) U. P. Encumbered Estates Act (25 of 1934), Ss. 7 and 4—Ss. 4 and 7 are independent—Special Judge has sole jurisdiction to ascertain landlord applicant's debts and to pass decree in respect thereof—Object of S. 7 is to avoid simultaneous proceedings in respect of such debts before special Judge under U. P. Encumbered Estates Act and before another Judge under U. P. Agriculturists Relief Act.

Both S. 4 and S. 7 are independent of each other and neither section controls the other and therefore S. 7 must be interpreted according to its plain language. The U. P. Encumbered Estates Act is self-contained. Its scheme unmistakably shows that exclusive jurisdiction is given by it to the Special Judge to ascertain the debts of the landlord applicant and to pass a decree for the amount of such debts. Section 7 was enacted with a view to avoid the practical inconvenience that would result if simultaneous proceedings for the ascertainment of such debts were allowed to continue both before the Special Judge under the Encumbered Estates Act, and before another Judge under the U. P. Agriculturists' Relief Act. S. 4 prescribes the period of limitation for an application under the Act and it nowhere lays down that remedies under the Encumbered Estates Act and the U. P. Agriculturists' Relief Act could be availed of simultaneously. The fact, that by virtue of S. 4 (3) the time taken by a landlord in the prosecution of an application for the amendment of a decree under the provisions of the U. P. Agriculturists' Relief Act, is to be excluded in the computation of the period of limitation, strongly suggests that the Legislature intended to prohibit the simultaneous prosecution of proceedings under the two Acts. [P 155 C 2 ; P 156 C 1]

*** (d) U. P. Encumbered Estates Act (25 of 1934), S. 7 (1) (a) and (b)—Scope — S. 7 (1) (b) applies to suits or proceedings not only against but also by landlord :** 1938 A. L. J. 541=('38) 25 A.I.R. 1938 All. 477 = 177 I. C. 215 and 1939 A. L. J. 555 =('39) 26 A.I.R. 1939 All. 619 = 186 I. C. 885, *OVERRULED.*

Section 7 (1) (a) and (b) embrace all suits and proceedings (except an appeal, review or revision or a process for ejectment for arrears of rent) irrespective of the fact whether those suits or proceedings are by or against the landlord. Section 7 (1) (b) is not limited in its operation to suits, proceedings etc. to be instituted against the landlord but applies to suits or proceedings etc. to be instituted by the landlord also : 1938 A. L. J. 541=('38) 25 A.I.R. 1938 All. 477=177 I. C. 215 and 1939 A. L. J. 555=('39) 26 A.I.R. 1939 All. 619 = 186 I. C. 885, *OVERRULED* ; ('41) 28 A.I.R. 1941 Oudh 80 and ('41) 28 A.I.R. 1941 Oudh 193, *Rel. on.* [P 154 C 2 ; P 156 C 2]

Shripati Sahai Srivastava — for Applicant.

Shiv Prasad Sinha — for Opposite Party.

ORDER OF REFERENCE.

ISMAIL AND MULLA JJ. — This application in revision is directed against an order of the learned Munsif of Bansi rejecting an application for the stay of suit No. 221 of 1938. It appears that on 29th October 1936 the plaintiffs, Chaudhari Brijleshwari Prasad and others made an application to the Collector under S. 4, Encumbered Estates Act. The application was forwarded to the Special Judge under S. 6 of the Act. The usual notices were issued and the defendant, Lal Girjesh Bahadur Pal, as one of

the creditors, presented a written statement. During the pendency of the proceedings under the Encumbered Estates Act, the plaintiff brought a suit for accounts under S. 33, Agriculturists' Relief Act. In this suit it was admitted that some money was still due to the defendant under a hypothection bond executed by the plaintiffs in favour of the defendant. The defendant then made an application to the Munsif for the stay of the suit. The application was based on two grounds. The first ground was that S. 10, Civil P. C., barred the trial of the suit under S. 33 as the matter in issue in that suit was directly and substantially in issue in the proceedings under the Encumbered Estates Act. The next ground was that S. 7 (b), Encumbered Estates Act, barred the suit. The learned Munsif dismissed the application. The defendant has now come up to this Court in revision. Learned counsel for the applicant has confined his argument to Sec. 7 (b), Encumbered Estates Act, and has urged that the Court below erred in holding that S. 7 was limited in its operation to suits and proceedings instituted against the landlord in respect of the debt incurred by him and that it was no bar to suits or proceedings instituted by the landlord in respect of his debts. In this view of the law the defendant applicant is supported by a ruling of the Oudh Chief Court in A. I. R. 1941 Oudh 80.[1] The learned Judges of the Chief Court held :

"Section 7 (1) (a), Encumbered Estates Act, applies to all proceedings in any civil Court whether instituted by the landlord (debtor) or by the claimant (creditor). The Legislature did not intend the continuation of the proceedings under the Agriculturists' Relief Act when the creditor had applied under S. 4, Encumbered Estates Act. Hence, where after filing a suit under S. 33, Agriculturists' Relief Act, 1934, the landlord applies under S. 4, Encumbered Estates Act, the Court hearing the suit under S. 33 can stay the same under S. 7, Encumbered Estates Act, till the disposal of the proceedings under the Encumbered Estates Act."

The Court below, however, relied upon a ruling of this Court in 1938 A.L.J. 541.[2] The learned Judges in that case held :

"Proceedings, attachments, processes and suits mentioned in cls. (a) and (b) of S. 7, Encumbered Estates Act, are proceedings, attachments, processes, and suits against the landlord in respect of debts but the landlord himself is not necessarily under any disability for taking proceedings which he may be entitled to take under the law for the protection of his interest, and consequently the application under S. 30, Agriculturists' Relief Act, was maintainable."

We find considerable difficulty in accepting this interpretation of S. 7 (1) (a) and (b). There is nothing in the section itself which expressly lays down that the suits and proceedings that are to be stayed must be only against the landlord. All that is required by S. 7 (b) is that the suit or proceeding must be "in respect of any debts incurred before the passing of the said order (under S. 6)." If the suit or proceeding is in respect of any debt, it follows that prima facie S. 7 (1) (b) will apply. If the suit under S. 33 is allowed to proceed, it may terminate in a decree against the landlord. This however is not permissible under S. 7 (1) (b). The suit under S. 33 will therefore become infructuous. Section 14, sub-cl. (4) (c) clearly lays down that the provisions of the U. P. Agriculturists' Relief Act of 1934 shall not be applicable to proceedings under the Encumbered Estates Act. This supports the view that the Legislature did not intend two simultaneous proceedings to continue in favour of the landlord or against him. There is much force in the argument that the intention of the Legislature in enacting the Debt Act was to give relief to the indebted landlords and agriculturists; but we cannot ignore the clear provisions of the Act in giving effect to that intention. If we accept the view expressed by the Oudh Chief Court in A. I. R. 1941 Oudh 80,[1] it would obviously embarrass the subordinate Courts in this province as they will have two rulings of this Court expressing divergent opinions. In the circumstances, we think it desirable to refer the matter to a larger Bench. We accordingly refer the following point for opinion :

"Is S. 7 (1) (b), Encumbered Estates Act, limited in its operation to suits, proceedings, etc., to be instituted against the landlord in respect of any debts incurred by him before the passing of the order under S. 6 of the Act or it applies to suits or proceedings, etc., to be instituted by the landlord also?"

Let this case be put up before the Hon'ble the Acting Chief Justice for the constitution of a larger Bench.

OPINION

IQBAL AHMAD C. J. — The present reference to a Full Bench has been occasioned by conflict of judicial opinion between this Court and the Oudh Chief Court as to the true interpretation of S. 7 (1) (a) and (b), Encumbered Estates Act (25 of 1934) and the question referred for decision is as follows :

"Is S. 7 (1) (b), Encumbered Estates Act, limited in its operation to suits, proceedings, etc., to be instituted against the landlord in respect of any debts incurred by him before the passing of the order under S. 6 of the Act or it applies to suits or proceedings, etc., to be instituted by the landlord also?"

In 1938 A.L.J. 541,[2] a Bench of this Court consisting of Collister and Bajpai JJ., held that proceedings, attachments, processes and suits mentioned in cls. (a) and (b) of S. 7, Encumbered Estates Act, are proceedings, attachments, processes and suits against the landlord in respect of debts, but the landlord himself is not necessarily under any disability for taking proceedings which be may be entitled to take under the law for the protection of his interest. In short, the learned Judges held that S. 7 (1) (a) and (b) was limited in its operation to suits and proceedings instituted against the landlord in respect of the debts incurred by him and that it was no bar to suits and proceedings instituted by the landlord in respect of his debts. On an application for review being filed in the said case, the same learned Judges in 1939 A. L. J. 555[3] affirmed the view previously expressed by them as to the interpretation of the said section.

A Bench of the Oudh Chief Court, on the other hand, in A.I.R. 1941 Oudh 80,[1] held that S. 7 (1) (a), U. P. Encumbered Estates Act, applies to all proceedings in any civil Court whether instituted by the landlord (debtor) or by the claimant (creditor) and accordingly, where the debtor has applied under S. 4, U. P. Encumbered Estates Act, and the debt is proved under the provisions of that Act a suit by him under S. 33, U. P. Agriculturists' Relief Act, which is pending at the time must be stayed under

1. ('41) 28 A.I.R. 1941 Oudh 80 : 191 I.C. 415 : 16 Luck. 287 : 1940 O.W.N. 1126, Dildar Husain v. Baboo Lal.

2. ('38) 25 A. I. R. 1938 All. 477 : 177 I. C. 215 : 1938 A. L. J. 541, Sheo Baran Singh v. Ranbir Prasad.

3. ('39) 26 A. I. R. 1939 All. 619 : 186 I. C. 885 : 1939 A. L. J. 555, Ranbir Prasad v. Sheobaran Singh.

S. 7 (1) (a), U. P. Encumbered Estates Act. To the same effect is the decision of that Court in A. I. R. 1941 Oudh 193.[4] Section 7 runs as follows :

"7. (1) when the Collector has passed an order under S. 6 the following consequences shall ensue : (a) all proceedings pending at the date of the said order in any civil or revenue Court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal, review or revision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such Court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued; (b) no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order but if for any reason whatsoever such a suit or proceeding has been instituted, it shall be deemed to be a proceeding pending at the date of the said order within the meaning of cl. (a)."

It would be noted that S. 7 is general in its terms and the language used is precise and unambiguous. Sub-clause (a) speaks of "all proceedings pending at the date of" an order under S. 6, and sub-cl. (b) similarly deals with "fresh suit or other proceedings." The only words of limitation used in the said sub-clauses are "except in appeal, review or revision against a decree or order . . . . or a process for ejectment for arrears of rent." There are no further words of limitation that may in any way cut down or modify the generality of the words quoted above. The language used is plain and admits of but one meaning, i. e., all suits or proceedings other than those expressly excepted, relating to the debts due from the landlord applicant. The Legislature must, therefore, be deemed to have intended to mean what it has plainly expressed and, prima facie, there appears to be no warrant for the introduction of the words "against the landlord" in either of the said sub-clauses—words which are not there. It follows, therefore, that sub-cls. (a) and (b) embrace all suits and proceedings (except an appeal, review or revision or a process for ejectment for arrears of rent) irrespective of the fact whether those suits or proceedings are by or against the landlord. This was recognized by the learned Judges who decided the case in 1939 A. L. J. 555[3] and they observed that :

"It may be conceded that S. 7 does not in terms say that the suits or proceedings mentioned there should be against landlords."

They, however, went on to observe that :

" it is obvious that attachments and execution processes in cl. (a) and processes for ejectment for arrears of rent needs must be against the landlord," and this was one of the reasons that possibly led the learned Judges to hold that the sub-clauses in question are confined in their operation to suits and proceedings against the landlord. The short answer to the observation last quoted, however, is that the sub-clauses in question embrace not only attachments, execution processes and processes for ejectment, but also suits and other proceedings, and it is manifest that suits and proceedings may be initiated either by or against the landlord. The learned Judges then referred to the rule of interpretation that enjoins that

"the dominant purpose in construing a statute is to ascertain the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject."

They then observed that

" bearing the above canon in view, we find that the intention of the Legislature was not to place the landlord under a disability but to provide for the relief of his encumbered estate, and when on an application by him the Collector has passed an order under S. 6 of the Act the consequences that should flow from such order should be consequences to the benefit of the landlord and not to his detriment."

The rule of interpretation quoted by the learned Judges is subject to the cardinal rule of interpretation that " the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just or expedient. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the meaning may be, it must receive its full effect. When once the meaning is plain, "it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words": *vide* Maxwell on the Interpretation of Statutes, seventh edition p. 4. Both the Encumbered Estates Act and the Agriculturists' Relief Act came into force on the same date namely 30th April 1935 and it may be conceded as observed by the learned Judges, that these Acts were passed with a view to provide relief to debtors and for the relief of the encumbered estates of landlords, but it does not necessarily follow from this that provisions to safeguard the interest of the creditors in certain respects were not enacted by the Legislature in either of the two Acts. Nor does it necessarily follow that the remedies under the two Acts could not be in the alternative. The Encumbered Estates Act is a self-contained Act, and an examination of its scheme unmistakably shows that exclusive jurisdiction is given by it to the Special Judge to ascertain the debts of the landlord applicant and to pass a decree for the amount of such debts. It is easy to imagine the practical inconvenience that would result if simultaneous proceedings for the ascertainment of such debts were allowed to continue both before the Special Judge under the Encumbered Estates Act, and before another Judge under the Agriculturists' Relief Act, and it seems to me, that S. 7 was enacted with a view to bar the door to such an inconvenience. The last reason assigned by the learned Judges in 1939 A. L. J. 555[3] in support of the view expressed by them was based on S. 4 (3), Encumbered Estates Act, which provides :

" If within three months after the date on which Ch. 3 of this Act comes into force a landlord has applied for amendment of a decree under the provisions of the United Provinces Agriculturists' Relief Act, 1934, the period from the date of his application to the date of the final disposal thereof shall be excluded from the period within which he may

4. ('41) 28 A. I. R. 1941 Oudh 193 : 192 I. C. 434 : 16 Luck. 538 : 1941 O. W. N. 1293, Mohammad Husain v. Nageshwar Prasad.

make an application under sub-ss. (1) and (2) of this section."

After referring to this provision the learned Judges observed as follows :

" It is clear from the above that an agriculturist landlord may apply under the Agriculturists' Relief Act first for the amendment of a decree under S. 30 of the Act and he may then apply for relief under the Encumbered Estates Act. If it was thought that he should be precluded from applying under S. 30, Agriculturists' Relief Act, after he had applied under the Encumbered Estates Act, one would have expected the Legislature to say so in unambiguous language somewhere."

Section 4 inter alia prescribes the period of limitation within which an application under the Act may be presented to the Collector. Sub-s. (1) of that section prescribes a period of one year for the making of such an application. Sub-s. (2) empowers the Local Government to extend the period fixed by the section for making applications by a further period of six months. Then follows sub-s. (3) which has been quoted above. It allows the exclusion of the period referred to in it in the computation of the period of limitation for the filing of an application under S. 4. Lastly sub-s. (4) of S. 4 gives discretion to the Court in specified circumstances to extend the periods prescribed by sub-ss. (1) and (2) by a further period of six months. In short, S. 4 is a section that prescribes the period of limitation for an application under the Act and it nowhere lays down that remedies under the Encumbered Estates Act and the Agriculturists' Relief Act could be availed of simultaneously. Indeed the fact, that by virtue of sub-s. (3) the time taken by a landlord in the prosecution of an application for the amendment of a decree under the provisions of the Agriculturists' Relief Act is to be excluded in the computation of the period of limitation, strongly suggests that the Legislature intended to prohibit the simultaneous prosecution of proceedings under the two Acts. This is further demonstrated by the fact that the benefit of the provisions of sub-s. (3) could be availed of only if the application referred to in that sub-section was filed within three months from the date on which Chap. 3 of the Act came into force. Again if it was the intention of the Legislature that notwithstanding S. 7 (1) (a) and (b) of the Act a landlord could, during the pendency of proceedings under the Encumbered Estates Act file an application for amendment of a decree under S. 30 (2) or a suit under S. 33, Agriculturists' Relief Act, it was wholly unnecessary to give him an extended period of limitation for an application under S. 4 as has been done by sub-s. (3) of that section. Further there is nothing in sub-s. (3) of S. 4 which is inconsistent with, or in any way restricts the scope of S. 7 (1) (a) and (b). In other words, both S. 4 and S. 7 of the Act are independent of each other and neither section controls the other. It follows that S. 7 must be interpreted according to its plain language and sub-s. (3) of S. 4 does not justify the introduction of the words "against the landlord" in S. 7 (1) (a) and (b). There is yet another reason which leads me to the conclusion that the Oudh view is correct. The Legislature in S. 7 took good care to specify in detail the proceedings which were to be exempt from the operation of that section, e. g., in sub-cl. (a) it provided "except an appeal, review or revision" and in sub-cl. (b) it provided "other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent." If the Legislature had intended that suits and proceedings by landlord were to be exempt from the operation of that section, it would have after the exceptions noted above, said so by adding such words as "or suits or proceedings by a landlord." There are, however, no such words in the section. For the reasons given above, my answer to the question referred is that S. 7 (1) (b) of the Act is not limited in its operation to suits, proceedings, etc. to be instituted against the landlord, but applies to suits or proceedings etc. to be instituted by the landlord also.

BRAUND J. — I agree and find nothing that I can usefully add.

DAR J.—I agree.

G.N./R.K. *Answer accordingly.*

C. P. C. —

(a) ('40) Chitaley, Pre. N. 7.

A. I. R. (29) 1942 Allahabad 156

DAR J.

Emperor

v.

L. Munna Lal — Opposite Party.

Criminal Original Cases Nos. 1 of 1942 and 2, 3 and 4 of 1941, Decided on 6th January 1942.

(a) Government of India Act (1935), S. 311 — "Existing Indian law" — Meaning of.

The "Existing Indian law" has been interpreted in S. 311 as a law passed or made by any Legislature before the commencement of Part 3, Constitution Act. As Part 3 came into force on 1st April 1937, the expression "Existing Indian law" means a law passed or made before 1st April 1937 by any Indian Legislature. [P 161 C 2]

(b) Government of India Act (1935), Sch. 7, List 1, Entry No. 34 and S. 316—"Federal law" in entry No. 34 — Meaning of — Sugar Industry (Protection) Act (13 of 1932) (Central) is not Federal law—Sugarcane agriculture and sugar industry being Provincial subjects, U.P. Legislature held competent to repeal (Central) Sugar Cane Act (15 of 1934) and to enact U. P. Sugar Factories Control Act (1 of 1938) and to make laws about sugarcane, sugar and sugar factories.

The expression "Federal law" in Sch. 7, List 1, Entry No. 34 means either a law made by the Federal Legislature after the Federal Legislature has come into existence or a law made by the Indian Legislature during the transitional period that is, between the enactment of the Constitution Act and till Federal Legislature comes into existence, but other existing Indian laws which were enacted before the Constitution Act, could not fall within the meaning of the Federal law as used in the Constitution Act : ('41) 28 A.I.R. 1941 F.C. 47, *Rel. on.* [P 161 C 2; P 162 C 1]

In 1932 and prior to the enactment of the Constitution Act, sugar and sugarcane were regarded as central subjects and the Indian Legislature had made laws about sugar and sugarcane, namely Sugar Industry (Protection) Act (13 of 1932). But the position entirely changed with the passing of the Constitution Act; sugarcane agriculture and sugar industry then both became Provincial subjects and an express declaration became necessary to bring the sugar industry under Federal control by an Act of Indian Legislature passed after the Constitution Act came into force. No such declaration has been made and the Sugar Industry Protection Act, 13 of 1932

cannot be regarded as a Federal law, and the three Extension Acts, 14 of 1938, 20 of 1939 and 8 of 1941 cannot be regarded as containing any such declaration either expressly or by necessary implication. The protection of industry and not protection and development of industry was the stated object of the latter three Acts and the two functions of protection and development are not so indissolubly connected that they cannot be separately performed. The protection of industry contemplates protection against foreign competition and necessitates raising of tariff walls, a task which can only be accomplished by the Centre. Whereas the development of industry requires the regulation and internal management of industry in a Province which responsibility can be properly discharged by the Province. Sugarcane as an agriculture and sugar manufacture as an industry are thus entirely Provincial subjects and the U. P. Legislature was competent to repeal the Sugarcane Act (15 of 1934) and to enact U. P. Sugar Factories Control Act (1 of 1938) and to make laws about sugarcane and sugar as also about sugar factories. [P 162 C 1]

(c) U. P. Sugar Factories Control Act (1 of 1938), S. 29—Act in introducing taxing clauses is not in any manner unconstitutional in view of provisions of Government of India Act.

In the Constitution Act there is no statutory bar which precludes the Legislature in carrying out legislation with regard to any of the matters placed in their charge by the lists, if the Legislature required special revenue for the purpose of carrying out the scheme embodied in a particular legislation from introducing a taxing clause in the legislation itself for which a special revenue is required and therefore they need not resort to an independent taxing enactment. Therefore, the U. P. Sugarcane Factories Act (1 of 1938) in introducing taxing clauses is not in any manner unconstitutional. [P 162 C 2]

(d) Government of India Act (1935), S. 297 (1) — Law which is open to objection under S. 297 (1) stated — Law made by Provincial Legislature by virtue of entry relating to agriculture and development of industry is not open to objection under S. 297 (1) — U. P. Sugar Factories Control Act, 1 of 1938 is not law on subject of export but one on subject of agriculture, industries and factories — U. P. Act 1 of 1938 is not open to objection under S. 297 (1) on ground of any indirect interference with export or import—Measures of price control, collective marketing and expropriation of goods do not per se interfere with free trade clause.

The law which is open to objection under S. 297 (1) is a law made by Provincial legislature sustantially by virtue of the entry relating to trade and commerce or by virtue of entry relating to production, supply and distribution of commodities. And if a law is made substantially by virtue of the entry relating to agriculture or of entry relating to development of industry such as the U. P. Sugar Factories Control Act (1 of 1938), it is not open to objection under this section. Further, the law contemplated by this section is a law which prohibits or restricts entry into or export from the province of goods directly and a law which does not deal directly and in substance with prohibition or restriction of export or import of goods but which deals with other needs of the province and provides for them, though incidentally, the effect of provision is that in some measure export or import is restricted, such a law is not within the meaning of this section. The U. P. Sugar Factories Control Act (1 of 1938) does not expressly or directly prohibit or restrict export or import of sugar or sugarcane from or into the province. It is not a law on the subject of export but it is a law on the subject of agriculture, industries and factories. The measures of price control, collective marketing and expropriation of goods do not per se and as a matter of course interfere with free trade clauses in the Constitution Act, and any remote or indirect interference which may result to export or import by these measures is not open to objection under S. 297 (1), Constitution Act: 1932 A.C. 542 and 1936 A. C. 578, *Expl.*; (1939) 62 C. L. R. 116, *Rel. on*; ('39) 26 A.I.R. 1939 P. C. 36 and 1936 C. L. R. 398, *Ref.* [P 163 C 2]

(e) Government of India Act (1935), Sch. 7, List 2 Entry No. 49—Words "local area" in Entry No. 49—Meaning of—Factory area notified by Governor under S. 29 (2), U. P. Sugar Factories Control Act, 1 of 1938, is "local area" within Entry No. 49.

The words "local area" as used in Sch. 7 List 2 Entry No. 49 have no technical meaning and are merely used in the dictionary sense of the words and therefore mean any limited area or any area peculiar to a place. The local areas need not be governmental sub-divisions. It is open to a Provincial Legislature to make an industrial survey of the province and to divide up the entire province into industrial areas or factory areas or mill areas or in any other kind of areas, and each one of these areas may be notified and be treated as a local area. And once such areas come into existence and remain in operation they can be regarded as local areas within the meaning of Sch. 7, List 2 Entry No. 49 in which a cess may be levied. Consequently, the notification of the factory area by the U. P. Governor in exercise of the powers under S. 29 (2), U. P. Sugar Factories Control Act, 1 of 1938, is perfectly valid and the factory area is a "local area" within the meaning of Sch. 7 List 2 Entry No. 49. The fact that the area was created only for taxing purposes and that it is a mere taxing unit and not a general administrative unit do not make the factory area any the less a "local area." [P 165 C 2; P 166 C 1]

(f) U. P. Sugar Factories Control Act (1 of 1938), S. 29—Provincial Legislature can tax manufacturer as citizen—Taxation of manufacturer as manufacturer held valid.

A manufacturer is a citizen of the province and like all other citizens in his capacity as a citizen he must share the burden of taxation with others. The manufacturer as a manufacturer and not as a citizen in common with other citizens can also be taxed and the tax can be measured by the quantity of raw produce which he consumes in connexion with his manufacture. It is not an absolute right of manufacturers to carry on any manufacture or industry in any country on their own terms. All Governments possess a right to regulate industry and to put it under license and to charge a fee which may be necessary for regulation and for governmental expenses. All Governments also possess power to incur special expenditure for the benefit of a particular class of persons and to recover the expenditure thus incurred by a special tax from that class alone which has received the benefit. [P 166 C 1]

(g) Government of India Act (1935), Sch. 7 Lists 2 and 3 and S. 143—Fee and tax—Distinction.

Taxes are compulsory contribution to public authorities to meet the general expenses of Government which have been incurred for the public good and

without reference to special benefits. Fees are payments primarily in the public interest for special services which people must accept whether willingly or not. Fees differ from taxes in that they are payments for special benefits enjoyed by the payer while taxes are for general benefits, expenses which are laid "for the benefit of the whole society." The essence of a tax is the absence of *quid pro quo* between the tax-payer and the public authority. Fees are "particular contributions" (as opposed to general contributions) by persons who give occasion to this expense. The distinction between a fee and a tax is somewhat shadowy and it is not necessary that the fee need not be large enough to be a tax and to serve the purpose of general revenue. The fee levied on goods may be too large for regulation purposes and leave a surplus for general revenue and still would be valid : ('39) 26 A.I.R. 1939 P. C. 36, *Rel. on.* [P 166 C 1,2]

(h) Government of India Act (1935), Sch. 7 List 2 Entries Nos. 49, 54 and 29 and List 3 Entries Nos. 26 and 36 — "Cess" defined— Special tax can be regarded as cess—Provincial Legislature can levy fees and cesses on special class of persons to recoup itself for special benefits conferred on that class — Levy of nominal fee and cess under S. 29, U. P. Sugar Factories Control Act, is justified.

"Cess" is a tax levied for a specific purpose, often with a prefixed word defining the object. A special tax or in other words a tax levied against a class for a special benefit conferred on that class can be regarded as a cess even if that class is scattered all over the province and the tax is measured on the quantity of consumption. Fees and cesses are two forms of special taxation which a Provincial Legislature is by reason of Sch. 7 List 2 Entries Nos. 49, 54 and 29 and List 3 Entries Nos. 26 and 36 entitled to resort to in order to recoup itself for any special expenditure which it has incurred for the benefit of a special class of persons against the special class. And the Provincial Legislature may recover the whole of this expenditure either by levying a fee which may be partly recurring and partly nonrecurring and recurring portion may be based on monthly payment measured on the consumption of goods by the payer of fee or by levying a cess or partly by levying a fee and partly by levying a cess at its option. By Sch. 7 List 2 Entry No. 49, power is given to Provincial Legislatures to levy cesses on entry of goods in any local area for consumption, use or sale therein and no exception is made in favour of manufactured goods or of raw produce or of goods or raw produce connected with a manufacture or industry in that local area. It was, therefore, open to the U. P. Legislature to recover their special expenditure in connexion with sugar industry either by levying a fee or by levying a cess ; it preferred to recoup itself by levying a nominal fee and a cess under S. 29, Sugar Factories Control Act (1 of 1938) and it cannot be said that on the plain reading of the entries the action was not justified. [P 166 C 2 ; P 167 C 1]

(i) Government of India Act (1935), Sch. 7 List 1 Entry No. 45 List 2 Entries Nos. 48 and 49 and List 3 Entry No. 36—Excise duty, sale tax and cess on entry of goods—Distinction—Tax on consumption or purchase of goods is not excise duty—Tax on raw produce required by manufacturer whether excise duty, general tax or special tax—Test—Cess imposed under S. 29, U. P. Sugar Factories Control Act (1 of 1938), being tax on consumption and directly payable by consumer cannot be regarded as excise duty.

The true distinction between an excise duty, a sale tax and a cess on entry of goods as used in the Constitution Act does not consist in the fact that the tax is on goods or that the tax is payable by manufacturer or producer but it consists in the fact whether the tax is on the act of production or on the act of sale or on the act of introducing goods in a particular area. Consequently, a tax on consumption of goods or a tax on purchase of goods, whatever else it may be, cannot be an excise duty. And a tax on raw produce required by the manufacturer for his manufacture may be an excise duty or may be a general tax or may be a special tax, and the fact whether it is one or the other will depend upon the true nature of the tax. If the tax is on the act of production or manufacture of goods it will be an excise duty, if the tax is on citizens generally and a manufacturer happens to be one of them, it will be a general tax, if the tax is for a special benefit conferred upon the manufacturer it will be a special tax and in that case it may take the form of a fee or a cess. In such a case and in each case the class of tax falls to be determined upon the true nature of the tax in the light of surrounding circumstances. The cess imposed under S. 29, U. P. Sugar Factories Control Act, 1 of 1938, which is payable by the consumer of sugarcane on sugarcane when it has entered the factory to be consumed and to lose its identity as a sugarcane is a tax on consumption. It may possibly be regarded as a tax on purchase, but it cannot be regarded as a tax on production of sugarcane or a tax on the producer of sugarcane. And a tax on consumption being a direct tax payable by consumer cannot be regarded as an excise duty : (1934) A. C. 45, *Rel. on.* [P 167 C 1,2 ; P 168 C 1]

Nor can the cess under S. 29, U. P. Sugar Factories Control Act, 1 of 1938, be regarded as a tax on production or manufacture of sugar because the tax is levied at a stage when the production or manufacture of sugar has not yet begun. [P 168 C 1]

(j) Government of India Act (1935), Sch. 7, List 1, Entry No. 45 and List 2, Entries Nos. 48 and 49 — Every tax on first sales is not excise duty—Tax on first sale when may not amount to excise duty stated.

Every tax on first sales whether payable by manufacturers or by purchasers cannot as a matter of law be regarded as excise duty. For it is possible to levy a tax against a manufacturer or purchaser even on first sales which may in reality be a tax on act of sale and not a tax on manufacture or production and which being in the nature of fee may be imposed in the form of fee or in the form of sales tax for special benefit conferred upon or services rendered to a manufacturer: ('41) 28 A.I.R. 1941 Mad. 913, *Ref.* [P 167 C 2]

(k) Interpretation of Statutes — Statute impugned as ultra vires — Court should not enter more largely in statute than is required for case.

Where a statute is impugned as being ultra vires of the powers of the Legislature, the Court should not enter more largely in the statute than what is required for the purposes of the case. [P 167 C 2]

(l) Government of India Act (1935), Sch. 7, List 1, Entry No. 45 and List 2, Entries Nos. 48, 49 and 54 and List 3, Entry No. 36 — "Excise duty" — Meaning of — It is not used in British sense — Provinces can tax manufacturer for special services rendered—Cess imposed under S. 29, U. P. Sugar Factories Control Act, is cess within Sch. 7, List 2, Entry No. 49 and

not duty of excise within Sch. 7, List 1, Entry No. 45 — It can also be treated as fee within Sch. 7, List 2, Entry No. 54 and List 3, Entry No. 36.

Schedule 7, List 1, Entry No. 45 and List 2, Entries Nos. 48 and 49 clearly indicate that the excise duty is used in a restricted sense so as to allow provinces to exercise powers under sales tax and cesses on goods without making those taxes excise duties, in the British sense of the word. The aforesaid entries should not be interpreted in such a way as to make the powers of the province merely illusory : ('39) 26 A.I.R. 1939 F. C. 1, *Rel. on.* [P 168 C 1]

Even assuming that in England a tax on a manufacturer measured by the quantity of raw produce which he consumes in his manufacture is to be regarded as an excise duty, there is no reason why it should be so regarded in India and why it should not be regarded what in fact it is, a direct tax on consumption of raw produce : *Foreign case law discussed.* [P 168 C 1]

Under the Constitution Act, the provinces have power to tax a manufacturer for special services rendered to him and for special benefit conferred upon him and a fee or cess levied for such services or benefit is not an excise duty. The cess imposed under S. 29, U. P. Sugar Factories Control Act (1 of 1938), is in the first instance a cess within the meaning of Sch. 7, List 2, Entry No. 49 and not a duty of excise within the meaning of Sch. 7, List 1, Entry No. 45 and if there be any difficulty in regarding it as a cess it can also be treated as a fee under Sch. 7, List 2, Entry No. 54 and List 3, Entry No. 36. [P 169 C 2]

(m) U. P. Sugar Factories Control Act (1 of 1938), S. 29—Rules under — U. P. Amendment Act, 11 of 1940, does not affect validity of rules framed under Act 1 of 1938 — Rules under Act 1 of 1938 continue in force.

Bye-law framed under an Act can only subsist so long as the Act subsists. But since the U. P. Sugar Factories Control Act has only been amended by U. P. Act 11 of 1940 and the amendments in the Act which were made did not require any amendment in the rules framed under Act 1 of 1938 it is not necessary to re-enact the rules and the rules previously made continue in force : (1916) 1 K. B. 688, *Disting.* [P 169 C 2]

(n) U. P. Sugar Factories Control Act (1 of 1938 as amended by Act 11 of 1940), S. 29 (2) and 29, Rules under, R. 25A — Additional cess of six pies imposed to meet cost of subsidy granted to sugar industry—Fact that individual manufacturers did not receive their share of subsidy does not render additional cess invalid — Nor can it excuse payment of cess on due date under R. 25A of Rules framed under Act—Fact that without receiving benefit of remission of excise duty accused under R. 25A has paid cess and delay in its payment was due to bona fide dispute about its validity may affect question of sentence.

The additional cess of six pies was levied under S. 29 (2) to meet the cost of subsidy granted to sugar industry in United Province as a whole. If individual manufacturers did not, for reasons arising of their own fault or for other reasons for which they were not to blame receive their share of subsidy, that fact cannot render the imposition of cess invalid nor can it excuse the payment of the cess under regulation on due date under R. 25-A. But the facts that the accused under R. 25-A received no benefit of remission of excise duty and without receiving any benefit of excise duty he has also paid the cess and such delay as arose in payment of the cess was due to a bona fide dispute about its validity are matters which may legitimately affect the question of sentence. [P 169 C 2]

(o) Government of India Act (1935), S. 100—Words "with respect to"—Meaning of.

The words "with respect to" in S. 100 mean on the subject of. [P 163 C 1]

Advocate-General and Government Advocate — for the Crown.

Sir Tej Bahadur Sapru, G. S. Pathak and H. P. Gupta — for Opposite Party.

JUDGMENT.— This case and the connected cases Nos. 2, 3 and 4 of 1941 are four original trials of a Sugar Manufacturer at Bijnor for infringement of a Regulation made under the United Provinces Sugar Factories Control Act (1 of 1938) in not depositing the cess due from him on the due date. The accused in all these cases is Seth Munna Lal, the managing proprietor of Seth Shiva Prasad Banarsi Das Sugar Mills, Bijnor, and four cases relate to four successive defaults which were made in payment of the cess due for the month of December 1940 and of January, February and March 1941; this case relates to default for the month of December 1940 and the connected cases Nos. 2, 3 and 4 of 1941 relate to defaults for successive three months of January, February and March 1941. On informations laid by the Collector of Bijnor, these cases were originally initiated in the Court of the Subdivisional Magistrate Bijnor, but on a petition of the accused that the cases "involved the determination of many important questions of constitutional law of unusual difficulty" they were transferred to this Court and have resulted in present trials.

The cl. 2 of S. 29, United Provinces Sugar Factories Control Act (1 of 1938) hereafter called the impugned Act empowered the Governor to impose a cess not exceeding six pies a maund on the entry of sugarcane into a local area for consumption, use or sale therein. Rule 25-A, United Provinces Sugar Factories Control Rules, 1938, hereafter called the impugned Rules lays down the procedure for the collection of this cess ; it directs the occupier of every sugar factory to maintain a correct daily account of the sugarcane entering the local area comprised in his factory, and within a fortnight of the close of each month to pay into the Treasury the amount due as cess on the quantity of sugarcane which has thus entered each month, and to submit to the Collector within the said time a statement showing the quantity of sugarcane which has entered and the amount of cess thus credited together with Treasury Receipt and in the event of his failure in any of these matters, it makes the occupier punishable with a fine which may extend to two thousand rupees. In exercise of the power conferred upon him by the impugned Act, the Governor imposed a cess of six pies per maund on Sugar Factories which remained in force till 4th December 1940.

In November 1940 the United Provinces Sugar Factories Control (Amendment) Act (11 of 1940) was passed which raised the amount of cess fixed by S. 29 (2) of the impugned Act from six pies to twelve pies per maund on the entry of sugarcane for consumption in Sugar factories. In exercise of power thus conferred and with effect from 5th December 1940, the Governor imposed a cess at the rate of three pies per maund together with an additional cess of six pies per maund on the entry of all sugarcane into the local area comprised in seventy-four

sugar factories in these Provinces and one of the factories thus notified and made liable to pay cess was Seth Shiva Prasad Benarsi Dass Sugar Mills Bijnor of which Seth Munna Lal, the accused, was the "occupier" in the month of December 1940 and in January, February and March 1941. The cess of six pies per maund originally imposed which was subsequently reduced to three pies on the entry of sugarcane in factories was levied mainly to defray the cost of the scheme which was embodied in the impugned Act to develop the cultivation of sugarcane and the sugar industry in these Provinces. The additional cess which is six pies per maund was levied in the words of the Statement of Objects and Reasons of U. P. Sugar Factories Control (Amendment) Act (11 of 1940) :

"To provide for the realisation of the subsidy given to the industry by means of an advance from the Government of India through the imposition of a special cess of six pies per maund of cane for a period of three years."

During the year 1939-40 the sugar industry in these Provinces passed through an exceptional crisis. On account of the price control exercised by the Sugar Syndicate, large stocks of sugar accumulated in factories with the result that the demand of banks which had advanced loans to factories threatened the ruin of sugar industry and the inability of the factories to purchase sugarcane on account of accumulated stocks in the next crushing season threatened the ruin of the cane agriculture. In order to tide over this crisis, the Government of the United Provinces entered into an arrangement with the Government of India by which the Government of India agreed to remit their excise duty to the extent of one rupee per maund on sugar which having been produced before 25th August 1940, was issued on and after that date from any factory in the United Provinces on condition that the loss thus suffered by the Government of India in their excise duty was treated as a loan by the Government of the United Provinces and was returned with interest in such monthly instalments as might be convenient to the Provincial Government. A detailed scheme on compliance of which factory-owners could receive remission of the excise duty was laid down and the benefit of the remission only accrued to those factory-owners who had unsold stock in their hands or to those who could and did comply with the conditions on which duty was remitted. This concession has been described as a subsidy to the industry, and in a sense it was, as it enabled the industry as a whole temporarily to escape the payment to the Government of India of the excise duty which should have fallen upon it on sales after 21st August 1940, but the relief was only a temporary one because the Government of India had remitted the duty as a loan and the Government of the United Provinces also treated it as a loan and they proceeded to take steps to recover it from the industry by levying a cess upon it.

For some reason which has not appeared at the trial, the accused did not receive the benefit of this remission of excise duty and he did pay in fact a sum of Rs. 1,44,909 in January and February 1941 in payment of excise duty in Central Treasury at Delhi. At the same time in the month of December 1940 and in January, February and March 1941, month after month several lacs of maunds of sugarcane entered his factory and several thousands of rupees became due for the Provincial cess. Within the time allowed by law, the accused paid the cess at the rate of three pies per maund but he demurred to the payment of the additional cess of six pies per maund till these informations were laid by the Collector against him. After the complaints were filed the accused paid on 30th April 1941, the amount due for the said additional cess also but under protest excepting a portion falling due for March 1941 for which a sum of Rs. 16,000 odd still remains due from him to the Government.

The charge against the accused is that he knowingly and intentionally did not deposit the cess which fell due from him in December 1940 and in January, February and March 1941 on due dates, nor did he file the statement of consumption of sugarcane and of payment of cess and the Treasury Receipt on due dates and in not doing so he has incurred the penalty provided for by Rule 25-A of the impugned Rules. The accused admits that he is the occupier of the factory, he does not dispute that the cess in fact was levied on his factory, nor does he dispute the amount of cess which became due from him ; his main defence is that the impugned Act and the cess which it levies and the Rules which are framed thereunder are all invalid and ultra vires and he not having received any benefit from the cess is not bound to pay it. The authority of the Act is challenged on the ground that it legislates about subjects which are beyond the Provincial field of legislation, it is also challenged on the ground that the Act is unconstitutional inasmuch as it combines taxing measures along with non-taxing measures in one and the same legislation and it is further challenged on the ground that the Act restricts exports and imports of sugar and sugarcane from and into these Provinces and as such contravenes S. 297 (1), Government of India Act, 1935. The contention with regard to the cess is that it is a tax in the nature of an excise duty masquerading as a cess and the Rules are attacked on the ground that they were made in 1938 before the Sugar Factories Act was amended in 1940 and with the amendment of the Act they lost all their binding force.

By the Government of India Act 1935, hereafter called the Constitution Act, the Provinces and Centre are given a divided and exclusive field of legislation and also a joint field. The subject-matter of the impugned Act are sugar factories, sugarcane agriculture, sugar industry and regulation of production and supply of sugarcane and sugar and a qualified scheme of price control and marketing of these commodities. Factories are a subject in respect of which the Centre and the Provinces exercise a concurrent jurisdiction, the other subjects are exclusively Provincial excepting development of industries which also is a Provincial subject excepting with regard to industries which by Federal law have been declared to be under Federal control in public interest. On a representation made by the Imperial Council of Agricultural Research to the Government of India and on a recommendation made by the Tariff Board on that representation, the Government of India published a Resolution in the Gazette of India dated 13th January 1932, in which they stated :

"That the case for protection to the Sugar industry rests on the importance of cane cultivation in the agricultural economy of India and that in order to maintain, and if possible, increase the area under cane, stimulus must be provided for the manufacture of fine sugar."

Soon after the Central Indian Legislature passed an Act called the Sugar Industry (Protection) Act (13 of 1932), which mainly provided for the protection of the sugar industry upto 31st March 1938, with a further provision for a statutory enquiry with regard to the protection which might be affor-

ded to the industry between 1938 and 1946. The actual language used in the Preamble of the Sugar Industry (Protection) Act (13 of 1932) has given rise to a contention on behalf of the accused and it is as follows :

"Whereas it is expedient, in pursuance of the policy of discriminating protection of industries in British India with due regard to the well-being of the community, to provide for the fostering and development of the sugar industry for a period ending with 31st March 1946, by determining the extent of the protection to be conferred upto 31st March 1938, and by making provision for the determination of the extent of the protection to be conferred for the remainder of the period : it is hereby enacted as follows:"

For certain reasons the statutory enquiry contemplated by the Sugar Industry (Protection) Act (13 of 1932) has not yet taken place and by successive Acts called the Sugar Industry Protection (Temporary Extension) Act (14 of 1938), Sugar Industry (Protection) Act (20 of 1939) and Protective Duties Continuation Act (8 of 1941) the period of statutory enquiry has been extended. But the Preambles of these extending Acts are differently worded and they only set out the expediency of the protection of the sugar industry and they do not set out its development as the aim and object of the enactment. The Central Indian Legislature further passed two Acts, called The Sugar Excise Duty Act (14 of 1934) and The Sugarcane Act (15 of 1934). By the former enactment, a duty at a specified rate was imposed on sugar produced in any factory in British India and either issued out of such factory or used within such factory in the manufacture of any commodity other than the sugar, payable by the owner of the factory. The latter Act was enacted in the words of its preamble "for the purpose of assuring to sugarcane growers a fair price for their produce to regulate the price at which sugarcane intended to be used in the manufacture of sugar may be purchased by or for factories" and it provided for certain controlled areas within which sugarcane was cultivated and grown and factories worked, to enable the Local Government to exercise price control in the said controlled areas. By the Constitution Act, the legislative authority of the Centre and of the Provinces was materially altered and, in exercise of these new powers, the United Provinces and the Province of Behar which between them approximately account for 85 per cent. of sugar produced in this country, passed two similar Acts called Bihar Sugar Factories Control Act (No. 7 of 1937) and the U. P. Sugar Factories Control Act (1 of 1938), that is, the impugned Act. These Acts repeal the Sugarcane Act (15 of 1934) of the Central Indian Legislature and in its place put forward a more comprehensive scheme for dealing with the problems of sugarcane cultivation and sugar industry in these two provinces. The contention of the accused is that in 1932 and in 1934 the Central Indian Legislature passed a series of measures, the object of which was to develop the sugar industry of India as a whole, these measures being the Sugar Industry (Protection) Act, 1932, the Sugar Excise Duty Act (14 of 1934) and Sugarcane Act (15 of 1934). In the Preamble of the Sugar Industry Protection Act, 1932, it is expressly stated that the object of that enactment was to foster and develop sugar industry. After the Constitution Act came into force, the Central Indian Legislature again passed three fresh measures by which they extended the life of Sugar Industry (Protection) Act of 1932, viz., Temporary Extension Acts, Act 14 of 1938, Act 20 of 1939 and Act 8 of 1941. These Temporary Extension Acts imply that the original aims and object of the Act 13 of 1932, viz., the fostering and development of sugar industry still continue to be the aims and objects of Central Indian Legislature. And therefore the development of sugar industry is a central subject adopted by the centre both prior to and subsequent to the enactment of the Constitution Act, and Provincial Legislature consequently had no power to repeal the Sugar Act (15 of 1934) or to make any law dealing with the sugar industry and as the other provisions of the impugned Act are inextricably mixed up with provisions dealing with sugar industry so that they are not severable, the entire Act becomes vitiated and falls to the ground. The relative powers of the provinces and of the centre under the Constitution Act in respect of development of industries are set out in two Entries No. 34 in List 1 which is the Central List and No. 29 of List 2 which is Provincial List of Sch. 7, Constitution Act, and it is necessary to examine these entries at this stage. The entry in Central List is as follows :

"No. 34. Development of industries, where development under Federal control is declared by Federal law to be expedient in the public interest."

The entry in the Provincial List reads as follows:

"No. 29. Production, supply and distribution of goods; development of industries, subject to the provisions in List 1 with respect to the development of certain industries under Federal control."

It will be noticed that only those industries are excluded from the provincial field whose development by Federal law is declared to be under Federal Control and the first question which arises for considerationis what is the meaning of the words Federal law as used in Entry No. 34. In the Constitution Act, the expressions 'Federal law,' 'Existing Indian law' and 'Act of Indian Legislature' are used in a separate and distinct sense and are not convertible terms. The "Existing Indian law" has been interpreted in S. 311, Constitution Act, as a law passed or made by any Legislature before the commencement of Part 3, Constitution Act. As Part 3 came into force on 1st April 1937, the expression 'Existing Indian law' means a law passed or made before 1st April 1937 by any Indian Legislature. Part 2, Constitution Act, which relates to Federal Legislature, has not yet come into force and in that sense Federal Legislature and Federal law do not exist, but there is a transitional provision in the Constitution Act—S. 316—which provides that for the time the Indian Legislature shall exercise the powers given to the Federal Legislature by the Constitution Act and the laws made by the Indian Legislature shall be treated as Federal laws. But this provision could only apply to the laws made by the Indian Legislature after the enactment of the Constitution Act, and this S. 316 does not lay down that the Existing Indian law which existed before the Constitution Act was enacted, shall be deemed to be Federal laws. No doubt by S. 292, Constitution Act, the laws prevalent in India both Federal and Central and which existed before the commencement of Part 3 of the Act were continued in force but they were not given the force or the meaning of Federal law as has been done with regard to laws made by the Indian Legislature after Part 3 came into force under S. 316 of the Act. The plain meaning of the statute therefore is that the Federal law is either a law made by the Federal Legislature after the Federal Legislature has come into existence or a law made by the Indian Legislature during the transitional period that is, between the enactment of the Constitution Act and till Federal Legislature comes into existence, but other existing Indian laws which were enacted before the Constitution Act, could not fall within the meaning

of the Federal law as used in the Constitution Act. This was the meaning given to the expression "Federal law" by Sir Shah Sulaiman in interpreting the same expression in S. 107, Constitution Act, in (1940) 3 F. L. J. F. C. 157[1] at p. 185 and in my opinion that interpretation equally applies to the expression "Federal law" as used in Entry No. 34 of List 1 of Sch. 7, Constitution Act.

It is not necessary to decide whether the Preamble of the Sugar Industry (Protection) Act (13 of 1932) can be read as containing a declaration that development of sugar industry was under Central control in the public interest. It may be that in 1932 and prior to the enactment of the Constitution Act, sugar and sugarcane were regarded as central subjects and the Indian Legislature had made laws about sugar and sugarcane. But the position entirely changed with the passing of the Constitution Act ; sugarcane agriculture and sugar industry then both became Provincial subjects and an express declaration became necessary to bring the sugar industry under Federal control by an Act of Indian Legislature passed after the Constitution Act came into force. No such declaration has been made and the Sugar Industry Protection Act of 1932 cannot be regarded as a Federal law, and the three Extension Acts, 14 of 1938, 20 of 1939 and 8 of 1941 cannot be regarded as containing any such declaration either expressly or by necessary implication. The protection of industry and not protection and development of industry was the stated object of the latter three Acts and the two functions of protection and development are not so indissolubly connected that they cannot be separately performed. The protection of industry contemplates protection against foreign competition and necessitate raising of tariff walls, a task which can only be accomplished by the Centre. Whereas the development of industry requires the regulation and internal management of industry in a Province which responsibility can be properly discharged by the Province. Sugarcane as an agriculture and Sugar manufacture as an industry are thus entirely Provincial subjects and the Provincial Legislature was competent to repeal the Sugarcane Act (15 of 1934) and to make laws about sugarcane and sugar as also about sugar factories.

It is now contended that the impugned Act being essentially a Factory Act dealing with licensing of Sugar factories and with regulation of prices of sugar and sugarcane, the Provincial Legislature acted unconstitutionally in introducing taxing clauses in that enactment. It is submitted that in England all taxes are imposed by a separate enactment and such has been the practice in India and in the constitution of Australia there is a provision in S. 55, Commonwealth Act, which forbids mixing up of laws imposing taxation with laws dealing with other matters. Whatever may be said about the propriety of such a practice, I cannot say that in the Constitution Act of India, there is any statutory bar by which taxing clauses cannot be introduced into measures dealing with other subjects. In List 2 of Sch. 7, Constitution Act, from items 39 to 54 various taxes are specified which it is open to a Provincial Legistature to impose and some of these taxes have natural connection with some of the subjects which in earlier items of the List 2 have been placed under Provincial charge and in respect of which a Provincial Legislature is entitled to make laws. For instance, items 20 and 21 of List 2 deal with the subject of agriculture and land and items 39, 41 and 42 provide for land revenue and for taxes on agricultural income and on land and buildings. Again, items 27 and 29 relate to trade and commerce, production, supply and distribution of goods and development of industries and items 48 and 49 provide for taxes on the sale of goods and on advertisements and cesses on the entry of goods into a local area for consumption, use or sale therein. Is there any reason to suppose that the Constitution Act intended that in carrying out legislation with regard to any of the matters placed in their charge by the Lists, if the Legislatures required special revenue for the purpose of carrying out the scheme embodied in a particular legislation, they are precluded from introducing a taxing clause in the legislation itself for which a special revenue is required and they must resort to an independent taxing enactment? It may be that under some constitutions such a procedure might be open to objections, but in the absence of any clear authority I cannot hold on the strength of the practice prevailing in other constitutions that the impugned Act in introducing taxing clauses was in any manner unconstitutional.

The impugned Act sets up a governmental and administrative machinery for carrying out the scheme of the Act; it provides for an Advisory Committee a Sugar Control Board, a sugar commissioner, a cane commissioner, a sugar commission and an Inspectorate. It puts the factories under a license both to construct the factory and to work it in a season and through the license it exercises control over the grading of sugar, its sale price and the quantity of sugarcane crushed in a factory in a season. It further empowers the Government to fix the price of sugar and demarcate an area from which factories must purchase all their sugarcane and not below a certain price and in order to meet the cost of the scheme embodied in this Act it authorises the levy of a small licensing fee and a small tax on the sale of sugarcane or in the alternative a cess on the entry of sugarcane in factories for consumption. One essential feature of the Act is that to each factory is reserved an area where sugarcane is grown and in which area the cultivator must sell all his sugarcane to the factory and the factory must purchase it at a price not below a minimum fixed by the Government and the factory under the terms of its license must join a central organisation called a sugar syndicate in which organisation by its rules and regulations sugar of the members is pooled and is sold at a price reserved by the syndicate. And to this extent the impugned Act does interfere with the liberty of the sugarcane grower to sell his sugarcane to whomsoever he likes and not the price which he likes and it interferes with the freedom of sugar manufacturer to sell his sugar at his own price.

The policy behind the Act is apparent. The sugarcane cultivators are an illiterate and ignorant class leading a life of poverty and destitution at the mercy of money-lenders and traders for their daily subsistence. In order to protect them and save them from utter ruin a price control was necessary. The sugar industry itself worked by power and modern machinery, was a growing and young industry in these provinces and it was being run on borrowed capital and was surrounded by malpractices and cut-throat competition. To preserve and develop, it some kind of marketing scheme was necessary, and this necessarily involved some sort of pooling arrangement or expropriation of goods, but the direct object of the legislation was to preserve and develop sugarcane cultivation and sugar industry and not to prohibit exportation from or importation into the province of sugarcane or

1. ('41) 28 A.I.R. 1941 F. C. 47 : 192 I. C. 225 : 1940 F. C. R. 188 : (1940) 3 F. L. J. F. C. 157, Subramanyan Chettiar v. Muthuswami Goundan.

sugar. And the question which arises for my consideration is whether economic planning is prohibited to the provinces by the constitution of India.

The contention of the accused is that all measures of price control, collective marketing and expropriation in relation to goods with whatever object undertaken operates as a restriction on free circulation of goods and on free trade and are unconstitutional. It is contended that a free trade clause is implicit in S. 297, Constitution Act, and in any case when a sugarcane grower is compelled to sell his sugarcane to one factory alone in these provinces at a price fixed by the Government and a sugar manufacturer is compelled to sell his sugar at a reserved price and on the basis of a pooling arrangement, both are prevented from exporting their goods out of province and this operates not only as a restriction on free trade and on interprovincial trade, but it offends against the plain language of S. 297, Cl. (1), Constitution Act, material portion of which is as follows:

"Section 297 (1). No Provincial Legislature shall (a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the province, or the entry in that list relating to the production, supply and distribution of commodities, have power to pass any law prohibiting or restricting the entry into or export from the province of goods of any class or description. . . .

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid."

This Court can have no opinion on the controversy between protection and free trade. But trade must exist before it can be free and goods must be manufactured or produced before they can be put in circulation and agriculture and allied industries must thrive and prosper and be developed before they can become subject-matter of any effective inter-province or foreign trade. By the Constitution Act the responsibility of preserving and developing agriculture and industries is laid on the Provinces and they are empowered to make laws "with respect to" these subjects and the phrase "with respect to" means "on the subject of" and the subject designates according to Higgins J., in *Union Label case* 6 C.L.R. 469[2] at p. 610 "the centre and not the circumference of power and the Legislature can by definition increase the area of its legislative field." Without going as far as Higgins J., has done, the power to make laws on the subject of agriculture and development of industries necessarily implies a power to regulate and power to regulate necessarily carries with it a power to impose restrictions which indirectly may interfere with export or import of goods. Economic planning of agriculture and industry now-a-days is a part of regulation of agriculture and industry and very often in circumstances prevailing in a Province requires price control or collective marketing or expropriation of goods and the necessity to adopt these schemes may arise to preserve agriculture or industry from extinction or to aid the growth of industry or agriculture. These measures invariably in some way interfere with the liberty of subjects to deal with their goods according to their wish and they may indirectly and as a remote consequence affect export from or import into a Province. But if these powers are denied to a Province the power given to them to regulate industry becomes wholly illusory and the Provinces remain saddled with the responsibility of preserving and developing agriculture and industry while retaining no powers to achieve the object placed under their charge.

In my opinion the law which is open to objection under S. 297 (1), Constitution Act, is a law made by Provincial Legislature substantially by virtue of the entry relating to trade and commerce or by virtue of the entry relating to production, supply and distribution of commodities. And if a law is made substantially by virtue of the entry relating to agriculture or of entry relating to development of industry as is the case before me, it is not open to objection under this section. Further, the law contemplated by this section is a law which prohibits or restricts entry into or export from the Province of goods directly and a law which does not deal directly and in substance with prohibition or restriction of export or import of goods but which deals with other needs of the province and provides for them, though incidentally, the effect of provision is that in some measure export or import is restricted, such a law is not within the meaning of this section. It follows from this that the prohibition or restriction contemplated by the section is a prohibition or restriction on the act of export or import and so long as the goods remain the property of the Province and are a stock of the province and before they have become subject of inter-province or foreign trade, the Province has every right to expropriate goods or to put any restriction upon them which it considers necessary for the needs of the province.

Now the Sugar Factories Act does not expressly or directly prohibit or restrict export or import of sugar or sugarcane from or into the province. It is not a law on the subject of export but it is a law on the subject of agriculture, industries and factories. And in so far as it directs the sugarcane in a reserved area to be sold by some sort of statutory compulsion at a price not below a minimum, it has adopted a necessary measure in the interest of and in order to preserve and develop sugarcane cultivation at a stage when the sugarcane was not and was not likely to be in future, with the doubtful exception in some Border districts, subject of inter-province trade. And in so far as the Act regulates the quantity of sugar and its price it also takes a necessary measure in the interest of sugar industry at a stage before sugar had become the subject of inter-province trade. And any remote or indirect interference which may result to export or import by these measures is not open to objection under S. 297 (1), Constitution Act.

The cases on the subject of 'restrictions on free trade' are legion; but in my opinion they do not lay down anything really contrary to what I have said above. It is now generally agreed that all measures of price control, collective marketing and expropriation of goods do not per se and as a matter of course interfere with free trade clauses in a constitution, and the interference contemplated by the constitution is a direct interference and not an indirect interference. And in each case which arose on these free trade clauses, the main question was whether the impugned provision resulted in a direct interference or in an indirect interference. The famous Australian case of James decided by the Privy Council in 1932 A.C. 542[3] and in 1936 A. C. 578[4] was a case of expropriation of goods under Dry Fruits Act of Australia.

2. 6 C.L.R. 469, The Attorney General for the State of New South Wales v. The Brewary Employees Union of New South Wales.

3. (1932) 1932 A. C. 542 : 101 L. J. P. C. 149 : 147 L. T. 321 : 48 T. L. R. 564, James v. Cowan.

4. (1936) 1936 A. C. 578 : 105 L. J. P. C. 115 : 155 L. T. 393 : 80 S. J. 688 : 52 T. L. R. 696 : 55 Ll. L. Rep. 291, James v. Commonwealth of Australia No. 2.

That Act was passed by Australian Commonwealth to protect the dry fruit industry of certain States and there exists a legitimate difference of opinion as to what was the real and direct object of that Australian Act. The Privy Council holding the view that the real and direct object of that Act was to drive the dry fruits off the Australian market and to interfere directly with inter-state trade and export, declared the Act to be ultra vires, but their Lordships' judgments read as a whole do not support the view that all indirect interferences with trade were regarded by them as objectionable even in a simple case of expropriation when it was not accompanied by any marketing scheme. The observations of Letham C. J. in a recent Australian case, (1939) 62 C. L. R. 116[5] at p. 132 may usefully be referred at this stage :

" In (1936) A.C. 578,[4] the decision in (1932) A.C. 542[3] is explained, and the result is that S. 92 invalidates only such expropriations as are shown to be directed against inter-state trade and commerce in the sense that the real object in creating the power of acquisition was to make it possible to place restrictions upon such trade and commerce. It is important to observe that in 1936 A. C. 578[4] the case in 1932 A. C. 542[3] is regarded as a case 'simply' of a restriction or prohibition of export from State to State. Such a description of the Dry Fruits Control Scheme may be novel to some but it is clearly upon this basis that 1932 A. C. 542[3] is fitted into the intellectual framework of 1936 A. C. 578.[4] But such a description does not apply to a collective marketing which endeavours to provide means for obtaining what is thought to be a proper price for producers and for preventing consumers from being charged what are thought to be excessive prices. Such a statute is not simply an Act which restricts or prohibits export from State to State."

Indirect and remote interference which may result from collective marketing schemes or price control measures has not been considered by the Judicial Committee or in Canada or in Australia as restrictions on export or import or on free trade. In 1938 A. C. 708,[6] a Provincial Natural Produce Marketing Act was held valid by the Privy Council and in 1936 C.L.R. 398 a Dominion Natural Product Marketing Act was held to be invalid by the supreme Court of Canada. But, in both cases, it was assumed and accepted that marketing legislation itself was not open to any valid objection and the main controversy in these cases was whether the Province or the Dominion was competent to pass the legislation. The latest Australian view is expressed in (1939) 62 C.L.R. 116[5] in which the Act impugned embodied a collective marketing scheme, a scheme of expropriation of property and a price fixing scheme and all this with reference to a commodity which as a matter of fact was subject of inter-state trade. Starke J., expressed his dissentient view in the following forcible language :

"The constitution, we have been told, must not be mocked (1932 A.C. 542[3] at p. 558), but Judicial decisions are rapidly destroying the effectiveness of the guarantee contained in S. 92 of the Constitution, that trade and commerce among the States shall be absolutely free. Transport may be licensed, prices may be controlled; trade in goods among the States may be regulated by laws directed towards procuring standards of quality, condition or grade of articles of commerce, and now we are called upon to declare that the States may compulsorily acquire commodities for like purposes and thus prevent or hinder all trade in such commodities among the States."

Nevertheless the remaining members of the Bench (Letham C. J., Rich, Evatt and McTiernan JJ.) held that the Act was valid. I have already quoted above an observation of Letham C. J., in connexion with the expropriating feature of the Act. His other observation with regard to collective marketing feature of the Act is as follows :

"The reconciliation of the apparent difference between the statements to which I have referred is, in my opinion, to be found in the proposition that a State Parliament is not necessary and is of course prohibited from controlling the sale of any commodity within its borders by the imposition of a collective marketing scheme, but that such a scheme would be invalid if it is shown that it is directed wholly or partially against inter-state trade (*see* 1936 A. C. 578[4] at p. 630) in the sense that the real object of the Act is to make it possible to place restrictions on inter-state commerce. In my opinion in spite of what might appear to be a contrary view expressed in the comment upon (1933) 48 C. L. R. 266,[7] which I have quoted the view of their Lordships of the Privy Council was that a State Parliament could enact and provide for the administration of a compulsory marketing scheme so long as it was not directed against inter-State trade and was not merely a prohibition as distinct from regulation of such trade."

And Letham C. J. has stated the law with regard to price fixing powers of the Australian States even with regard to commodities which are subject of inter-state trade in the same case in these words :

" In my opinion it must now be held that so far as S. 92 is concerned, a State price fixing Act applying (as a matter of construction) to trade and commerce in general may validly apply to inter-state trade and commerce if it is not shown to be directed against such trade and commerce."

By the Constitution Act a Provincial Legislature is given power to impose certain taxes and fees, which are specified in List 2 and List 3 of Sch. 7, Constitution Act. Entry No. 48 of List 2 authorises imposition of taxes on the sale of goods; Entry No. 49 of List 2 authorises imposition of cesses on the entry of goods into a local area for consumption, use or sale therein; Entry No. 54 of List 2 authorises charging of fees in respect of any of the matters in that list and Entry No. 36 part 2 of the List 3 authorises levy of fees in respect of any of the matters in that list and one of the matters specified therein is "Factories" being Entry No. 26 of that List. In pursuance of powers thus conferred the Provincial Legislature has provided by S. 12 of the impugned Act a license fee not exceeding one hundred rupees to be levied by the Government for granting a license to construct a factory and a separate fee of the same amount for granting a license to crush cane in a factory and by S. 29 cls. (1) and (2) of the impugned Act the Governor is authorised after consulting the Sugar Control Board to impose by notification a tax on the sale of sugarcane not exceeding six pies per maund or alternatively to impose a "cess not exceeding twelve pies a maund on the entry of sugarcane into a local area, specified in such notification for consumption, use or sale therein." No tax on the sale

5. (1939) 62 C. L. R. 116, Milk Board (New South Wales) v. Metropolitan Cream Pty. Ltd.

6. ('39) 26 A. I. R. 1939 P. C. 36 : 180 I. C. 538 : 1938 A.C. 708 : 107 L.J.P.C. 115 : 82 S. J. 728 : 54 T. L. R. 1090, Shanon v. Lower Mainland Dairy Products Board.

7. (1933) 48 C.L.R. 266, Peanut Board case.

of sugarcane has yet been imposed but in exercise of
a powers thus conferred the Government has imposed a licepse fee on factories for granting licenses and the Governor by notification has treated the area comprised in seventy four factories in these Provinces as a local area in which he has imposed a cess on the entry of all sugarcane for consumption, use or sale therein. At first the maximum cess permitted by the impugned Act was six pies per maund and the Governor had imposed the maximum cess of six pies per maund. But in 1940 the impugned Act was amended and the maximum was raised to twelve pies per maund and with effect from 5th December 1940, the Governor has imposed a cess of three pies together with an additional cess of six pies per maund, the former cess is to provide for administrative expenses of the scheme embodied in the impugned Act and the latter cess is levied to meet the liability of a subsidy granted to sugar industry
b in these provinces.

By S. 29, cl. (3) the Provincial Government is required to make rules specifying the authority empowered to collect the tax or cess and the person from whom and the manner in which the tax or cess shall be collected. Under R. 25A of the impugned Rules the liability of payment of cess is laid on the occupier of factory and S. 29 (4) of the impugned Act also provides that if any agreement for the sale of cane is entered into before the imposition of cess, the seller will be entitled to recover from the buyer in addition to, and as a part of the contracted price, the amount of cess to which the seller may be liable. By Ss. 15 and 18 of the impugned Act to each factory is assigned a reserved area in which sugarcane growers must sell all their sugarcane to the factory and the factory must purchase all their produce. Some factories may grow their own sugarcane
c in small quantity, but this would be somewhat exceptional. The evidence before me is and this seems to be the rule that all the sugarcane or most of the sugarcane which enters the factory comes from the reserved area and it comes by way of statutory compulsion, because after being produced in the field in the reserved area it is sold to factory and after factory has purchased it it enters the factory for being manufactured into sugar. The cess is levied at the stage when after its sale by the grower to factory it enters the factory for consumption or being turned into sugar.

The contention of the accused is that the cess in dispute is a tax on sugar manufacturer and on the raw produce required for the manufacture of sugar, the Provincial Legislature not having any power to impose a tax on the sugar manufacturer or on his raw produce have dressed up the tax in the form of
d a cess. This underlying idea of cess according to the accused is that it is a tax payable in some administrative area or in some governmental subdivision, on entry of goods generally, payable by citizens generally and when a tax is imposed upon one class of persons, e. g., sugar manufacturer and no others and when it is imposed upon one class of goods. e.g., sugarcane and no others these goods being the raw produce of the manufacturer such an impost is a tax on manufacture masquerading as a cess and not a genuine cess. The accused further contends that the tax in question is really an excise duty collected at an early stage from the manufacturer on his raw produce and this could only be levied by Central Indian Legislature under Entry No. 45 of List 1 and it was beyond the competence of the Provincial Legislature to impose such a tax.

These contentions raise some questions of fundamental importance. Has the Provincial Legislature power to create new local areas or not and must these local areas be only governmental sub-divisions e
and can they not be industrial sub-divisions or for the matter of that any other kind of administrative or taxing units? Has not the Provincial Legislature power to levy a special tax on a class for special benefit which it confers on that class and must the manufacturing class be exempted from special taxes even when they receive special benefits and cannot the tax upon them be measured by consumption of their raw produce, so long of course, as the tax is not laid upon the manufacture or production of goods? What is the true nature and basic idea of cess? If it is to be laid on goods need it apply to more than one kind of goods and if it is recoverable from persons, need it apply generally or universally and can it not be confined to those alone who have received special benefit and from whom a return for benefit conferred can be properly demanded? The words "local area" have nowhere been interpreted in the Constitution f
Act. But they occur at one or two places, particularly in S. 143 (2), Constitution Act, which is as follows :

"Any taxes, duties, cesses or fees which, immediately before the commencement of part 2 of this Act, were being lawfully levied by any Provincial Government, Municipality or other local authority or body for the purposes of the province, municipality, district or other local area under a law in force on the first day of January 1935, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature."

It is submitted that the use of words "local area" in S. 143 suggests that it is used in the sense of a governmental sub-division or an administrative unit. g
But the administration need not be political, it may be industrial, educational or it may take any other form of governmental activity. Indeed I cannot see why it is not open to Provincial Government or Provincial Legislature to make an industrial survey of the province and to divide up the entire province into industrial areas or factory areas or mill areas or in any other kind of areas, and each one of these areas may be notified and be treated as a local area. And once such areas come into existence and remain in operation they can be regarded as local areas within the meaning of Entry No. 49 of List 2 in which a cess may be levied. We know that under the Sugarcane Act (15 of 1934) passed by the Central Indian Legislature sugarcane cultivation was divided into controlled areas and under the impugned Act it has been divided into reserved and assigned areas. By cl. (2) of S. 29 of the impugned h
Act the Governor is authorized by the Provincial Legislature to notify local areas and to impose a cess in such notified areas. In exercise of this power the Governor has notified the area comprised in seventy-four factories in these provinces as a local area, and the area thus notified may now be regarded as statutory local area. It is true that this local area did not exist from before and the area was notified and cess was imposed by a simultaneous notification; it is also true that the area was created only for taxing purposes and it may be that it is a mere taxing unit and not a general administrative unit. But these facts do not make the factories area any the less a local area though the question whether the Legislature has any power to tax the factories raises other considerations which will have to be separately considered. I feel that the words 'local area' as used in Entry No. 49 of List 2 have no technical meaning

and they are merely used in the dictionary sense of the words. In Murray's Oxford Dictionary 'local' means inter alia 'limited or peculiar to a particular place or places' and 'local area' therefore, should mean any limited area or any area peculiar to a place, and as such factory area might well be regarded as a local area.

In its extreme form the contention that no Provincial Legislature can tax either the manufacturers or their goods is to be stated to be rejected. A manufacturer is a citizen of the province and like all other citizens in his capacity as a citizen he must share the burden of taxation with others. It is not disputed that an octroi or a cess on goods can be levied on entry of goods in cities and towns. Most cities and towns have some industries working in their midst, many cities and towns are wholly or substantially industrial. If a cess or octroi is levied on the entry of goods in such cities and towns it may fall on goods also connected with industries. Can it be reasonably contended that while other citizens when dealing with these goods must pay the octroi or cess, the manufacturer when dealing with these goods should not be held liable? But the question remains whether the manufacturer as a manufacturer and not as a citizen in common with other citizens can be taxed and if so, can the tax be measured by the quantity of raw produce which he consumes in connection with his manufacture. The sugar manufacturers in these provinces are a small class of subjects of the Province. In order to protect them and to make them prosperous the Government had to enact a scheme and to grant a subsidy. In order to meet the cost of the scheme and subsidy, taxation became neccessary and the province decided to raise this special revenue not by general taxation but by a special tax payable by sugar manufacturers who had received a special benefit by the scheme and by the subsidy.

It is not an absolute right of manufacturers to carry on any manufacture or industry in any country on their own terms. All Governments possess a right to regulate industry and to put it under license and to charge a fee which may be necessary for regulation and for governmental expenses. All Governments also possess power to incur special expenditure for the benefit of a particular class of persons and to recover the expenditure thus incurred by a special tax from that class alone which has received the benefit. A question has been raised that a fee can never be large enough to be a tax. The distinction between a fee and a tax is somewhat shadowy and it is not necessary that the fee need not be large enough to be a tax and to serve the purpose of general revenue. In Findley Shirras 'Science of Public Finance' Vol. 1 Edn. 1936, the distinction between fees and taxes is stated in the following words :

"Taxes are compulsory contribution to public authorities to meet the general expenses of Government which have been incurred for the public good and without reference to special benefits. Fees are payments primarily in the public interest for special services which people must accept whether willingly or not . . . Fees are for governmental services, while prices are for services of a business character. They differ also from taxes in that they are payments for special benefits enjoyed by the payer, while taxes are for general benefits, expenses which are laid, as Adam Smith says, 'for the benefit of the whole society.' The essence of a tax is the absence of *quid pro quo* between the tax payer and the public authority. Fees in Adam Smith's words are 'particular contributions (as opposed to general contributions) by persons who give occasion to this expense' . . . . Fees are undoubtedly co-ordinate with taxes, and are sometimes grouped under the main head tax revenue, just as fees are grouped under non-tax revenue. It is indeed sometimes difficult to draw a clear line of distinction between taxes and fees."

In 1938 A.C. 708[6] in order to carry out a marketing scheme a licensing fee was levied on goods which was too large for regulation purposes and which left a surplus for general revenue. In deciding in favour of its validity Lord Atkin at page 721 observed as follows :

"A license itself merely involves a permission to trade subject to compliance with specified conditions. A license fee, though usual, does not appear to be essential. But if licenses are granted it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the province or for both purposes. The object would appear to be in such a case to raise a revenue for either local or provincial purposes. . . . It cannot as their Lordships think, be an objection to a license fee that it is directed both to the regulation of trade and to the provision of revenue."

A further question has been raised that a cess is not a special tax, the basic idea of a cess being that it is either a local rate or an octroi but in each case it is a fixed payment which the occupiers or residents, generally of a locality are called upon to make in case they make use of the locality or of the goods which come in the locality, but tax payable by seventy four owners of sugar factories scattered throughout the province, a tax to be measured by the quantity of sugarcane consumed in each factory may be a special tax but it is not a cess. The question whether seventy four factories can be regarded as a local area, I have already discussed it elsewhere and it may be left out of consideration here, but I do not see why a special tax or in other words a tax levied against a class for a special benefit conferred on that class cannot be regarded as a cess even if that class is scattered all over the province and the tax is measured on the quantity of consumption. "Cess" has been explained in Murray's Oxford Dictionary as "In India a tax levied for a specific purpose, often with a prefixed word defining the object." And in Encyclopaedia Britannica it has been explained as "a term formerly more particularly applied to local taxation in which sense it is still used in Ireland, otherwise it has been superseded by 'rate.' In India it is applied with the qualifying word prefixed to any taxation, such as irrigation cess and the like and in Scotland to the land tax. The word is a shortened form of 'assess' and the spelling is due to mistaken connexion with census."

In my opinion fees and cesses are two forms of special taxation which a Provincial Legislature provided it is given authority to do so is entitled to resort to in order to recoup itself for any special expenditure which it has incurred for the benefit of a special class of persons against the special class. And the Provincial Legislature may recover the whole of this expenditure either by levying a fee which may be partly recurring and partly non-recurring and recurring portion may be based on monthly payment measured on the consumption of goods by the payer of fee or by levying a cess or partly by levying a fee and partly by levying a cess at its option. By Entry No. 54 of List 2 and Entry No. 36 of List 3 power is given to the Provincial Legislature to levy fees in most general terms in all matters which are within their legislative fields and by Entry No. 29 of List 2 and Entry No. 26 of List 3 development of industries and control of factories

respectively are matters placed within their legislative charge. By Entry No. 49 of List 2, power is given to provincial Legislatures to levy cesses on entry of goods in any local area for consumption, use or sale therein and no exception is made in favour of manufactured goods or of raw produce or of goods or raw produce connected with a manufacture or industry in that local area. It was, therefore, open to the legislature of these provinces to recover their special expenditure in connexion with sugar industry either by levying a fee or by levying a cess; it preferred to recoup itself by levying a nominal fee and a cess and it cannot be seriously disputed that on the plain reading of the entries the action was justified. But it is submitted that these Entries Nos. 49, 54 of List 2 and Entry No. 36 of List 3 which give power to levy fees and cesses to provinces, should not be read in ordinary way and in their plain meaning, but they should be so restricted and read in such a way as not to bring them in conflict with the power given to Centre to levy excise duty by Entry No. 45 of List 1. The contention is that excise duty is a tax on goods collected at any stage from raw produce to finished product and a tax on a manufacturer levied against a basic article connected with his manufacture is in substance a tax on manufactured goods and is really an excise duty, though it may be dressed up in any form and be called by any name.

This necessitates the examination of three entries in the Constitution Act which permit taxes to be imposed on goods and a fourth entry which allows fees to be levied against all classes of persons. By Entry No. 45 of List 1, Centre is allowed to levy duties of excise on tobacco and other goods manufactured or produced in India, by Entry No. 48 of List 2 the provinces are allowed to levy taxes on the sale of goods and by Entry No. 49 of the same list provinces are allowed to levy cesses on the entry of goods into a local area for consumption, use or sale therein. It will thus be seen that all three taxes are on goods and therefore the fact that the tax may be on goods is not decisive of its character. The further fact that the tax is payable by manufacturer or producer of goods is in my opinion equally inconclusive. The Provinces may provide special facilities in a particular area for use, sale or consumption of goods manufactured or produced in the Province and put a tax in that area on entry of goods; if a producer or manufacturer finds it to his advantage to bring his goods in that area and is called upon to pay a tax this would be a tax payable by producer or manufacturer but not on production or manufacture of goods but because he wants to bring them in a particular area. Similarly, the provinces may find special purchasers for certain goods manufactured or produced who might pay special price for goods, and tax the sales, here again the tax is payable by manufacturer or producer but here again the tax is not on producer or manufacturer but on sales to those special purchasers. In my opinion the true distinction between an excise duty, a sale tax and a cess on entry of goods as used in the Constitution Act does not consist in the fact that the tax is on goods or that the tax is payable by manufacturer or producer but it consists in the fact whether the tax is on the act of production or on the act of sale or on the act of introducing goods in a particular area. Two conclusions follow from this that a tax on consumption of goods or a tax on purchase of goods, whatever else it may be, cannot be an excise duty. And a tax on raw produce required by the manufacturer for his manufacture may be an excise duty or may be a general tax or may be a special tax, and the fact whether it is one or the other will depend upon the true nature of the tax. If the tax is on the act of production or manufacture of goods it will be an excise duty, if the tax is on citizens generally and a manufacturer happens to be one of them it will be a general tax, if the tax is for a special benefit conferred upon the manufacturer it will be a special tax and in that case it may take the form of a fee or a cess. In such a case and in each case the class of tax falls to be determined upon the true nature of the tax in the light of surrounding circumstances.

The impugned Act authorises the imposition of a license fee, a sales tax on sugarcane or in the alternative a cess on the entry of sugarcane in a local area. The license fee is for a nominal amount not even sufficient to cover the governmental expenses of the Act. The sales tax has not yet been imposed but it is a tax which if levied shall operate upon first sales, because under the impugned Act the sugarcane produced in a reserved area cannot remain with the producer and has to be sold and there can only be one sale first and last to the factory, then the sugarcane is consumed and turned into sugar and by statute the liability of payment of tax falls upon the purchaser. It is contended that a tax on first sale of goods operates as an excise duty as a matter of law and it has been so held in 4 F. L. J. 332.[8] That was a case under Madras General Sales Tax Act 1939 in which a tax was levied on a manufacturer of groundnut oil and cake on the sales which he made of oil and cake and on the purchases which he made of groundnut for manufacturing oil. The tax on purchases of groundnut was not in controversy as will appear from the statement of counsel on p. 336, but the tax on sales of oil and cake by the manufacturer was held to be an excise duty. That imposition on its own facts may well be regarded as an excise duty, but if it was intended by the Madras High Court to lay down as a matter of law that all and every tax on first sales whether payable by manufacturers or by purchasers are to be regarded as excise duty, then the case may require reconsideration. For it is possible to levy a tax against a manufacturer or purchaser even on first sales which may in reality be a tax on act of sale and not a tax on manufacture or production and which being in the nature of fee may be imposed in the form of fee or in the form of sales tax for special benefit conferred upon or services rendered to a manufacturer. But as the tax on sales, though authorised by the impugned Act, has not yet been levied, it is not necessary to pursue this matter any further and to express any final opinion on the point and I must heed the warning given by the Judicial Committee not to enter more largely in the statute than what is required for the purposes of the case.

It remains now to consider the nature of the cess which has been levied under the impugned Act. The cess is payable by the consumer of sugarcane on sugarcane when it has entered the factory to be consumed and to lose its identity as a sugarcane, its final sale has taken place and it will no longer remain in circulation and be the subject of further sales. A tax like this is a tax on consumption, it may possibly be regarded as a tax on purchase, but it cannot be regarded as a tax on production of sugarcane or a tax on the producer of sugarcane. And a tax on consumption being a direct tax payable

8. ('41) 28 A. I. R. 1941 Mad. 913 : I. L. R. (1941) Mad. 874 : (1941) 2 M. L. J. 607 : (1941) 4 F. L. J. H. C. 332, Province of Madras v. B. Paidanna.

by consumer cannot be regarded as an excise duty: *see* 1934 A. C. 45.[9] Nor can the cess in dispute be regarded as a tax on production or manufacture of sugar because the tax is levied at a stage when the production or manufacture of sugar has not yet begun.

It is now contended that the cess is a tax on manufacturer on a basic article required for his manufacture, in other words a tax on his raw produce and Entry No. 45 of List 1 does not only give a right to the Centre to levy duties on goods produced or manufactured in India, but it gives right to levy duties of excise and duties of excise is a term of definite import in England which covers practically all indirect taxes on home made goods and a great many taxes which are not on goods at all, and the excise duty is collected from the stage of raw produce upto consumption, and the Constitution Act being an Act of British Parliament, the expression excise duty in Entry No. 45 of List 1 is used in British sense of word. The first observation which falls to be made on this topic is that in England there is a unitary Government and one source of taxation while in India we have a Federation with competing powers given to Provinces and to Centre with regard to taxation of goods. This fact alone makes the problem under Indian Constitution entirely separate from other constitutions when a controversy arises whether a particular tax is an excise duty. Again, very few articles produced or manufactured in India have yet been subjected to excise duty by the Centre and great many goods manufactured or produced in Provinces are likely to remain permanently free from excise duty in future also. Could it be the intention of the Parliament that Centre should have a power which it would never require to use in practice and Provinces should not have a power which would be of great use to them ?

It seems to me that the intention of the Parliament can be best gathered by the language of entries and the three entries, one Central and two Provincial read together clearly indicate that the excise duty is used in a restricted sense so as to allow Provinces to exercise powers under sales tax and cesses on goods without making those taxes excise duties, in the British sense of the word. I am not also certain that in England excise duties are collected at the stage of raw produce. But even assuming that in England a tax on a manufacturer measured by the quantity of raw produce which he consumes in his manufacture is to be regarded as an excise duty, I see no reason why it should be so regarded in this country and why it should not be regarded what in fact it is, a direct tax on consumption of raw produce. And indeed so far as I am concerned one part of the above contention is not open to any debate. In 1939 F. C. R. 18[10] the Federal Court has unanimously held that the expression duties of excise in Item 45 of List 1 is not used in the British sense of the word but it is used in a restricted sense and the three entries in Lists 1 and 2 which deal with taxes on goods should be so interpreted as to allow both the Centre and the Province to exercise their powers and they should not be interpreted in such a way as to make the powers of the Province merely illusory. Not only do I respectfully agree with this view but it is my duty to follow it. It is true that in the same case Sulaiman J. had expressed the view that possibly a tax on first sale of goods might be regarded as an excise duty and Jayakar J. had observed that excise duty might be collected at any stage from raw produce up to consumption, but these remarks are merely obiter dicta because the question did not arise before them whether a tax on a manufacturer measured by the consumption of raw produce is a tax on consumption or on production, nor did the other question arise before them whether a manufacturer can be taxed for special benefit conferred upon him. Such observations as they have made in explaining the nature of excise duty must be taken in connexion with the facts of that case, and I do not think anything which I have said above is really inconsistent with their judgments read as a whole.

A number of American and Australian cases were cited before me in which the nature of excise duty has been explained with reference to American, Australian or British constitution. In some cases it was laid down that a tax on a manufacturer may be a tax on his goods and the Court is to be guided not by the form of the tax but it has to consider its real nature however disguised it may be. In some of the Australian cases which I am presently going to notice certain taxes on goods or on manufacturer were held to be excise duties as in some others they were held not to be excise duties. I have only one general comment to make with reference to all these cases. They were all cases, whenever a tax was held to be excise duty in which power to levy a tax on goods was wholly wanting in the States or the power to levy that particular form of tax was wanting in the States. In such a case the form of the tax or its disguise became a matter of real importance. But the problem before me is an entirely different one. Here admittedly both the provinces and the centre have got the power to tax the goods and the question is how these powers are to be interpreted, reconciled and mutually exercised and whether by reason of these competing entries which do not arise in other constitutions, the provinces have got a power to levy a fee or tax on manufacturer to recoup themselves for special expenditure incurred for the manufacturer and for special benefit conferred on him. In Australian constitution the power to levy excise duties or to tax home made goods is exclusively in the Commonwealth and that constitution also contains an inter-State free trade clause and a clause which requires taxation by separate legislation. The Australian States unlike other provinces do not possess any enumerated powers — their power of taxation rests on their residuary powers and any indirect tax or burden placed by States on goods which are subject of inter-State trade and which affects the freedom of trade or free circulation of goods raises very different consideration in that constitution.

The question of taxing a manufacturer or his goods cropped up in Australia in connexion with manufacturing licenses, sale of goods and marketing schemes. Levying a fee on a manufacturer and on his goods in the form of a license fee for governmental expenses of regulation of manufacture is regarded in Australia to be within the powers of the States and not an excise duty : *see* (1904) 1 C. L. R. 497.[11] Two attempts were made in Australia to tax motor spirits. In the earlier case (1926) 38 C. L. R. 40[12] under Motor Vendors Spirit Act of South Aus-

9. (1934) 1934 A. C. 45 : 103 L.J.P.C. 1 : 150 L.T. 81 : 50 T. L. R. 83, Attorney-General for British Columbia v. Kingcome Navigation Co. Ltd.

10. ('39) 26 A.I.R. 1939 F.C. 1 : 180 I.C. 161 : 1939 F. C. R. 18 : I.L.R. (1939) Kar. F. C. 6, In re The Central Provinces and Berar Act No. 14 of 1938.

11. (1904) 1 C. L. R. 497, Peterswald v. Barlley.

12. (1926) 38 C. L. R. 40, The Commonwealth Oil Reference, Ltd. v. South Australia.

tralia—the tax was laid on first sale of motor spirit, this was held to be tax on production and an excise duty. In the latter case (1935) 51 C.L.R. 108[13] under Motors Spirit Vendors Act of Queensland, the sellers of motor spirit were put under license to purchase on their sales of motor spirit an equal amount of power alcohol manufactured in Queensland, the scheme was obviously devised to encourage local power alcohol against foreign motor spirit, yet having regard to its form the imposition was held not to be an excise. Taxes in connexion with marketing schemes have both failed and succeeded in Australia. As under the Australian constitution taxation could only be by a separate enactment, these impositions were introduced in the marketing Legislature in the form of levies or deductions. In (1936) 56 C. L. R. 390[14] under the Flour Acquisition Act, 1931 (N. Sw.) flour manufactured by the millers was expropriated and they were required to take it back on payment of a standard price and the profit thus made by the State out of flour expropriated after deduction of expenses was to be paid into special fund for the relief of necessitous farmers. This was regarded as a tax on the millers taken from them under the device of expropriation of flour and forced payment of standard price and was held to be an excise duty. In (1938) 60 C. L. R. 263[15] under the marketing of Primary Products Act, 1935 (Victoria), a levy was made on producers of £1 for every half acre of land planted with chicory and this was held to be a tax on production and an excise duty.

On the other hand in (1933) 49 C. L. R. 399[16] an Act dealing with the marketing of milk provided that the price of the milk should be paid to the suppliers with a deduction for charges incurred in the treatment, carriage and distribution and sale of milk and for the costs, charges and expenses of the administration of the Act by the milk Board. It was held that this provision for deductions did not 'convert the scheme into one for taxation' and deductions were not excise duty. In (1936) 57 C.L.R. 372[17] under S. 18, Dry Fruits Act, 1928 (Victoria) an imposition which was laid upon fruit sellers to meet the cost of Victoria Dry Fruit Board in carrying out a scheme of packing and grading of fruits, was held to be a payment for services rendered and not an excise duty. In (1938) 61 C.L.R. 665,[18] the marketing Board which was set up under the Marketing of Primary Products Act 1938 (Victoria) was given power to make certain pool deductions to meet the cost of scheme and the deductions thus made were not regarded as excise duties.

In Canada the Provinces and the Dominion both have enumerated powers with residuary powers in the Dominion and Provinces are given power to raise Provincial revenue by direct taxation. A tax on goods so long as it is not placed on production or manufacture of goods and is not indirect is therefore within the competence of the Provinces in Canada. Accordingly in 1934 A. C. 45[9] a tax on consumption under the Fuel Tax Act 1930 of British Columbia imposed upon every consumer of fuel oil according to quantity which he consumed was held to be a direct tax and not an excise duty. And in 1938 A. C. 708[6] the power of Provinces to levy a fee in connexion with production of the Provinces was recognized by the Privy Council on the ground that the Provinces had a right to license local manufacture and charge a fee for it which may be large enough to cover regulation expenses and to add to the revenue of the Provinces and also on the ground that it was a remuneration for services rendered. I should have gratefully received any guidance from the American, Canadian and Australian cases. But I feel that they really do not apply and in any case they do not lay down anything which compels me to hold that under the Indian Constitution the Provinces have no power to tax a manufacturer for special services rendered to him and for special benefit conferred upon him and that a fee or cess levied for such services or benefit is really an excise duty. And conclusion to which I have reached is that the impugned cess is not open to the attacks made against it, and the impugned imposition is in the first instance a cess within the meaning of Entry No. 49 of List 2 and not a duty of excise within the meaning of Entry No. 45 of List 1, and if there be any difficulty in regarding it as a cess it can also be treated as a fee under Entry No. 54 of List 2 and Entry No. 36 of List 3.

There remain now to notice briefly two more pleas in defence, one relating to the binding force of impugned Rules by reason of the amendment of impugned Act and the other relating to the legal consequences which arise by reason of the fact that the accused personally did not receive any subsidy for whose payment the cess in dispute was levied. The impugned Act was passed in 1938 and the impugned Rules were made soon after in 1938. In 1940 the impugned Act was amended in several particulars and the maximum amount of cess which was originally fixed at six pies per maund was raised to twelve pies per maund. But as the amendment of the Act did not require any change in the Rules, the old rules were not changed. The contention of the accused is that with the amendment of the Act in 1940 the Rules of 1938 ceased to have any binding force and it was necessary to enact Rules afresh and for this contention reliance is placed on (1916) 1 K. B. 688[19] decided by Lord Reading. That was a case in which a person was prosecuted for a breach of bye-laws framed under an Act which was wholly repealed. Bye-law framed under an Act can only subsist so long as the Act subsists. Here the impugned Act has only been amended and the amendments in the Act which were made did not require any amendment in the Rules. In such a case it is not necessary to re-enact the Rules and the Rules previously made continue in force.

The additional cess of six pies was levied to meet the cost of subsidy granted to sugar industry in these provinces as a whole. If individual manufacturers did not, for reasons arising of their own fault or for other reasons for which they were not to blame, receive their share of subsidy, that fact cannot render the imposition of cess invalid nor can it excuse the payment of the cess under regulation on due date nor can it furnish any defence to this trial. But the facts that the accused received no benefit of remission of excise duty and without receiving any benefit of excise duty he has also paid the cess and such delay as arose in payment of the cess was due to a bona fide dispute about its validity are matters

13. (1935) 51 C. L. R. 108, The Vacuum Oil Company's case.
14. (1936) 56 C. L. R. 390, Attorney-General for New South Wales v. Homebrush Flour Mills.
15. (1938) 60 C.L.R. 263, Mathewas v. The Chicory Marketing Board (Victoria).
16. (1933) 49 C. L. R. 399, Crothers v. Sheil.
17. (1936) 57 C. L. R. 372, Hartley v. Walsh.
18. (1938) 61 C. L. R. 665, Hooper v. The Egg and Egg Puff Marketing Board (Victoria).
19. (1916) 1 K. B. 688 : 85 L. J. K. B. 537 : 114 L. T. 1209 : 80 J. P. 149 : 14 L. G. R. 486 : 32 T. L. R. 244, Watson v. Winch.

which may legitimately affect the question of sentence. Taking all facts into consideration I find that the impugned Act, the impugned cess and the impugned Rule are all intra vires the Provincial Legislature and the accused Seth Munna Lal is guilty of an offence under R. 25A, U. P. Sugar Factories Control Rules 1938 for which I sentence him to pay a fine of Rupees twenty five only. And in accordance with S. 205, Government of India Act 1935, I further certify that this case involves a substantial question of law as to the interpretation of the said Act.

G.N./R.K. *Order accordingly.*

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BRAUND AND YORKE JJ.

Firm Ram Krishna Das Jawahar Lal and after death of Ram Krishna Das Hari Shanker and others — Defendants — Appellants

v.

Firm Mutsaddi Lal Murli Dhar through Lala Banwari Lal — Plaintiff — Respondent.

First Appeal No. 547 of 1934, Decided on 23rd December 1941, from decision of Second Subordinate Judge, Meerut, D/- 22nd October 1934.

(a) Practice—Pleadings—Defective pleadings — Trial Court should insist parties to improve them — Suit will not be dismissed by appellate Court merely on ground of defective pleading where parties were not at any disadvantage nor under any misunderstanding.

Where the pleadings filed by the parties are defective, the trial Court should insist on their being improved before it embarks on the case. And a suit will not be dismissed by the appellate Court on the ground only of the defects in the pleadings if throughout the course of trial, there was no misunderstanding in the minds of the parties as to what the issues really were and neither party was at any substantial disadvantage by reason of the imperfections of the pleadings. [P 171 C 2]

(b) Contract—Forward and ready business — Distinction between.

There is a considerable difference between "forward" business and "ready" business and it does not necessarily follow that a firm which does the former also transacts business in the latter. [P 173 C 1]

(c) Principal and agent—Ostensible agent — Third party will not be affected with notice of limitations of agent's authority.

Where an ostensible authority exists, a person dealing with the agent will not be affected with notice of a private limitation of the ostensible authority as between the principal and the agent themselves. [P 173 C 1]

(d) Contract—Pucca arhati — Wagering contract — Real intention of parties is determining factor — Contract held wagering contract.

In the case of a pucca arhati transaction the real question is to ascertain what, as between the parties, was the real intention when they entered into the contract in question whether it was ever within their contemplation that goods should be delivered or whether their real intention was only to pay a difference on or after the due date. The mere circumstance that an opportunity is left open to the parties to complete their contract by actual delivery, will not be allowed to deprive the Court of the power to consider whether that was their real intention. A contract may nonetheless be a contract by way of gaming or wagering because it gives the buyer or seller an option to demand delivery or acceptance, as the case may be, of the subject-matter of the contract. In short, the parties will not be allowed to "camouflage"—their transaction by getting it up as a "delivery" transaction when, in fact, it was never their intention that it should be : (1896) A. C. 166; (1899) 1 Q. B. 794 and ('28) 15 A. I. R. 1928 P. C. 30, *Rel. on.* [P 174 C 1]

There was a long series of very substantial contracts between the parties over a period of seven months, in not one of which was there any genuine delivery of goods, except conceivably in one small case. These contracts were all based upon terms which were singularly appropriate to mere gambling transactions. Indeed, the contracts were themselves headed as "forward" contracts :

Held that the Court was entitled if not bound to regard the course of dealing between the parties as a reliable indication of what their real intentions were and that it should not be deflected from a common sense view of the matter either by the fact that one of the parties, might have given delivery, had he so elected, or by the fact that in one small case delivery either was, or may have been given and that the contracts between the parties were wagering contracts and would not be enforced in view of the provisions of S. 30, Contract Act : ('40) 27 A. I. R. 1940 All. 182, *Rel. on.* [P 174 C 2; P 175 C 1]

P. L. Banerji and L. N. Gupta — for Appellants.

K. C. Mital and C. B. Agarwala — for Respondent.

BRAUND J. — This is a case which would have been a good deal easier to try had the pleadings of the parties been better framed. In this respect we find little to choose between the pleadings of the plaintiffs and the defendants. The plaintiffs are a firm, called Mutsaddi Lal Murli Dhar, which we shall hereinafter refer to as the "plaintiff firm." They are what is known as "pacca arhatis" carrying on business in the wheat market at Hapur in these provinces. It is worth while observing that the partners of the plaintiff firm carry on business at other places also under different firm names, one of which subsidiary firms is the firm of "Bhawani Sahai Salig Ram" and a third such firm is styled "Murli Dhar Salig Ram." The former of these two branch firms carries on business also at Hapur and the latter at Ghaziabad. The defendants are a firm called "Ram Kishun Das Jawahar Lal," and for convenience we shall refer to them hereinafter as the "defendant firm." Subject to the question, which we shall discuss later, as to whether a certain Mr. Ram Kishun Das Khanna (hereinafter called "Khanna"), whose actions are in controversy in this suit, was a partner in it, the defendant firm consisted of a certain Lala Ram Kishun Das Tandon (hereinafter referred to as "Tandon") and Lala Jawahar Lal.

We think that the convenient course will be first to set out the facts by reference to pleadings. The plaint begins by alleging that between 3rd May 1933 and some date in January 1934 the defendant firm entered into a considerable number of what are called "forward" contracts with the plaintiff firm for the sale and purchase of wheat. By para. 6 it is alleged that these transactions resulted in a loss to

the defendant firm for the month of Jeth Sambat 1990 of Rs. 514 odd, for the month of Mangsar Sambat 1990 in a loss of Rs. 6030 odd and for the month of Magh Sambat 1990 in a loss of Rs. 5239 while for the month of Bhadon Sambat 1990 there was a profit to the defendant firm of Rs. 1122-15-6. Up to that point the plaint is quite clear and one would have expected it to be followed by a claim against the defendant firm for these losses after giving credit for the profit, amounting to Rs. 10,000 odd. Paragraph 7 of the plaint takes the matter rather further because it alleges that, in addition to the account in the name of the defendant firm on which the above mentioned transactions took place, there were also opened two other accounts which in reality belonged to the defendant firm, but were actually kept in different names, namely in the names of "Shib Charan Das" and "Ram Chandra," respectively. On these two accounts which were also accounts in respect of forward contracts for the sale and purchase of wheat, there was a loss to the defendant firm of Rs. 1727 odd of which Rs. 226 remained unpaid. The plaint is clear enough up to that point. We can pass over for the present paras. 8 to 13 of the plaint and come at once to para. 14, which is in these terms :

"The defendants on different dates paid to the plaintiff firm Rs. 14,686-8-0 in cash under 'hundis,' etc., and a sum of Rs. 1,122-5-6 was credited on account of profit and a sum of Rs. 21,142-4-6 on account of loss, price of grain, expenses and interest, etc., was debited to the defendant in the account book. Now a sum of Rs. 5,332-13-0 is payable by the defendants, which they in spite of duns and demands have not paid."

Finally the plaintiff firm claims by way of relief payment of this last mentioned sum of Rs. 5332-13-0. We may say at once that we have found it extremely difficult on these pleadings to understand how this sum of Rs. 5332-13-0 is arrived at. We could have understood a claim for Rs. 10,000 odd on the balance of the outstanding "forward" accounts. But it is not easy to reconcile this with the sum claimed. The truth of the matter appears to be that, after pleading the 'forward' transactions in the earlier paragraphs of the plaint, the plaintiff firm suddenly jumps by para. 14 to a general account between it and the defendant firm of which the forward transactions form only part. The balance of Rs. 5332-13-0 which the plaintiff firm claims is in reality the balance of the general account and has no relation to the 'forward' transactions alone. The result is that, while the pleadings are in form directed to a cause of action relating to the 'forward' transactions only, the relief is directed to the recovery of a balance on a larger general account of which the "forward" transactions only form part. We point this out, because, notwithstanding the pleadings, it appears to us that the suit has been tried as if it were a suit relating to the "forward" transactions only and this appeal has certainly been argued before us upon that footing. We think that the proper way for the plaintiff firm to have framed its plaint, if it had desired to recover the balance due on a general account, was to ask for a declaration that it was entitled to the credits referred to in paras. 6 and 7, after allowing for the sum of Rs. 1122-15-6 mentioned in para. 6, and to have gone on to ask for an account to be taken in respect of the general account on that footing and for payment of what might be found due.

The material paragraph of the written statement is para. 20. The written statement seems to treat the suit as if it were a suit relating to the "forward" contracts alone and para. 20 of the additional pleas denies these contracts in every possible form. It is not content with formally denying them and putting the plaintiff firm to proof of them, but it goes out of its way, in addition to denying that there were any "forward" contracts, to deny that, if there were any, they were entered into on any authority given by the defendant firm and moreover, that any body on behalf of the defendant had any authority to enter into any "forward" transactions on the defendant firm's behalf. That was plainly pleading by anticipation a want of authority on the part of the person, whoever it was, who had purported on the defendant firm's behalf to enter into any such contract with the plaintiff firm. It is, we think, unfortunate that the defendant firm did not ask for particulars of the contracts pleaded in paras. 3 and 4 of the plaint and of how they were made and it is still more unfortunate that the plaintiff delivered no reply. In fact, nine-tenths of the conflict in this case has raged round the question whether Khanna, who, as we have said before, was associated with the defendant firm, had any authority, either as a partner or as an agent, to enter into the "forward" contracts in question. Though we concede that the pleadings are not happy and which we could have wished that the learned Judge who tried the case had insisted on their being improved before he embarked on it, we are not prepared at this stage to dismiss the suit, as we have been invited by the appellants to do, on the ground only of the defects in the pleadings. We have come to this conclusion because it is quite evident that throughout the course of trial, which took place over seven years ago, there was no misunderstanding in the minds of the parties as to what the issues really were and, moreover, there were certain proceedings by way of "oral pleadings" which did, in fact, serve to clarify the issues before the trial started. It is not, we think, possible to say that either party was at any substantial disadvantage by reason of the imperfections of the pleadings.

The "forward" contracts in controversy are those contained in Sch. (A) of the plaint. It appears that the defendant firm was a firm carrying on business as dealers in grain at Moradabad. There has never been any question, as we have already said, but that Tandon and Lala Jawahar Lal were partners in the firm. They resided, so it appears, at Moradabad, and they have a nephew whose name was Shib Charan who appears to have occupied himself in the firm's business as well. Hapur, which is a grain market, lies a little less than a hundred miles from Moradabad and there the two "branches"—we use that expression as a matter of convenience—of the plaintiff firm, namely, the plaintiff firm itself and the firm of Bhawani Sahai Salig Ram, carried on business as "pucca arhatis." It should be said that Hapur possessed a Chamber of Commerce under the rules of which grain dealings were carried on.

There is no doubt that the contracts referred to in Sch. (A) of the plaint, were in fact, entered into. Many of the contract notes have been exhibited and Ex. 7 (2) p. 55 of our paper book, is an example of one. These contracts seem to have all been detached from a book maintained by the plaintiff firm and were all headed "Book of forward transactions." They begin with a contract note giving the names of the parties, the commodity dealt in, the bulk, the "forward" date and the rate. They then contain certain conditions, among which is a condition incorporating the rules of Hapur Chamber of Commerce. We shall have to refer to these conditions at a later stage. We agree with the learned Judge in thinking that these transactions did take place, and

indeed, it has not been seriously contended before
a us that they did not. We are also satisfied that they were all "forward" transactions in the sense that they were, or purported to be, purchases of wheat at fixed prices by the defendant firm from the plaintiff firm at future dates and (with one possible exception) they were balanced, by corresponding sales at or before the due dates by the defendant firm to the plaintiff firm. As to one transaction, or series of transactions dated Mangsar Sudi 8, it appears that 625 tons were bought in by the plaintiff firm against the defendant firm on account of the failure by the latter to provide "cover" during the period the contract was opened and in one other case—that of Mangsar Badi 14 there appears possibly to have been an actual delivery of 50 tons of wheat. The gross amount in tons of the aggregate of these, "forward" transactions came over a period from May to November, to close on 3000 tons, which repre-
b sented many lacs of rupees.

Khanna appears to have been something of a rolling stone, who came to be associated with the defendant firm not long before May 1933. He it was who actually engaged in the contracts and we find that all of them are actually entered into over his signature, purporting to act on behalf of the defendant firm. The fact is that Khanna "represented" the defendant firm at Hapur and transacted their business affairs there either by personal visits to that place or by telephone conversation from Moradabad. Neither Tandon nor Lala Jawahar Lal appear to have been present themselves at any time at Hapur, and in whatever capacity he may have acted, business was actually transacted by Khanna. There is one other matter which is to be found as a fact, namely that undoubtedly, as between Khanna, acting on behalf of the defendant firm, and the other
c branch of the plaintiff firm at Hapur, namely Bhawani Sahai Salig Ram, there were a considerable number of wheat contracts for actual delivery. In fact, it appears to be certain, and this again is not, we think, seriously disputed that the name of Bhawani Sahai Salig Ram was maintained for the purpose of carrying through actual delivery business, while the name of Mutsaddi Lal Murli Dhar, which is the plaintiff's firm name, was kept for the purpose of carrying through "forward" business.

In these circumstances, therefore, we can start upon the firm ground that the contracts in question were entered into by Khanna, either representing or purporting to represent the defendant firm. The first contention raised by the defendant firm at the trial was that Khanna was not a partner in the defendant firm. This issue, although as we have said, not raised by the formal pleadings, was raised
d by the oral pleadings on 24th July 1934, long before the trial. In this appeal however, the question whether Khanna was really a partner has not been pressed although it is noticeable that Khanna himself in his evidence (which incidentally, he has given on behalf of the plaintiff firm) still maintains that he was a partner. The learned Judge at the trial, however, treated it as an issue and came to the conclusion that he was not a partner and we entirely agree with his finding in that respect. Mr. Agarwala has in fact frankly said in this appeal that he cannot maintain Khanna's position as a partner, and, indeed, there is no evidence beyond his own bare statement that he ever was one. Apart from anything else, we are inclined to regard the notice sent by Khanna to the plaintiff firm on 25th November 1933, Ex. F, as conclusive on this point, because in this document Khanna himself refers to the defendant firm as "his master." Apart however from this had it been true that Khanna was really a partner e
in the defendant firm that circumstance would have been very easy to prove from the books of the defendant firm showing some division of profits and losses between them. It is, nevertheless, a singular circumstance of the case that not a single book of the defendant firm has from first to last been produced. We entertain no doubt that the learned Judge was right in dismissing Khanna's claim to be a partner. That however by no means disposes of the case because the plaintiff firm then falls back on the plea that, if Khanna was not a partner, he was, at any rate, an agent. It is, we again point out, unfortunate that there is no such specific pleading; but so far as the trial was concerned, it was clearly understood betweeen them that this was one of the two real issues and therefore we are content to decide it, notwithstanding the pleadings.

We think however that we need not deal with it
f at any great length in view of the conclusion which we have arrived at on the other part of the case which we shall deal with presently. We shall therefore content ourselves with setting out briefly the reasons why we think that the learned Judge was again right in coming to the conclusion that Khanna, whether as a mere servant or in some other capacity, was a duly authorized agent of the defendant firm for the purpose of entering into these 'forward' contracts. It has been the case of the defendant firm, and, indeed, it has had to be, that they knew nothing of what was going on. That we are utterly unable to believe. The suggestion made by the defendant firm has been that the "forward" transactions were in reality private and personal speculations made by Khanna with the connivance of, and perhaps in partnership with, the nephew, Shib Charan, and that they were entered into behind the back of the
g defendant firm and were not the defendant firm's transactions at all. We think that this is hardly more than a suggestion. A good deal of play has been made by Mr. Banerji on behalf of the defendant firm with a private pocket book belonging to Shib Charan which is said to have fallen by accident into the possession of Khanna and was produced by him at the trial. This note book contains entries of one or two of these "forward" transactions in Shib Charan's handwriting and we have been asked to deduce from them that they were the private transactions of Khanna and Shib Charan and were not the transactions of the firm. It is said that it is inconceivable that they should not have been entered in the firm's regular books and that it is significant that two or three of them should be found in Shib Charan's private note book. Apart from the curious circumstances in which this note book is said to
h have got into Khanna's possession, this argument really begs the whole question, because if this business was not the business of the defendant firm, it is just as curious that the defendant firm did not produce their books at the trial as that the production of these books was not demanded by the plaintiff firm. We are, in fact, left in complete ignorance whether the transactions were really entered in the defendant firm's books or not. In our view, the note book which is Ex. 9 (1) does not really help one way or the other.

It is certain that Khanna was employed by the defendant firm in some capacity or the other and it is equally certain that he did transact business on their behalf, at Hapur, because we have a long series of transactions of a "ready" character with the branch firm of Bhawani Sahai Salig Ram. We start from this, therefore, that Khanna was an employee of the defendant firm. The only question is whether

he had an authority to do "forward" business at Hapur. We recognize that there is a considerable difference between "forward" business and "ready" business and that it does not necessarily follow that a firm which does the former also transacts business in the latter. At the same time, we have to bear in mind the very well-known principle of the law of agency that, where an ostensible authority exists, a person dealing with the agent will not be affected with notice of a private limitation of the ostensible authority as between the principal and the agent themselves. We have been at a disadvantage throughout because the books of the defendant firm have not been produced and we have been unable to see precisely what the character of its business was. But it appears clearly in evidence that in some cases, at any rate, the defendant firm did do, "forward" business. In the evidence of Raghunath Prasad its munib, he admits at p. 29, line 33 of the record two cases in which the firm entered into "forward" delivery contracts, and it is significant that, in the case of one of them (Jhandu Mal Banwari Lal) that business was done through Khanna. We observe too that even by para. 20 of their written statement the defendant firm do not deny that they ever did any "forward" business. In the evidence of Jawahar Lal at p. 34 of the record, line 8, it appears to us that he impliedly admits that the defendant firm did "forward" business by pointing out that while Khanna was permitted to transact business in ready goods, he had no express permission "for forward contracts." That would have been a very curious way of putting it if the facts really were that the defendant firm never transacted any forward business at all. Surely Jawahar Lal would have said so in plain language in his explanation. The munib of another firm, Ganeshi Lal Mangat Rai, has been produced to show that the defendant firm did do, "forward" business with it, and that that business was settled by a cash payment to the defendant firm itself. In the same way, there is the evidence of Murari Lal, the munib of the firm Mina Mal Balkishan Das and Hari Kishan Das Ram Kishan Das that the defendant firm did "forward" business and received and paid profits or losses as the case might be. We have the evidence of Gokul Chand, who was the munib of the Krishna Oil Flour Mills at Moradabad—a firm also belonging to Tandon—in which he admits that the defendant firm did do "forward" business.

We have set this evidence out briefly but, coupled with the long series of transactions over several months, we are quite satisfied that it points to one reasonable conclusion only, namely, that the defendant firm did habitually transact "forward" delivery business and was perfectly well aware that this business was being carried on on its behalf at Hapur by their servant or agent Khanna. We regret that we have not seen the books of the defendant firm and we blame the plaintiff firm for not having taken the proper steps to procure them. While we appreciate that the onus lies in the circumstances on the plaintiff firm to prove the authority of Khanna to enter into these transactions on behalf of the defendant firm, we have very little doubt that it has successfully done so. We have not mentioned that throughout this period hundis were from time to time being drawn by the plaintiff firm on the defendant firm and accepted by Khanna on the defendant firm's behalf. All this was passed through the general outstanding account between the two firms and it is impossible for us to believe that the drawing of these hundis was not perfectly well-known to the defendant firm. An actual acknowledgment of one of these hundis by Raghunath Prasad, the munib of the defendant firm, has even been traced and forms Ex. 8 (1) at p. 83 of the record. It is in the handwriting of Raghunath Prasad as appears from Khanna's evidence at p. 17 and acknowledges an acceptance by the defendant firm of a hundi for a thousand rupees. We have only to add on this part of the case that we do not attach any great importance to Ex. 2 (7) on which considerable reliance has been placed. We do not find it necessary to do so. It is a document dated as late as November 1933 in the handwriting of Shib Charan purporting to give Khanna a plenary authority to deal with the branch firm of Bhawani Sahai Salig Ram. It is by its terms a colourless document and its date precludes it from being of any great assistance to us in the present circumstances. We have come to the conclusion on this part of the case that the learned Judge was in effect, right when he said : "In my opinion these are acts of more than a servant and are acts of an agent where not merely instructions but one's own discretion and judgment was also used in the course of business dealings." To this we will only add that we are satisfied that the business dealings of the defendant firm did include "forward" business.

That brings us to the other part of the case, upon which we shall, in fact, dispose of it. The other issue throughout has been whether these contracts were wagering contracts. We have already dealt at some length with their history and have pointed out that they have been continuous and regular over several months. We shall have now to look at the terms of the contract itself. These contracts were more or less uniform and they all contained practically identical conditions. The form used was, in fact, a printed form. Paragraph 1 of the terms incorporates the conditions of the Hapur Chamber of Commerce. Paragraphs 2, 3 and 4 are the material ones, and we set them out :

"2. 'Pucca arhati' shall be competent to give delivery of the goods relating to the transaction entered into by the party, no matter from what source he gets those goods; but the person entering into the transaction shall not have authority to demand delivery (of the goods) from the 'arhati.' He can demand delivery only through the "arhati" up to 12 o'clock from the 1st to the 12th of the second fortnight of the month to which the transaction relates after depositing the earnest money. The 'arhati' can also pass on to the person entering into the transaction his (arhati's) own forward transaction and he can also give delivery of the goods. The person entering into the transaction shall not have any objection to that.

3. If the delivery of the goods is not effected by the stipulated date, the rate fixed by the Hapur Chamber of Commerce as the rate prevailing on that date shall be accepted by (shall be binding on) the party entering into the transaction.

4. The 'pucca arhati' shall be liable to pay the amount of profit and entitled to realize the amount of loss; he shall not be bound to disclose the names of the particular parties to whom he paid the amount of loss."

As it seems to us, cl. 2 gives the "pucca arhati" an option to give actual delivery if he wishes whether from stock or from some other source. But it deprives the other party of the right to claim actual delivery from the "pucca arhati" at any time. It seems however that the "arhati" can also satisfy his obligation by passing on a forward transaction of his own. The effect of the three clauses taken together, put in its simplest form, seems to be that the 'pucca arhati' was to be in a position to choose whether he

delivered or not and was if he so liked to be able to settle the matter by paying or receiving, as the case might be, a mere difference. It is, we concede, not impossible, nor even intrinsically unlikely, that such a form of contract might be used for a genuine 'ready' transaction. But it is also impossible to deny that this form of contract is equally capable of use as the vehicle of a mere gambling transaction. It seems to us therefore that, standing by itself, the contract does not help us very much one way or the other, except that, as we see it, it is a document under the terms of which mere gambling could conveniently be carried on. The real question to our minds in this case is to ascertain what, as between these parties, was the real intention when they entered into the contracts in question, in the sense of asking ourselves whether it was ever within their contemplation that grain should be delivered or whether their real intention was only to pay a difference on or after the due date. Before dealing with this question, we should like to consider one or two authorities. In (1896) A. C. 166[1] the House of Lords in England considered the law relating to such transactions as these in relation to stocks and shares on the stock exchange. The value of this case is that it shows that, in England at least the mere circumstance that an opportunity is left open to the parties to complete their contract by actual delivery, will not be allowed to deprive the Court of the power to consider whether that was their real intention. This is made clear from the speech of Lord Herschell who says :

"The proposition amounts to this, that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a Court of justice to recover their debts, could compel a Court of justice to adjudicate and secure to them their bets by a judgment if only, they inserted in their contract a provision which might in certain events become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency ; the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I should require much consideration before I gave my assent to a proposition involving such consequences."

We think that we must bear that in mind in applying S. 30, Indian Contract Act. And, again in the case in (1899) 1 Q. B. 794,[2] it is made equally clear by the English Court of Appeal that a contract may nonetheless be a contract by way of gaming or wagering because it gives the buyer or seller an option to demand delivery or acceptance, as the case may be, of the subject-matter of the contract. In short, the parties will not be allowed to "camouflage" —if we may make use of that expression — their transaction by getting it up as a "delivery" transaction when, in fact, it was never their intention that it should be. The latest authoritative case is one in Privy Council in 55 I. A. 32.[3] In that case Lord Darling on behalf of the Board, after considering the two cases to which we have already referred, states the law in a form which is, of course, binding on us in these words :

" . . . The authorities cited show that to produce that result, i. e., the result of avoiding the contract there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded, but that differences only should become payable."

On the facts of that case before the Judicial Committee it was held that the transactions in question were not merely gambling transactions and were not therefore void. The facts, however, there were different from the facts before us. There were, we think, only three transactions in question and even so, there was some actual genuine delivery business as part and parcel of the same contracts. The facts were wholly different from ours and there were, indeed, no conditions of the contract to throw any light on the matter. It was a simple case, as we read it, of a sale followed by a purchase instead of completion. There is only one other case to which we desire to refer and that is a case of this Court itself decided by Rachhpal Singh J., 1940 A. L. J. 48.[4] It is an interesting case from our point of view because it arises out of precisely the same form of contract as the one with which we are dealing. It also concerns a contract made at Moradabad. The learned Judge attaches great significance to cl. 4 of the contract, as indeed, with great respect do we. We have already set out cl. 4 above. We attach no less significance than did the learned Judge in that case to the circumstances that the 'pucca arhati' was in no circumstances to be bound to disclose the name of any other person to whom he might have incurred a loss in respect of the transaction in question, nor, indeed, whether he had incurred a loss at all. That is an ideal provision, if the transaction is to be a mere gamble. The learned Judge says :

"The terms of the contract in the case before me clearly show that the plaintiff and the defendant were entering into a contract as principals. The terms of the contract show that there was a mutual understanding that there was to be no delivery and that only differences would be paid by one party to the other. Paragraph 2 clearly provides that the defendant will have no right to call for delivery. Paragraph 4 of the contract provides that the defendant will have no right whatsoever even to enquire from the plaintiff his 'pucca arhati' as to whom he had to pay any losses in respect of the transaction in question . . . . . after a consideration of all the circumstances of the case. . . . . I hold that there was no intention to give delivery and the parties mutually agreed to pay the difference only."

It comes, we think, therefore, to a question of fact —what is their real intention? That brings us back to the circumstances of the present case. There was a long series of very substantial contracts over a period of seven months, in not one of which was there any genuine delivery of goods, except conceivably, in one small case. These contracts were all based upon terms which were as we have shown singularly appropriate to mere gambling transactions. Indeed, the contracts were themselves headed as "forward" contracts. We think that we are entitled if not bound, to regard the course of dealing between the parties as a reliable indication of what their real intentions were and that we should not be

1. (1896) 1896 A. C. 166 : 65 L. J. Q. B. 428 : 74 L. T. 468 : 44 W. R. 497 : 60 J. P. 468, Universal Stock Exchange Limited v. Strachan (No. 1).
2. (1899) 1 Q. B. 794 : 68 L. J. Q. B. 509 : 80 L.T. 438 : 47 W. R. 441 : 15 T. L. R. 251 : 6 Manson 136, In re Gieve.
3. ('28) 15 A.I.R. 1928 P. C. 30 : 107 I. C. 29 : 51 Mad. 96 : 55 I. A. 32 (P.C.), Sukhdevdoss Ram Prasad Firm v. Govindoss Chaturbhujadoss & Co.
4. ('40) 27 A. I. R. 1940 All. 182 : 188 I. C. 29 : I.L.R. (1940) All. 136 : 1940 A.L.J. 48, Harcharan Das Som Prakash v. Jai Jai Ram.

deflected from a common sense view of the matter either by the fact that one of the parties might have given delivery, had he so elected, or by the fact that in one small case delivery either was, or may have been given. We bear in mind that the books of the defendant firm have not been produced, because we think, it suited neither side to produce them. It did not suit the plaintiff to call for their production because, if he had they might well have shown that these were merely gaming transactions. It did not suit the defendant to produce them because, if he had, they might have shown conclusively that Khanna was their agent.

The transaction of Mangsar Badi 14 on which there is said to have been a delivery of 50 tons would not alter our view, even if we were satisfied that there was really such a delivery. At the best we point out that this was a contract which seems to have been entered into with the plaintiff branch firm of Bhawani Sahai Salig Ram and not with the plaintiff firm in the first place. For all these reasons, we have come to the conclusion that the contracts between the plaintiff firm and the defendant firm which are sued upon were wagering contracts and cannot be enforced in view of the provisions of S. 30, Contract Act. In that respect, we disagree with the learned Judge, who does not seem to have had the advantage of considering the authorities. We must, therefore, allow this appeal, set aside the decree of the Court below and substitute for it a decree of our own dismissing the suit with costs. We think that, notwithstanding that the appellants have failed in one of their contentions in this Court they are nevertheless entitled to their costs of this appeal. We should perhaps add that, had we been able to agree with both the findings of the learned Judge, we should have still to consider carefully what form of relief the plaintiff would have been entitled to.

K.S./R.K. *Appeal allowed.*

C. P. C.—

(a) ('40) Chitaley, O. 6 R. 17, N. 11; S. 99, N. 5. ('41) Mulla, O. 6 R. 17 Page 591 Note: 'Leave to amend when given'; S. 99 Page 364 Note: 'Error, defect or irregularity not affecting the merits of the case'.

A. I. R. (29) 1942 Allahabad 175

VERMA AND YORKE JJ.

Nawab Bahadur Mohammad Abdul Samad Khan—Defendant—Appellant

v.

Lala Girdhari Lal and others — Plaintiffs — Respondents.

First Appeals Nos. 165, 139, 173 and 399 of 1934, Decided on 23rd December 1941, from decision of Sub-Judge, Bulandshahr, D/- 8th January 1934.

(a) Limitation Act (1908), Art. 141—Applicability.

The effect of Art. 142 of the Act of 1871 and Art. 141 of the Act of 1877 was to create a fresh rule in regard to limitation in all cases in which the prospective right arising out of adverse possession had not already ripened into an absolute title : 14 All. 156 (F.B.), *Rel. on.* [P 179 C 1]

(b) Marriage—Validity — Irregular union is not marriage — No presumption of legal marriage where legal marriage is impossible.

A presumption of a legal marriage having taken place may arise from the fact of two persons living together over a long period and being regarded by their neighbours and friends as husband and wife, but such a presumption has no application where it is not possible to have a legal marriage between the parties and an irregular union cannot be turned into a marriage by any amount of ceremonies or by any subsequent enactment. [P 179 C 2]

(c) Hindu Widows' Re-marriage Act (1856), S. 2—Applicability—Widow entitled to remarry under custom remarrying—S. 2 does not apply —There is no divestment unless custom of forfeiture is also proved.

A Hindu widow entitled to remarry under a custom of the caste does not even subsequently to the enactment of the Act of 1856, come within the mischief of that Act and will therefore not upon remarriage be divested of her widow's estate unless it be found upon the evidence that in addition to there being a custom of remarriage of widows there is also in existence a custom of forfeiture of the first husband's estate upon such remarriage. [P 180 C 1]

(d) Hindu law—Widow— Property obtained by adverse possession as widow enures to benefit of husband's estate.

A Hindu widow is not a life renter but has a widow's estate that is a widow's estate in her deceased husband's property. If possessing as widow she possesses adversely to anyone as to certain parcels she does not acquire the parcels as stridhan but she makes them good to her husband's estate : ('24) 11 A.I.R. 1924 P. C. 121, *Foll.* [P 180 C 1]

And where after remarriage a Hindu widow remains in possession of her (first) husband's lands for 12 years, she acquires the property for her first husband and on her death his reversioners succeed to the estate : ('25) 12 A.I.R. 1925 All. 369, *Rel. on.* [P 180 C 1]

(e) Adverse possession — Against widow — Not binding on reversioners.

Adverse possession against a Hindu female heir will not be effective against and binding on the reversioners : 14 All. 156 (F.B.) ; ('28) 15 A.I.R. 1928 All. 561 (F.B.) and ('33) 20 A.I.R. 1933 All. 493, *Rel. on.* [P 180 C 1]

(f) Transfer of Property Act (1882), S. 41— Applicability—Suit by reversioners after widow's death—Transferee cannot raise defence under Section 41.

It is not open to the defendants (transferees) to rely upon S. 41 as a defence to a suit by reversioners because the effect of allowing them to do so would be to deprive Art. 141, Limitation Act, of all value. Section 41 requires the consent, express or implied, of the person interested in immovable property. Possession by strangers as against a Hindu female limited owner must necessarily be either by adversity or by the consent of the limited owner. The section is not applicable to cases of adverse possession and the consent of the limited owner can be operative only so far as she is concerned. It cannot bind the reversioners who, so long as the female limited owner is in possession, have no more than a spes successionis and are not persons "interested in" immovable property. Further, S. 41 is based upon the doctrine of estoppel and it operates to create what can only be described as a personal estoppel : ('33) 20 A.I.R. 1933 All. 493, *Rel. on.* [P 181 C 1,2]

(g) Merger—Mortgage — Extinguishment of —Capacities in which person in possession of mortgagee rights and equity of redemption quite different—No merger.

Merger of estates takes place when two estates held
a in the same legal right become united in the same person. The question whether there has or has not been a merger of the equity of redemption with the mortgagee rights depends on the intention of the person in whose possession both rights were at the same time. [P 182 C 2; P 183 C 1]

Where the capacity in which a person is in possession of the mortgagee rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that those two capacitites are united in the same physical person cannot result in a merger and consequently there can be no extinguishment of the mortgage. [P 182 C 1]

Mushtaq Ahmad — for Appellant.

P. L. Banerji and S. B. L. Gour — for Respondents.

b **YORKE J.**—These are four appeals by defendant 1 (165), defendant 2 (139), defendants 11 and 19 (399) and the plaintiffs (173) from the judgment of the Subordinate Judge of Bulandshahr in a suit for recovery of possession over certain property in village Dalelgarhi, pargana Pahasu of that district. The plaintiffs sued as the reversioners of one Rao Gopinath Khattri, who died prior to the year 1846, and was succeeded in the first instance by his widow Mt. Phul Kunwar, who died about 1867, and thereafter by his daughter Mt. Chandra Kunwar, who died on 15th September 1920. After the death of Mt. Chandra Kunwar the plaintiffs 1 to 6 sold one-half of their share in village Dalelgarhi to plaintiff 7, Sardar Banke Singh Khattri of Bulandshahr, in order to obtain funds to finance this suit. Thereafter they instituted the suit on 11th October 1932, that being presumably the date on which the Courts re-opened
c after the vacation and the very last day of limitation for the suit instituted as a suit to which Art. 141, Limitation Act, was applicable, that article prescribing a period of 12 years for "like suit by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan female," the period beginning to run from the date when the female dies. The plaintiffs' case was that Rao Gopi Nath, son of Raja Madho Singh, owned the whole villages Dalelgarhi and Golabans and five biswas share in village Ahmadgarh. It was said that on the death of Rao Gopi Nath his widow Mt. Phul Kunwar came into possession of this property with a widow's estate, but that she came to have an illicit connexion with one Harsukh Rai, and by this connexion a son Ganga Sahai was born. It will be convenient to note here that Ganga Sahai must have been born before the year 1849 since
d there is evidence to show that he was a major in the year 1867.

The plaintiffs in setting forth their case omitted certain facts which are of importance whether through ignorance or intentionally. It will be as well to mention those facts here, though they did not form part of the plaintiffs' case. The connexion between Harsukh Rai, who was subsequently called Rao Harsukh Rai, and Mt. Phul Kunwar was a permanent connexion which lasted till the death of Harsukh Rai. It is proved that on 6th September 1846 Mt. Phul Kunwar usufructuarily mortgaged the entire property of her husband in favour of Harsukh Rai for a sum of Rs. 10,000. In the year 1862 Harsukh Rai executed a will (Ex. 19) dated 21st November 1862 devising his property among the persons whom he described as his heirs; that is to say, his first wife, his second wife by 'Kerao' Mt. Phul Kunwar, Ganga Sahai, Gopal Rai, his adopted son, and Chunnilal, his nephew. By this will he left, among other property, to Mt. Phul Kunwar the mortgagee rights in village Dalelgarhi, of which she was the owner of the mortgagor right, that is the equity of redemption, as being the widow of Rao Gopi Nath and having in respect of that property a widow's estate. He provided that Mt. Phul Kunwar would have no power to transfer her property or the property of the share of the minor Ganga Sahai, and that after her death Ganga Sahai would succeed to the entire estate. He left other property to his other heirs.

After the death of Harsukh Rai, which must have been not later than 1865, there was a dispute between the heirs named in the will of Harsukh Rai. This dispute was referred to arbitrators, who made an award (Ex. 20) dated 20th September 1865. That award to some extent put an end to the life-estate of Mt. Phul Kunwar and allotted certain property exclusively to her "without the partnership of any other person." Among the properties so allotted were the mortgagee rights in 20 biswas of village Dalelgarhi. Among other conditions of this award was one preventing Mt. Phul Kunwar from making a will or a deed of gift in favour of her son Ganga Sahai within a period of eight years, and another condition providing that if she died without making a will or a deed of gift, her estate would devolve in equal shares upon her son Ganga Sahai and her daughter, that is Mt. Chandra Kunwar, who was the wife of Gopal Rai, the adoptive son of Harsukh Rai. Nonetheless on 10th July 1867, Mt. Phul Kunwar did make a will (Ex. 21) by which she left the whole of her property roughly half half to her daughter, whom she describes as Mt. Chuhia "my legitimate daughter, who is the wife of Munshi Gopal Rai," and to her son Ganga Sahai. Among the properties which she left to her son Ganga Sahai
g was the 20 biswa share in village Dalelgarhi. In this will there is no mention of the mortgagee rights, but the property allotted is the share in the village. Thereafter Ganga Sahai in pursuance of the will, or as it may also be supposed, in pursuance of the provision in the arbitration award read with the provision in the will, took possession of the half of the property mentioned in the will, while his sister Mt. Chandra Kunwar it appears took possession of the other half of the property, namely, that which was mentioned as being left to her in the same will. At a later date it appears that Ganga Sahai got into difficulties, his property was sold up and it was purchased in auction sale on 21st August 1882, in execution of the decree obtained by one Chaube Bishambhar Nath, by one Sardar Bahadur Saiyed Mir Khan: *vide* the sale certificate (Ex. 16) dated
h 4th November 1882. The defendants to the present suit were persons who were subsequent transferees in one way or another of the heirs of this Mir Khan. The plaintiffs' case was that Ganga Sahai and the subsequent transferees from Ganga Sahai were all in possession of this property without right and their possession, though not assailable during the life of Mt. Chandra Kunwar, was liable now to be set aside in favour of the plaintiffs as the reversioners of Rao Gopi Nath.

The plaintiffs had, as I have noted above, whether intentionally or not, omitted all mention in this plaint of the mortgage of 1846. A plea was taken in the written statements of a number of defendants that the mortgage of 1846, which was recorded in the settlement robkar (Ex. 7) dated 7th May 1862 as subsisting at that date, was executed by Mt. Phul Kunwar in lieu of the debts due by her husband amounting to Rs. 10,000. It was further said by

other defendants that this mortgage had never been redeemed and thus the mortgagee Harsukh Rai (meaning presumably the successors-in-interest of Harsukh Rai) became the absolute owners of the property in question. On the plaintiffs being asked what they had to say in regard to this mortgage, learned counsel for the plaintiffs on 21st March 1933 made a statement under O. 10, R. 2, Civil P. C., as follows :

"The plaintiffs admit that Mt. Phul Kunwar mortgaged the property in suit with possession for a sum of Rs. 10,000 along with other property to Harsukh Rai in 1848" (which seems to be a mistake for 1846), "but the mortgage became extinct, for the mortgagee rights were transferred to Mt. Phul Kunwar mortgagor under the will of Harsukh Rai and the arbitration award made in 1862 and 1865."

This pleading is important in the light of the pleading in the written statement of defendant 1 that the mortgage had been executed in lieu of debts due by the deceased Rao Gopi Nath. It was open to the plaintiffs to plead that the mortgage was fictitious or that it was not for legal necessity. Presumably it was because they knew that there would be evidence forthcoming to show that it was for legal necessity and for good consideration that the only plea they took was that the mortgage had become extinct because the mortgagee rights were transferred to Mt. Phul Kunwar, the mortgagor, indicating that upon this transfer the mortgagee rights were merged with the equity of redemption and thus the mortgage was extinguished. A large number of defences were taken. The defendants first of all challenged the pedigree and alleged that the plaintiffs were not the next reversioners of Rao Gopi Nath. This issue has been found against them and this plea is no longer urged before us. Defendants 28 to 36 contended that the plaintiffs had no right of suit in respect of khewat No. 2, and that point was conceded in the arguments and the suit in respect of khewat No. 2 of village Dalelgarhi was dismissed and that point is also no longer before us. The defendants other than defendants 28 to 36 put forward a number of contentions in regard to adverse possession. They alleged that Mt. Phul Kunwar was lawfully remarried to Harsukh Rai, that she thereby incurred a forfeiture of her rights in the property of her first husband Rao Gopi Nath, and therefore her possession over that property was adverse to the reversioners, more particularly I suppose to her own daughter Mt. Chandra Kunwar. They also pleaded that the possession of Ganga Sahai after the death of Mt. Phul Kunwar was proprietary and adverse to the reversioners and that his adverse title matured into a full title at the end of 12 years. The defendants further said that the plaintiffs had no right to maintain a suit for possession because the mortgage in favour of Harsukh Rai still subsisted and had become irredeemable by the expiry of the full period of 60 years beginning from the year 1846. They stated this in the form which I have already quoted, namely that Harsukh Rai became full owner of the property, but as Harsukh Rai died only about sixteen years after the mortgage, it is obvious that they must be conceived to have been including with Harsukh Rai his successors-in-interest. A further line of defence was that the defendants were bona fide transferees for valuable consideration and that the suit was barred by S. 41, T. P. Act, and it was also said that the suit was barred by the principles of estoppel and acquiescence.

The learned Subordinate Judge framed a number of issues. On issue 1 he held that among Khattris there is no custom of remarriage of widows. It follows that even if the relationship between Mt. Phul Kunwar and Harsukh Rai was given a colour of respectability by being called a Kerao marriage, it was not a marriage at all but only an illicit relationship to which a respectable name was given. He remarked that the unchastity of a widow after the death of her husband cannot divest her of her husband's property and therefore Mt. Phul Kunwar remained all along in possession of a widow's estate and could not have become absolute owner by adverse possession or otherwise. On this issue therefore he held that Mt. Phul Kunwar was the owner and in possession of the property in dispute, that is the equity of redemption in respect of the property in village Dalelgarhi, as a Hindu widow.

As regards issue 2, he held that Mt. Phul Kunwar's will was a fact but that it conferred no rights on her son Ganga Sahai. In this connexion he lost sight of the distinction between the rights of mortgagor and the mortgagee rights, probably because, as mentioned by him under issue 10, he considered that there had been a merger. If that was the case then clearly Mt. Phul Kunwar had no absolute title to the property but only the estate of a Hindu female, and she had no power to make a disposition of the property by will in favour of Ganga Sahai. On issue 3 : "Whether Ganga Sahai was in adverse possession for more than 12 years or any of his successors-in-interest contesting the suit had been in such possession and how does it affect the suit ?" he held that doubtless Ganga Sahai was in possession as a trespasser, but he pointed out that in view of the decisions in this Court in 26 A. L. J. 1049[1] and 1933 A. L. J. 1185,[2] limitation under Art. 141, Limitation Act, did not begin to run against the reversioners as long as that possession was adverse to a female owner. The plaintiffs were entitled to wait until the death of the last female owner before instituting a suit.

The next important issue which the learned Subordinate Judge had to decide was issue 10 : " Whether the usufructuary mortgage made by Mt. Phul Kunwar in favour of Harsukh Rai subsists and is effective and how does it affect the suit ?" In dealing with this issue, the learned Judge had to consider the mortgage of 1846. He held that there was nothing to show that it was fictitious, but he held that there had been a merger of the mortgagor and mortgagee rights and this he held to be proved from a perusal of the will made by Mt. Phul Kunwar on 10th July 1867 in which she described herself as full owner of village Dalelgarhi and not as a mortgagor only (so far as the will was concerned she should really have described herself as a mortgagee only) and conferred (that is purported to confer) these ownership rights on Ganga Sahai. He regarded the question of the subsistence of the mortgagee rights, that is to say, the question whether there was or there was not a merger, from the point of view of intention, and took the view that the statements in the will were an indication of an intention not to keep the two rights separate but to allow them to merge. That is of course one possible point of view. After recording a finding that the usufructuary mortgage of 1846 no longer subsisted he went on to remark : "Moreover, there is no evidence to show that the mortgage deed was executed

1. ('28) 15 A.I.R. 1928 All. 561 : 112 I. C. 801 : 51 All. 188 : 26 A.L.J. 1049 (F.B.), Bankey Lal v. Raghunath Sahai.
2. ('33) 20 A.I.R. 1933 All. 493 : 144 I. C. 293 : 55 All. 554 : 1933 A.L.J. 1185, Shambhu Prasad v. Mahadeo Prasad.

for any legal necessity so as to bind the reversioners." Presumably, he was using this as an argument to bolster up the binding in regard to merger. If that was the intention I am clear that it was not justifiable in the light of the pleadings, but I shall deal with this matter at greater length at a later stage.

The learned Judge then proceeded to deal with issues 6 and 7. Issue 6 is : "Whether any of the contesting defendants are bona fide transferees for valuable consideration and S. 41, T. P. Act, bars the suit against them ?" Issue 7 is " whether the suit is barred by estoppel and acquiescence under S. 115, Evidence Act, against any of the contesting defendants ?" These issues he discussed at great length with reference to the cases of the individual defendants. He held, following the view of this Court, that it is not open to defendants who are auction purchasers to take the plea that the suit against them is barred by S. 41, T. P. Act, or by estoppel and acquiescence. On this view he held that the suit must succeed in respect of all those properties which passed directly to the defendants concerned by auction purchase from the heirs of Sardar Mir Khan. The defences of those defendants who were subsequent transferees other than by auction purchase from the heirs of Sardar Mir Khan he examined on the merits, and on this footing he ultimately decreed the plaintiffs' suit against contesting defendants Nos. 1, Nawab Bahadur Muhammad Abdul Samad Khan, 2 Uttam Singh, and 11 and 19 Mt. Razia Sultan Begam, who did not put in an appearance in the trial Court, and Mazhar Ali Shah, who had purchased in auction sale in 1912 as also against Nos. 3 to 10, 12, 13 to 18 and 20 who have not appealed. He dismissed the suit against defendants 7 and 21 to 27. He held that the plaintiffs were entitled to possession and also to mesne profits as against defendants 1 to 6 and 8 to 20 and decreed the suit accordingly. In the light of the arguments which have been put before us, it is not necessary for the purposes of this appeal to trace the history of the different purchases. That has been done by the learned Subordinate Judge and the history of these purchases was put before us by learned counsel for the various appellants, but I shall not repeat the account of those purchases given in the judgment of the trial Court because, as I shall show later, I am clear that S. 41, T. P. Act, cannot be successfully relied upon on behalf of the defendants to this suit. The same principle is clearly applicable in the case of the pleas of estoppel and acquiescence. The questions which we have to consider in this appeal are first, the questions of adverse possession and limitation; secondly, the question of merger, and thirdly, the question of the applicability of S. 41, T. P. Act. I shall deal first with the question of limitation.

There can be no doubt whatever that the article of the Limitation Act which is applicable to the present suit is Art. 141. Article 140 prescribes for a suit by a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immovable property, a period of limitation of 12 years which begins to run from the date when his estate falls into possession. Article 141 prescribes for 'like suit by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan female', a period of limitation of twelve years, which begins to run from the time the female dies. "Like suit" evidently means a suit for the possession of immovable property. The present suit is a suit by the plaintiffs as reversioners of Rao Gopi Nath on the plea that they are entitled to the possession of his immovable property on the death of Mt. Chandra Kunwar, the surviving female owner, or the last of those persons who held the estate under the title of a Hindu female. In the light of the wording of this article it is clear that so far as Art. 141 is concerned the suit is within time and the real question is one of adverse possession.

Before dealing with adverse possession I may, however, first dispose of a contention that it was not open to the plaintiffs to institute this suit relying on Art. 141, on the view that limitation having once begun to run, the enactment of a new article cannot operate to stop it from running. There is no room for doubt in the light of the cases quoted before us that prior to the enactment of Act 9 of 1871 the period of limitation for a suit to recover possession of immovable property was only 12 years from the date of the cause of action. The matter was originally covered by Bengal Regulation 2 of 1805 and subsequently by cl. 12 of S. 1 of Act 14 of 1859, which provided for "suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies —the period of 12 years from the time the cause of action arose." Applying the provisions of this clause, it was held by the Calcutta High Court that the cause of action whether for the widow or a reversioner, in the case of the widow's dispossession by a trespasser, arose at the time of dispossession, but that if the case was one of a transfer made by the widow herself the cause of action would arise at her death. This view was taken in the Full Bench case in 9 W.R. 505,[3] where it was said that :

"When alienations of her husband's estate are improperly made by the widow, they are good as against her for her life; and the reversionary heir's cause of action does not accrue until her death. But when property belonging to the husband's estate is held adversely to the widow and never reaches her hands, the cause of action accrues to her, and a suit, whether by her or by the reversionary heir, must be brought within the usual period, counting from the commencement of the adverse possession."

That view was quoted by their Lordships of the Privy Council in 23 W. R. 214,[4] where their Lordships remarked about this view : "That ruling has been acted upon in other cases and it appears to their Lordships that the principle of that decision is correct." The next stage in the history of the law of limitation was the enactment of Act 9 of 1871 which for the first time introduced Art. 142 which prescribed for a suit for possession of immovable property by a Hindu entitled to the possession of immovable property on the death of a Hindu widow a period of 12 years' limitation, which period begins to run from the time when the widow dies. This enactment would not have been helpful in the present case because during the lifetime of Mt. Chandra Kunwar the limitation would have continued to run under the former law which was not affected except where the person by whose death the reversioner acquired the right to sue was a Hindu widow. The law was brought into its present state by the enactment of Act 15 of 1877 which modified the old Art. 142 and substituted Art. 141 which provides for "Like suit by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan female a period of 12 years which begins to run when the female dies." The contention which is put forward is that as the

3. ('68) 9 W. R. 505 : Beng. L. R. Sup. Vol. 1008 (F.B.), Nobin Chunder v. Issur Chunder.
4. ('75) 23 W. R. 214 : 15 Beng. L. R. 10 : 2 I. A. 113 : 3 Sar 430 (P. C.), Aumirtolall Bose v. Rajoneekant Mitter.

law stood in 1867, when Ganga Sahai took possession of part of the property to which Mt. Chandra Kunwar was entitled, time for the institution of a suit to recover that property at once began to run. Act 9 of 1871 would not have created any change in favour of the reversioners since time would have continued to run, running as it did from the time of the death of Mt. Phul Kunwar. It is contended that although by Act 15 of 1877 a fresh period of limitation was enacted, the effect of which was that time would not begin to run until such time as Mt. Chandra Kunwar should die yet, inasmuch as time had once begun to run, it could not be stopped, in mid career as it were, by the new Act. I feel no doubt that this view is not correct. This question was considered in a Full Bench case of this Court as far back as the year 1892 in 14 All. 156.[5] That was a case covering almost exactly the same period as the present case. One Ram Sahai had died in 1862 leaving a widow and a daughter who was the plaintiff in the subsequent suit.

After the death of Ram Sahai his nephew and the nephew's son, who was the defendant in the suit, entered into possession adversely to the widow. In the light of the cases to which I have referred above time under the Act of 1859 clearly began to run from the year 1862, but the title by adverse possession had not yet matured into an absolute title when Act 9 of 1871 came on the statute book. That Act gave a new period of limitation and made the death of the widow the starting point for the suit by the plaintiff of that suit. The Full Bench held that possession of the estate of a deceased separated Hindu held adversely to his widow entitled to its possession did not operate for the purpose of constituting adverse possession to the reversioner or reversioners entitled to succeed upon her death to that estate. Certain aspects of the matter were considered particularly carefully by Mahmood J. whose conclusion was that the suit could not be held barred if it was not barred under the Limitation Act in force at the date of suit, unless the right of the plaintiff had already been extinguished, and he held by reference to S. 28 of the Act that the right is extinguished only on the expiry of the period provided by the article of the Limitation Act which is actually in force at the date when limitation would expire and the right would be extinguished. That is to say, the effect of Art. 142 of the Act of 1871 and Art. 141 of the Act of 1877 was to create a fresh rule in regard to limitation in all cases in which the prospective right arising out of adverse possession had not already ripened into an absolute title. Learned counsel has had to admit that he is unable to distinguish the decision in 14 All. 156.[5] The matter has been considered subsequently, but there is no doubt that there is no subsequent decision which in any way detracts from the force of the decision in 14 All. 156[5] on this particular point.

This question being disposed of, the first question for decision is whether the possession of Mt. Phul Kunwar herself could at any time have been adverse to the estate of her deceased husband Rao Gopi Nath. Mt. Phul Kunwar was admittedly a Khattri widow and it is not open to dispute in the present case that there is no ancient custom (and indeed no modern custom) of widow remarriage among Khattris. That point has not been disputed before us except by a very feeble reliance upon a statement in cross-examination of the plaintiff Girdhari Lal. Girdhari Lal stated in examination-in-chief "Karao marriage is not permitted in our caste. We are Khattris by caste." He went on to say in cross-examination : "Whether the Khattri caste to which I belong is a branch of Kshattriyas or not, I do not know. I belong to a twice-born class. If a widow of my caste enters a Karao marriage, she would be divested of the property inherited by her from her husband." It was argued that this was an implied admission that a Khattri widow could enter into a Karao marriage. The questions which arise are really two: (1) Could there by custom be such a remarriage of a widow among Khattris, that is, is such remarriage recognized by the caste? and (2) Was there in fact such a marriage? Of course if remarriage of widows is not recognized among Khattris it is practically impossible that there could in fact have been a marriage. Now, as regards the existence of a custom of remarriage there is no evidence whatever to support it and at the date in question, namely somewhere about 1846, this remarriage, if there was to be a remarriage, could only be in virtue of a custom since the Hindu Widows' Remarriage Act did not come on the statute book until the year 1856. Bearing in mind the approximate date of Ganga Sahai's birth, which I have mentioned above, this marriage must be presumed to have taken place not later than the year 1847 or 1848.

In these circumstances the question what is meant by a Karao marriage and what ceremonies, if any, are essential for a Karao marriage is really irrelevant. If at the time of this marriage it could be contracted only in virtue of a custom, and there was no such custom, then an irregular union could not be turned into a marriage by any amount of ceremonies or by any subsequent enactment. The mere fact that Harsukh Rai in 1862 spoke in his will of his wedded wife and his Karao wife does not go in the circumstances at all to prove that Mt. Phul Kunwar was his wife other than in name, the name being given because the connexion was a permanent one and one to which the members of the brotherhood had become accustomed and to which they did not, perhaps in deference to the position of Harsukh Rai, like to make any serious objection. The lady herself in her own will speaks of her "legitimate daughter" and her son and thus clearly distinguishes between the relationship between herself and her first husband Gopi Nath and that between herself and Harsukh Rai. It may be that there are cases where a presumption of a legal marriage having taken place may arise from the fact of two persons living together over a long period and being regarded by their neighbours and friends as husband and wife, but such a presumption has no application to the circumstances of the present case.

As regards the reliance which has been placed on the statement of Girdhari Lal that "if a widow of my caste enters into a Karao marriage, she would be divested of the property inherited by her from her husband" it is sufficient to say that Girdhari Lal is speaking about the situation at the present moment. It is undoubtedly open to a Khattri widow at the present date, and has been open to a Khattri widow at any date since 1856, to remarry under the Hindu Widows' Remarriage Act, and if she chooses to do so, she will by virtue of S. 2, Hindu Widows' Remarriage Act, be divested of her right and interest in her deceased husband's property, whether they are by way of maintenance or by inheritance or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same. Under that section "upon her remarriage the next heirs of her deceased

5. ('92) 14 All. 156 : 1892 A.W.N. 22 (F. B.), Ram Kali v. Kedar Nath.

husband or other persons entitled to the property on her death shall thereupon succeed to the same." It may be noted further in this connexion that it is the accepted view of this Court that a Hindu widow entitled to remarry under a custom of the caste does not, even subsequently to the enactment of the Act of 1856, come within the mischief of that Act and will therefore not upon remarriage be divested of her widow's estate unless it be found upon the evidence that in addition to there being a custom of remarriage of widows there is also in existence a custom of forfeiture of the first husband's estate upon such remarriage *(sic)*. In the present case, quite apart from it being clearly proved that there was no custom of remarriage of Khattri widows in existence, it is further clear that the statement made in cross-examination by Girdhari Lal does not go so far as to establish that there was a custom that Khattri widows who remarried would forfeit their husband's estate.

Learned counsel for the respondents has further pointed out that, even if there were such evidence to prove a custom of forfeiture, such a forfeiture is not automatic and, unless it is enforced, the nature of the possession of the widow would not be changed. It has in fact been held in a very well-known case that a Hindu widow, as often pointed out, is not a life renter but has a widow's estate, that is, a widow's estate in her deceased husband's property. If possessing as widow she possesses adversely to anyone as to certain parcels she does not acquire the parcels as stridhan but she makes them good to her husband's estate. The effect of this is that even if there could have been, or there ought to have been, or there was in theory, a forfeiture under the custom of the caste, yet by continuing in possession of her deceased husband's estate Mt. Phul Kunwar could not change her capacity, and therefore her so-called adverse possession would only enure for the benefit of the estate, that is for the benefit of the ultimate reversioners. The passage which I have quoted is from the decision of their Lordships of the Privy Council in **51 I.A. 171**[6] at p. 176. The principle of the decision is stated in para. 1 of the headnote which runs as follows :

"A title acquired under S. 28, Limitation Act of 1908, through adverse possession by a widow who claims and holds a widow's estate enures to the estate of her deceased husband and descends upon her death accordingly."

This case which is also reported in 22 A.L.J. 304[6] has been followed in A.I.R. 1925 All. 369,[7] in which it was held that where after remarriage a Hindu widow remains in possession of her (first) husband's lands for 12 years, but does not claim to do so in her own right but only as her first husband's widow, she acquires the property for her first husband and on her death his reversioners succeed to the estate. That is exactly the position in the present case, but I must with respect confess to feeling some doubt about the soundness of the proviso which suggests that it is possible for a Hindu widow to claim to be in possession of her husband's land in her own right, that is to say, to claim that by some act of her own she has the power to change the capacity in which she is in possession of her deceased first husband's property. I am quite clear on a consideration of all the facts that there was not and could not have been any remarriage by Mt. Phul Kunwar and there was not and could not have been any forfeiture of her Hindu widow's estate by her. It follows that she was never in adverse possession of her husband's property and she never acquired an absolute title in herself which she could transmit by any means to her son Ganga Sahai, not being the son of her husband Gopi Nath.

Coming next to the position of Ganga Sahai, he came into possession of the estate, whatever that estate was, which Mt. Phul Kunwar had in or about the year 1867. He succeeded to this property either by virtue of the will of Mt. Phul Kunwar—I leave out of discussion for the moment her competency to execute such a will and the question how far it could have been valid—or presumably by virtue of the provision in the arbitration award that in case Mt. Phul Kunwar should die without making a will or a deed of gift, her estate would devolve in equal shares upon her son Ganga Sahai and her daughter. Failing either of these methods, he came into possession adversely to his step-sister Mt. Chandra Kunwar. At that date limitation for instituting a suit to recover possession of the property at once began to run, but that period of limitation had not expired when by the Act of 1877 a new law was enacted creating a new rule for the institution of a suit for recovery of possession of this property. No doubt the possession of Ganga Sahai could be and must have been in some respects, that is in respect of such rights as subsisted in the estate of Rao Gopi Nath, adverse to Mt. Chandra Kunwar because Ganga Sahai was a stranger to the family of Gopi Nath, but there is no room for doubt that such adverse possession has no effect against the reversioners in view of the decision in 14 All. 156[5] and the plaintiffs were fully entitled to institute the present suit at any time within 12 years from the date of the death of Mt. Chandra Kunwar.

Some argument has been addressed to us suggesting that however correct from the point of view of limitation pure and simple, the decision in 14 All. 156[5] does not now hold good on the question whether possession adverse to the female limited owner binds the estate and is therefore fatal to the case of a reversioner claiming the support of Art. 141. I think there is no force in this contention. The whole argument rests on the foundation that their Lordships of the Privy Council have held in the *Shivagunga case*[8] that the estate vests in a Hindu widow and that a decree against her, if fairly obtained binds the reversioners. Whether the same principle was applicable to cases of adverse possession against the widow, was considered by a Full Bench of this Court in 51 All. 188.[1] The headnote runs as follows :

"A Hindu widow, who had succeeded to the estate of her husband, died in 1894, leaving a daughter as the heir. The daughter, however, never got possession, as her father's collaterals took possession of the estate adversely to her. She did not sue them to recover possession and died in 1920. Her sons, who inherited the estate, sued these collaterals for possession in 1923. The defendants pleaded limitation by reason of their adverse possession for over 12 years, and the question arose as to what extent and under what circumstances adverse possession, as against a Hindu female heir, would bind the reversioners. Held (Sulaiman A. C. J., and Mukerji J.) that Art. 141 and not Art. 144, Limitation Act, applied to the suit, which, having been brought within 12 years of the death of the daughter, was not barred by limitation. No question of adverse possession arose in the *Shivagunga case*[8] and the rule in that case was not a rule of limitation or

6. ('24) 11 A.I.R. 1924 P. C. 121 : 80 I. C. 788 : 5 Lah. 192 : 51 I. A. 171 : 22 A. L. J. 304 (P. C.), Lajwanti v. Safa Chand.

7. ('25) 12 A. I. R. 1925 All. 369 : 86 I. C. 445, Umrao Singh v. Pirthi.

8. (1861-63) 9 M. I. A. 539 : 2 W. R. 31 (P. C.), Kattama Nachiar v. Rajah of Shivagunga.

adverse possession, but a rule of Hindu law that the estate vested in a Hindu widow and that a decree against her, if fairly obtained, was binding on the reversioners. Even assuming that a rule of limitation had been laid down by that case, it must be deemed to have been superseded by the enactment of Art. 141 in the Limitation Act of 1877. The case in 48 Mad. 883[9] did not lay down that Art. 141, Limitation Act, was inapplicable to a suit like the present, or that the rule laid down in 23 Bom. 725[10] was no longer good law."

" Adverse possession against a Hindu female heir will not be effective against and binding on the reversioners." (Mukerji J.).

Boys J. differed to some extent from the other two Judges and thought that: " The question whether a reversioner is barred by adverse possession against the widow on the basis that she represented the estate, thus coming within the main rule of *Shivagunga's case*,[8] would probably have to be decided, as in the case of decrees, on the facts of the particular case."

I need not go into the details of the discussion of the question in the judgments of Sulaiman A. C. J. and Mukerji J., interesting though it is in its examination of the leading cases particularly 23 Bom. 725[10] and 48 Mad. 883.[9] The ultimate result is quite clear and the Full Bench decision was reiterated by a Division Bench recently in 55 All. 554.[2] I shall deal next with the question of the applicability of S. 41, T. P. Act. Learned counsel for the defendants appellants, particularly defendants 1 and 2, addressed certain agruments to us suggesting that these defendants had been wrongly held not to be entitled to the protection of this section. It was suggested that such inquiry as they could have made would not have led them to suspect any weakness in the title of Mir Khan or even of Ganga Sahai. Learned counsel for the respondents on the other hand, in answer to this contention and in support of his own appeal No. 173 of 1934, has contended that it is not open to the defendants to rely upon S. 41 as a defence to a suit by reversioners because the effect of allowing them to do so would be to deprive Art. 141, Limitation Act, of all value. It happens, and is bound to happen, in a very large number of cases that a widow survives her husband, or a daughter her father, by anything from 40 to 60 years and more. Such a widow or daughter may make transfers at quite an early stage of her career and her transferees may hold the property for 30 years or so before they transfer it to a third person and in such cases of possession under a sequence of transfers which have begun 50 or 60 years back it would be almost impossible for the ultimate transferee to trace back the history of the transfers and to come to know that the original transferor was a Hindu widow or daughter.

I am of course referring to cases where the ultimate transferee is a stranger and the original transferor is the owner of numerous properties. In many cases, the transferees cannot possibly get the benefit of any useful local knowledge. If S. 41 were to be applicable to such cases, the right which is given to a reversioner to institute his suit within a period of 12 years from the date of the death of the female limited owner would in almost every case be met, and successfully met, by the defence that the transferee was a bona fide transferee for value who had made such inquiry as was reasonable. Learned counsel, however, urges that the very wording of the first part of S. 41 is an answer to such a defence. The section provides that :

"Where, with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

Section 41 requires the consent, express or implied, of the person interested in immovable property. It is contended that possession by strangers as against a Hindu female limited owner must necessarily be either by adversity or by the consent of the limited owner. The section is not applicable to cases of adverse possession and the consent of the limited owner can be operative only so far as she is concerned. It cannot bind the reversioners who, so long as the female limited owner is in possession, have no more than a spes successionis and are not persons "interested in" immovable property. As has also been said, S. 41 is based upon the doctrine of estoppel and it operates to create what can only be described as a personal estoppel. The point was considered and discussed in a Division Bench case of this Court, 55 All. 554.[2] The headnote runs as follows :

"A Hindu daughter succeeded to her father's estate but she allowed her uncle's name to be entered in the revenue papers in respect of the estate and the uncle took possession. Subsequently, the uncle as ostensible owner transferred a part of the estate to the defendants. Later on, the daughter died and within 12 years of her death her sons sued to recover possession from the defendants.

"*Held* that the plaintiffs were not estopped under S. 41, T. P. Act, from claiming the property. Section 41, T. P. Act, refers to personal estoppels arising out of the conduct of the real owner and affecting him and persons claiming through him. The plaintiffs, who were reversioners, did not derive their title from the daughter, and therefore S. 41 could not apply to them. The mere fact that the estate was vested in the limited owner for the time being could not create an estoppel against the reversioners by virtue of the conduct of or consent obtained from the limited owner."

"*Held further* that during the lifetime of the limited owner the possession of the uncle or of his transferees could not be adverse to the reversioners so as to destroy their contingent rights. The plaintiff's cause of action which arose on the death of the limited owner was not barred by limitation."

In this connection the learned Judges referred to the Full Bench decision in 26 A.L.J. 1049[1] to which I have referred above. Learned counsel for the defendant-appellants have been unable to find any answer to this contention put forward on behalf of the respondent-plaintiffs by Mr. Gour, and it follows that if the plaintiffs are entitled to succeed at all they will be entitled to succeed not only against those defendants against whom the suit has already been decreed but also as against those against whom their suit has been dismissed.

I come now to the question of merger. As the case stands at this stage, it is clear that if there was a merger of the mortgagor and mortgagee rights in the possession of Mt. Phul Kunwar whereby the mortgage of 1846 was extinguished, then Mt. Phul

9. ('25) 12 A.I.R. 1925 P. C. 249 : 92 I. C. 85 : 52 I. A. 322 : 48 Mad. 883 (P.C.), Vaithialinga Mudaliar v. Srirangath Anni.
10. ('99) 23 Bom. 725 : 26 I.A. 71 : 1 Bom. L. R. 607 : 7 Sar. 543 (P.C.), Runchordas Vandravandas v. Parvatibai.

Kunwar was, after the death of Harsukh Rai and
a after the award of the arbitrators, in possession of the property of her late husband Rao Gopi Nath unencumbered by any mortgage. In respect of that estate she was not competent to make a will devising it to Ganga Sahai and Ganga Sahai, therefore, entered into possession as a trespasser. The title of his successors-in-interest can be no better than that of Ganga Sahai and it follows that the plaintiffs will be entitled to get a decree for possession of the whole property in suit. On the other hand, it is contended that there was never any merger. It is of course obvious that there could have been no merger while the property was in the possession of Ganga Sahai. Ganga Sahai had no title whatever in the property of Rao Gopi Nath and if therefore there was no merger prior to the property as a whole coming into his possession, he was in possession of the equity of redemption, the mortgagor right, as a
b mere trespasser, while in regard to the mortgagee right he could have been in possession in one of two capacities. If the mortgagee rights were in the possession of Mt. Phul Kunwar as stridhan, then Ganga Sahai was either in possession as a trespasser against his step-sister Mt. Chandra Kunwar whose stridhan they were, or in the alternative he was in possession under the will of his mother or his mother's will read with the arbitration award. In either case the capacity in which he was in possession of the mortgagee rights was something quite different from the capacity in which he was in possession of the equity of redemption and the mere fact that those two capacities were united in the same physical person could not result in a merger.

The argument has centred almost entirely round the question whether there was a merger of the two rights during the lifetime of Mt. Phul Kunwar.
c First of all, it is clear that Mt. Phul Kunwar, being in possession of the mortgagor rights as a Hindu widow holding the estate of her husband Rao Gopi Nath, came into possession of the mortgagee rights under the will of Harsukh Rai and under that will she was not given an absolute title in those mortgagee rights. On the contrary she was given nothing more than a life interest with a vested remainder in favour of her son Ganga Sahai. It seems to me to be quite clear that in these circumstances there could not be any merger of the mortgagee rights with the equity of redemption and so long as this state of affairs continued the mortgage could never have been extinguished. The question becomes more difficult when the previous state of affairs was changed by the arbitration award. The validity of that award and its binding nature has not been questioned in this suit. Its effect purported to be to
d allot exclusively to Mt. Phul Kunwar "without the partnership of any other person," among other property, the mortgagee rights in 20 biswas of mauza Dalelgarhi, pargana Pahasu. Prima facie by this agreement the provisions of the will were overridden and ceased to be of effect. This was a family settlement to which all the persons affected by the will of Harsukh Rai were parties. On the other hand, it has to be remembered that the absolute estate thus given to Mt. Phul Kunwar was limited by certain conditions. Condition 3 limited the rights of Mt. Phul Kunwar and Ganga Sahai. The whole of the management of the property had been given to Gopal Rai, adoptive son of Harsukh Rai, and neither Mt. Phul Kunwar nor Ganga Sahai could take the property out of his management; nor could they sell their share to any person other than Gopal Rai and Chunni Lal (the nephew) so long as those two persons were ready to make the purchase. This condition operated for a period of eight years after which
e period there was to be a reciprocal condition by which each party should give the other the first option to purchase any property of which it was desired to make a transfer. In this condition 3 the last sentence runs as follows :

"If within this period of eight years Mt. Phul Kunwar would like to make a will or deed of gift in favour of Ganga Sahai or her daughter or son-in-law (Gopal Rai) the said fixed period shall be a bar to it."

That is to say, she would have no right to execute a will or deed of gift in favour of any of these persons up to the year 1873, whereas in fact she died in about 1867. Much stress was laid in the two following conditions on this right of pre-emption referred to above. Condition 6 provided that if Mt. Phul Kunwar should die without making a will or a deed of gift, her estate would devolve in equal shares upon her son Ganga Sahai and her daughter.
f It was presumably because Mt. Phul Kunwar's will effected such a devolution without involving a division of each item of the property into two equal shares that possession and mutation after her death followed the conditions laid down in Mt. Phul Kunwar's will. It seems to me that the whole underlying intention of this award was to bring about ultimately a result, somewhat similar with of course considerable modifications, to that which was provided in the will of Harsukh Rai. The will of Harsukh Rai had of course made no mention of his daughter Mt. Chandra Kunwar, but that does not really affect the question as the idea of condition 6 and of the provision in Mt. Phul Kunwar's will was doubtless to benefit Gopal Rai, the husband of Mt. Chandra Kunwar, as much as Mt. Chandra Kunwar herself. In the light of these considerations it may well be doubted whether Mt. Phul Kunwar had even under
g the arbitration award a complete title in the mortgagee rights and not rather a title which was in some degree limited. If she was not owner of the mortgagee rights completely there could not I think have been any merger.

It is however also necessary to consider whether there could have been or was in fact any merger upon the hypothesis that after the arbitration award Mt. Phul Kunwar had a complete title to those mortgagee rights. On behalf of the vendee appellants, it is contended that Mt. Phul Kunwar held the mortgagee rights in one capacity and the mortgagor rights in another capacity and that even if she purported not to keep the mortgagee rights separate from the mortgagor rights, there could not in any case have been any merger. It is of course not in dispute that in many cases the question whether there has or has not been a merger of the equity of
h redemption with the mortgagee rights depends on the intention of the person in whose possession both rights were at the same time. In the present case, it is contended that, whatever the intention of Mt. Phul Kunwar may have been, the result never could have been an actual merger. I may remark here that the only section of the Transfer of Property Act which might appear to have some application is S. 101, but that section is not in terms applicable, and learned counsel have not been able to quote any case which was at all comparable to the present case. A reference has been made to Halsbury's Laws of England, Edn. 2, by Lord Hailsham, Vol. 23 at p. 513 in part 9 of the section relating to mortgages, which deals with the discharge of mortgages. Section 4 of this Chapter deals with the discharge of mortgages by merger and in para. 760 it is said that:

"Merger may take the form of a merger of estates or of a merger of a charge in the land. Merger of

estates takes place when two estates held in the same legal right become united in the same person. The estate which is the smaller in legal valuation is then in law, apart from statutory provisions, swallowed up in the greater. Merger of a charge takes place when the ownership of the charge and the ownership of the land are united in the same person. Prima facie there is no reason for keeping the charge alive and the title to the land is simplified by clearing it of the incumbrance."

Paragraph 761 goes on to deal with what may be considered to be exceptions to the general rule, as for instance the cases where it is not in the interest of the person in whom the two estates are united to allow them to merge or where he shows an intention to keep them separate. It seems to me that the principle stated in the sentence "merger of estates take place when two estates held in the same legal right become united in the same person" is clearly applicable and furnishes the ratio for deciding the question whether there has been a merger in the present case. It is not open to doubt that the equity of redemption was not held by Mt. Phul Kunwar in the same legal right as the mortgagee rights. She held the equity of redemption in pursuance of her right as widow of Rao Gopi Nath and she held the mortgagee rights in the first instance with a life-estate by virtue of the will of Harsukh Rai and subsequently with what I am assuming to be an absolute right though still as the legatee or devisee of Harsukh Rai. Learned counsel for the respondent Girdhari Lal has contended that it is sufficient that there should be a residing of the two rights even temporarily in the same person. In that case, that person might either allow a merger to take place or intend it to take place. He laid much stress upon the fact that it was Mt. Phul Kunwar herself who was the author of the mortgage and he argued that if at any stage the mortgagee right should come to reside and be vested in the author of the mortgage, the mortgage must necessarily be extinguished. I confess that I see no particular force in this argument. Prima facie, I can see no reason why a Hindu widow, who is a wealthy woman by virtue of being the owner of a large stridhan property, should not, in order to discharge debts due by her late husband, herself lend money to the husband's estate for the discharge of those debts and become in a different capacity a creditor of the estate. It may be that there has been no case of the kind but on principle I do not see anything to prevent it. Nor do I think that in such a case the principle laid down in *Lajwanti's case*[6] and in the single Judge case in *Umrao Singh*[7] quoted earlier, would have any application. To my mind in those cases there was never any question of change of capacity but the widow continued always to be in possession of the property concerned in the same capacity of a Hindu widow, whereas in the present case there can be no doubt that Harsukh Rai and the arbitrators could have had no intention to benefit the estate of Rao Gopi Nath and only intended a personal benefit for Mt. Phul Kunwar in her capacity as the highly respectable and recognised mistress of Harsukh Rai. On this view, I reject the argument that by the mere fact that both rights resided at a certain period in the same person there was necessarily any merger.

A second line of argument is that Mt. Phul Kunwar intended that these rights should be merged and for this reliance is placed upon the fact that in her will she purported to devise the whole of the properties, in respect of which she had been left the mortgagee rights by Harsukh Rai, to her son Ganga Sahai and her legitimate daughter, Mt. Chandra Kunwar without distinguishing the mortgagee rights from the mortgagor rights. I am not much impressed by this argument. At the stage in question Mt. Phul Kunwar seems to have practically forgotten that she had no power to dispose of the estate of Gopi Nath and if under that misapprehension she treated herself as having the right to dispose of the mortgagor rights and the mortgagee rights in one, that would not I think operate to effect a merger. The only result of her action seems to me to be that the will would only have been operative over those rights with which she was competent to deal. Learned counsel for the respondent evidently felt that it was difficult to support the case of merger in the lifetime of Mt. Phul Kunwar because he fell back on the argument that whatever might be the case with Mt. Phul Kunwar it was impossible as it were to vivisect Ganga Sahai, but I think that it is impossible to hold that any merger could have taken place while the two properties were in the temporary possession of Ganga Sahai because there is an obvious impossibility in Ganga Sahai fusing certain rights which he had with rights which he had not.

In my judgment therefore the argument that there could have been a merger and that there in fact was a merger of the mortgagor rights with the mortgagee rights is without force. The plaintiffs are the reversioners of Gopi Nath and they have no right whatever in respect of the mortgagee rights. It follows that their suit cannot succeed to any greater extent than this that their right as reversioners of Gopi Nath be declared and it be declared that they are the owners of the equity of redemption in respect of all the properties in suit. On the other hand, it is obvious that if the mortgage, a usufructuary mortgage of the property in suit, has not been redeemed, (and there is no suggestion that it ever has been redeemed or the mortgage extinguished otherwise than by merger) the plaintiffs are not in this suit entitled to get a decree for possession against persons in possession who are the successors-in-interest of the owner of the mortgagee rights. The present suit is not a suit for redemption, and I do not think it desirable or necessary in the present suit to go into the question whether or not the mortgage has become irredeemable and whether the plaintiffs can or cannot succeed in recovering possession of the property in suit by instituting such a suit. What is clear is that they are not entitled to obtain a decree for possession in the present suit. I would accordingly allow appeals Nos. 139, 165 and 399 of the defendants and direct that the plaintiffs' suit be dismissed with costs of both Courts, as against those defendants who have appealed and I would dismiss with costs the appeal No. 173 instituted by the plaintiffs Girdhari Lal and others.

VERMA J. — I am in agreement with the conclusions — on questions of fact as well as of law — arrived at by my learned brother, and have very little to add. On the question of limitation, it seems to me that the Full Bench decision of this Court in 14 All. 156,[5] has not only stood the test of time, but that its authority has been fortified by the pronouncements of their Lordships of the Privy Council. It was, in my opinion, clearly affirmed by the decision of the Judicial Committee in 23 Bom. 725.[10] In my judgment it had been wrongly held in 20 All. 42[11] that the decision in 14 All. 156[5] had been impliedly overruled by the judgment of their Lordships

11. ('97) 20 All. 42: (1897) A.W.N. 195, Tika Ram v. Shama Charan.

in 22 Cal. 445.[12] I am also of the opinion that the authority in 14 All. 156[5] was not shaken by the ruling of the Privy Council in 48 Mad. 883.[9] I consider it sufficient to refer to the judgments of Sulaiman A.C.J. and Mukerji J. in 51 All. 188.[1] If I may say so with respect, I find myself entirely in agreement with the judgments of those two learned Judges in that case. The same view was re-affirmed by a Division Bench in 55 All. 554.[2] On the question of merger, learned counsel on either side were agreed that the question, as it arises in this case, is *res integra*. In my judgment the contention of the defendants that, when Harsukh Rai bequeathed his mortgagee rights to Mt. Phul Kunwar he intended the bequest to be for the benefit of Mt. Phul Kunwar personally, and not in her capacity of Rao Gopi Nath's widow and as the holder of his estate for a Hindu widow's estate, must be accepted. That being so, I entirely agree with my learned brother that there is no reason in principle for holding that there was a merger of the two rights — the mortgagor's rights and the mortgagee rights—and with the reasons given by my learned brother for that conclusion.

K.S./R.K. *Order accordingly.*

12. ('95) 22 Cal. 445: 22 I.A. 25: 6 Sar. 523 (P.C.), Lachhan Kunwar v. Manorath Ram.

Limitation Act —
(a) ('42) Chitaley, Art. 141, N. 13.
('38) Rustomji, Art. 141 Page 1277, Note "Adverse possession against female—Present law."
(d) ('42) Chitaley, Arts. 142 and 144, N. 19 Pts. 1 and 9.
('38) Rustomji, Art. 141 Page 1294 Pt. 1.
(e) ('42) Chitaley, Art. 141, N. 13 Pts. 9 and 11 S. 2 (8), N. 3 Pt. 9.
('38) Rustomji, Art. 141 Page 1279 Pts. 7 and 8.

Hindu Law —
(b) ('40) Mulla, Page 510 Pt. (n).
('38) Gour, Page 151 Pt. 5; Page 153 Pt. 7.
(c) ('40) Mulla, Page 37 Pt. (r).
('38) Gour, Page 936 Pt. 3; Page 937 Pt. 6.
(d) ('40) Mulla, Page 226 Pts. (g) and (h).
('38) Gour, Page 1139 Pt. 6; Page 938 Pt. 12.
(e) ('40) Mulla, Page 218 Pt. (g).
('38) Gour, Page 1122, N. 2612.

T. P. Act —
(f) ('36) Mulla, S. 41 Page 181 Pt. (i).
('37) Mitra, S. 41 Page 144, N. 184.
(g) ('36) Mulla, S. 111 Page 639 Pt. (i); S. 101 Page 553, Note "Merger."
('37) Mitra, S. 101 Page 553, N. 536.

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ALLSOP AND VERMA JJ.

Ishwar Dayal alias Nand Lal minor through Mt. Sharbati — Plaintiff — Appellant

v.

Amba Prasad and after his death Sib Charan Das and others — Defendants — Respondents.

First Appeal No. 404 of 1935, Decided on 23rd January 1942, from decision of Civil Judge, Bulandshahr, D/- 25th May 1935.

(a) Hindu law — Debts — Mortgage executed by father before birth of son cannot be questioned by son.

A son cannot question his liability to pay a debt due on a mortgage executed by his father before he (the son) was born and at a time when there was no joint family. [P 185 C 1]

(b) Hindu law — Debts — Antecedent debt— Joint family property is liable.

Any money borrowed for the payment of an antecedent debt can be recovered from the property of the joint family. [P 185 C 1]

(c) Hindu law — Debts — Legal necessity — Mill established by father not being ancestral property — Money borrowed for such business is not for legal necessity.

Money borrowed by a father for purposes of a mill which he has established before the birth of the son but which has not been proved to be ancestral property is not for legal necessity and the son is not liable for that debt. [P 185 C 1]

C. B. Agarwala — for Appellant.

Panna Lal — for Respondents.

ALLSOP J.—This appeal arises out of a suit instituted by the plaintiff in order to obtain a declaration that a mortgage executed by his father and a decree subsequently obtained against the father on the basis of the deed were not binding upon the plaintiff and that the debt secured by the mortgage could not be recovered by sale of the properties mentioned in the plaint. These properties consisted of eight houses or shops and one item of zamindari property. After instituting the suit and after the mortgagee and decree-holder had put in his written statement the plaintiff amended his plaint and asked for a further declaration that the property in suit was not liable to sale in execution of a simple money decree No. 57 of 1928 obtained by Lachhmi Narain against the father Raghubar Dayal. It is conceded that the eight shops in suit were sold in execution of this decree and purchased by Mt. Gopi, the wife of Raghubar Dayal, and the step-mother of the plaintiff. It is also conceded that she is in possession and learned counsel for the plaintiff-appellant has been unable to point to any evidence to show that the debt incurred by Raghubar Dayal to Lachhmi Narain was incurred for any immoral purpose. It follows therefore that the transfer of the shops and houses to Mt. Gopi cannot be questioned by the plaintiff-appellant and he is no longer interested in the equity of redemption in these eight shops or houses. He is interested therefore only in item 9 of property mentioned in the plaint, that is a zamindari share in some property in the town or village of Dibai. The question is how far the mortgage and the decree on the basis of it are binding on this property. The mortgage deed was executed by Raghubar Dayal on 22nd January 1925 in order to secure a debt of Rs. 25,000. This sum of Rs. 25,000 consisted of four items, namely, a sum of Rs. 12,690 which was to be paid by the mortgagee in order to redeem a previous mortgage of the year 1917, a sum of Rs. 5537 which was to be paid by the mortgagee to discharge Raghubar Dayal's liability for a debt originally amounting to Rs. 5000 due to Seth Shib Charan Das who was the son of the mortgagee, a sum of Rs. 1530 which was to be paid by the mortgagee to one Banarsi Das on the basis of a decree and finally, a sum of Rs. 5243 which was paid over in cash by the mortgagee to the mortgagor at the time of the registration of the bond.

It is admitted that the plaintiff who is the son of Raghubar Dayal cannot question his liability for

the payment of item 1 because the money was due upon a mortgage which was executed by Raghubar Dayal before the plaintiff was born and at a time when there was no joint family. It has been argued that the plaintiff was not liable to pay item 2 because the mortgagee had not paid the sum due to Seth Shib Charan Das. It was argued that Seth Shib Charan Das and the mortgagee were really members of a joint family and there was no question of payment by one to the other. There can be no doubt however that Raghubar Dayal did borrow a sum of Rs. 5000 from Shib Charan Das and that this constituted an antecedent debt at the time when the mortgage was executed. Any money borrowed for the payment of this antecedent debt could be recovered from the property of the joint family. There is no point in going into the question whether Seth Shib Charan Das and the mortgagee were members of a joint family or not. The point is that the promissory note executed by Raghubar Dayal in favour of Shib Charan Das has been produced with an endorsement upon it that the liability has been discharged. There is no doubt that there was a liability from Raghubar Dayal to Shib Charan Das and the liability was discharged as a result of the deed of mortgage. It is clear therefore that this sum of Rs. 5537 can be recovered from the joint family property and that the father was justified in alienating the property to pay this debt. The item of Rs. 1530 is established to have been due under a decree and the money was paid. There is no doubt that the son was liable for this sum and that the mortgage of the property in order to secure a debt incurred for the discharge of the liability was justified.

There remains the cash item of Rs. 5243. The learned Judge of the lower Court has held that a part of this sum has been established as having been borrowed for legal necessity. There was a flour mill which was established by Raghubar Dayal before his son was born and he is alleged to have borrowed part of this money for the purposes of this mill. It seems to me that even if the money was borrowed for this reason, the father had no right to alienate the joint family property in order to obtain money for the purposes of the mill. It has been argued before us on behalf of respondent 1 that is Amba Prasad the mortgagee that this mill was really joint family property and consequently that the father was entitled to alienate other property in order to obtain money for the purposes of the mill. It has been urged that the mill was established by Raghubar Dayal out of money which he had inherited from his father. Learned counsel has argued that any property which is acquired by a Hindu out of money obtained from his father becomes ancestral property when that Hindu has a son. Learned counsel has referred us to the case in A. I. R. 1940 Bom. 200.[1]

The learned Judges in that case said that profits made from a business started with the proceeds of the sale of ancestral property would form part of the ancestral coparcenary property. I must not be understood either to agree or disagree with this proposition. I think, on the whole that it is not advantageous to increase the possibilities of litigation over a matter of this kind, but it may be in some instances, if ancestral property in one form is converted definitely into property of another form that there may be force in the arguments on which the learned Judges in that case based their decision. The question does not really arise in the case before us because it was not pleaded that this flour mill was established out of the proceeds of property acquired by Raghubar Dayal from his father and there was no evidence to prove that this was so.

On the facts before us, there is nothing to establish that this mill was ancestral property and consequently there is no force in the contention that Raghubar Dayal was justified in alienating ancestral property to obtain funds for the purposes of the mill. There is no other evidence to prove that the sum of Rs. 5243 was borrowed for any purpose which would make the son liable for paying this money. It was never denied that the zamindari property which is mentioned in the plaint was ancestral property in which the plaintiff-appellant acquired a share when he was born. The position then is that the plaintiff-appellant has an interest only in this one property and that his suit in respect of the remainder, viz., the house and shops was rightly dismissed by the learned Judge of the Court below, and also that the plaintiff is liable only for the payment of a sum of Rs. 19,757 by way of principal out of the sum of Rs. 25,000 secured by the mortgage. The learned Judge of the lower Court dismissed the plaintiff's suit because he argued that the plaintiff had valued the whole property in the plaint at a sum of Rupees 10,000 and the plaintiff's liability was for a much larger sum. It seems to me that this was not quite a right decision. It is impossible in this Court to work out the full equities because we do not know the history of the property during the time when this suit and this appeal have been pending, but the fact undoubtedly remains that the plaintiff's property No. 9 in the plaint, that is, the zamindari property is liable only for a sum of Rs. 19,757 out of the sum of Rs. 25,000, the principal sum secured by the mortgage and I think that the plaintiff is entitled to a declaration to this effect in respect of this item of property. Whether this declaration will ultimately be of any benefit to the plaintiff-appellant when the equities are worked out I am unable to say and I must be understood not to express any opinion upon the point. I would give the plaintiff-appellant a declaration that property No. 9 mentioned in the plaint, that is, the zamindari property, is liable to the extent of only Rs. 19,757 out of the principal sum of Rs. 25,000 secured by the mortgage and that the liability for the interest will be apportioned accordingly. In the circumstances, I would direct that the plaintiff should get one-fifth of his costs throughout from defendant-respondent 1, Shib Charan Das and Gopi Nath, the representative-in-interest of the defendant-respondent, Amba Prasad, and that these respondents should get four-fifths of their costs throughout from the plaintiff-appellant. The other parties should bear their own costs.

VERMA J. — I agree with the order proposed. I also agree that there is no evidence worth the name to show that the flour mill was started by Raghubar Dayal with the assistance of ancestral funds. That being so, the question of law raised by Mr. Panna Lal does not arise and I do not therefore consider it necessary to express any opinion upon it.

K.S./R.K. *Order accordingly.*

Hindu Law —
(a) ('40) Mulla, Page 319 Pt. (p).
('38) Gour, Page 555 Pt. 4.
(b) ('40) Mulla, Page 356 Pts. (f) and (g).
('38) Gour, Page 526 Pt. 4.
(c) ('40) Mulla, Page 273 S. 248.
('38) Gour, Page 388 S. 118.

1. ('40) 27 A. I. R. 1940 Bom. 200 : 188 I. C. 873 : 42 Bom. L. R. 256, Ayyangouda Basangouda v. Gadigeppagouda.

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VERMA AND YORKE JJ.

Debi Din — *Appellant*

v.

Secretary of State for India and others — *Respondents.*

First Appeal No. 288 of 1934, Decided on 6th November 1941, from decision of Addl. Dist. Judge, exercising powers of President of Tribunal, Improvement Trust, Cawnpore, D/- 14th April 1934.

(a) Civil P. C. (1908), S. 100 — Finding that materials of house belonged to occupiers is one of fact.

A finding that the materials of houses were the property of the occupiers is a finding of fact. [P 187 C 1]

(b) U. P. Town Improvement (Appeals) Act (3 of 1920), S. 3 (1) (b) (1) — In appeal under S. 3 (1) (b) (1) only points of law can be considered.

In an appeal under S. 3 (1) (b) (1) the only points which are really open to consideration are points of law. [P 187 C 1]

(c) Land Acquisition Act (1894, as amended by U. P. Town Improvement Act, 8 of 1919), S. 23—In calculating market value of land to be acquired only use to which land is being put has to be considered.

Under S. 23 the only matter to be taken into consideration by the Land Acquisition Collector and the Tribunal in calculating the market value of the land to be acquired is the use to which the land is put by the owner at the date of the notification under S. 36, U. P. Town Improvement Act and the income which is derived by the owner of the property by means of that use. Section 23 expressly excludes all considerations of potential value and hence in assessing the market value any fact other than the use to which the land is being put such as the history of the land, its physical features or situation cannot be taken into account : ('28) 15 A.I.R. 1928 All. 147 (F.B.), *Rel. on* ; F. A. No. 512 of 1929, *Not approved.* [P 188 C 1]

(d) Land Acquisition Act (1894, as amended by U. P. Town Improvement Act 8 of 1919), S. 23—Market value of land—Number of years' purchase — Decision of Improvement Trust Tribunal or sale deeds in respect of pieces of land which abut on or are even part of land to be acquired are not admissible—Capitalisation of rents of kucha houses at 16⅔ years' purchase held proper.

Exemplars do not come into the scheme of clause firstly of S. 23. Therefore, in determining the multiple that is the number of years' purchase while calculating the market value of the land under S. 23 a decision by the Improvement Trust Tribunal is not admissible. For the same reason there is no evidentiary force in the sale deeds relating to pieces of land which abut on or are even part of the land which is being acquired. [P 188 C 2]

[Capitalisation of rents of kucha houses at 16⅔ years' purchase giving a return of 6 per cent. per annum held proper.] [P 188 C 2]

(e) U. P. Town Improvement Act (8 of 1919), S. 58—Owner referring Collector's assessment of compensation to Improvement Trust Tribunal—Tribunal upholding Collector's decision—Secretary of State opposite party is entitled to costs.

Where on a reference to the Improvement Trust Tribunal at the instance of the owner against the decision of the Land Acquisition Collector as to the assessment of compensation, the decision of the Collector is upheld by the Tribunal, the Secretary of State opposite party is entitled to his costs. [P 189 C 1]

Shiva Prasad Sinha, Shankar Sahai Verma and Bankey Behari — for Appellant.

N. P. Asthana — for Respondents.

YORKE J.—This is a first appeal under S. 3 (1) (b) (1), U. P. Town Improvement (Appeals Act), Act 3 of 1920, from the decision of the Improvement Trust Tribunal of Cawnpore. The appellant Debi Din, who was also the applicant to the Tribunal, was the owner of a compound or ahata situated in mahalla Anwarganj, Cawnpore. It is said that in the year 1920 there was a notice in the Gazette under S. 36, U. P. Town Improvement Act, 8 of 1919, with reference to this area and to a neighbouring area described as Ghosiana. We do not think it has been established that that notification had any reference, to this area, but it looks as if there had been a threat of a scheme in regard to this area at that time. The Ghosiana scheme at any rate proceeded and it resulted in an application to the Tribunal in 1927. A copy of the judgment of the Tribunal in that case has been put before us, but we doubt whether it is relevant in the present case.

In the year 1922 it is said that the appellant told the Government that he himself would like to build a model settlement. At that time we are told that the Improvement Trust stated that in that case it would only acquire a strip 60 feet wide touching this proposed settlement or a portion of it. The appellant at any rate made very little progress with the construction of his model settlement. In the year 1930, that is on 10th October 1930, a fresh notice was issued under S. 36 of the Act with reference to what was called the Pench-Bagh Dalelpurwa Scheme No. 20. That notice covered the whole area now in suit and omitted only from its scope a portion of land which was occupied by a house which the appellant himself had built inside the area denominated by him for the purpose of his model scheme. The matter proceeded according to the usual methods in land acquisition proceedings as governed by the Land Acquisition Act subject to the modifications of that Act contained in the United Provinces Town Improvement Act, and on 25th March 1933 the Land Acquisition Collector Mr. Avadh Behari Lal made an award which is paper No. 8A of this record. That award shows that the area in question was covered in part on the east side by kucha huts, on the south side by some kucha-pucca shops, while on the west side it was mainly open to a road. In the centre of the area there was a large area of open land which was being used for the purpose of cultivation of vegetables and also for guava trees. The Land Acquisition Collector applying the provisions of the Act had ascertained the income which was being received by the appellant, who is the owner of all this land, as derived by him from the land, from the kucha houses and from the kucha-pucca or kucha shops. He found that the rental income of the houses came to Rs. 207-6-0 per mensem, giving an annual income of Rs. 2488-8-0. The annual income from the cultivated land was Rs. 378, and in regard to the guava trees the Land Acquisition Collector accepted Rs. 250 as the annual income, though he obviously thought that the figure was

improbably high. He thus arrived at an annual income from these three forms of property of Rupees 3116-8-0. He then went on to deal with the valuation of the houses with which we are not concerned in the present appeal as there is a finding of fact that the materials of those houses were the property of the occupiers.

He had next to consider the question of capitalisation of the income received by Debi Din appellant from these different sources. He noted that the kucha huts would ordinarily be valued at about 10 years' rent while the ground rent deserved full $16\frac{2}{3}$ years' rent. He went on to say that the agricultural rent of suburban areas was ordinarily capitalised at 25 years' purchase but in such areas the rents were governed by the Tenancy Act and were subject to revenue. Here the rents were as full as could be agreed between the parties and possibly 20 years' purchase was fairer. With regard to the fruit trees he remarked that the yield of fruits was usually capitalised at eight years, as the life of such fruit trees was short and their yield was uncertain. He went on to remark that instead of this differential treatment proposed to capitalise the whole income from agricultural rent and fruits as also the rents from the kucha houses at $16\frac{2}{3}$ years' purchase, "which is equivalent to an interest of 8 annas (per cent. per mensem) and is the usual factor for valuation of landed property in the town." On this assumption he proceeded to value the entire property at the rate of $16\frac{2}{3}$ years' purchase of the income and he arrived thus at a figure of Rs. 47,073 after deducting from the gross income the payments which had to be made by Debi Din on account of house tax and water tax. To this sum of Rs. 47,073 he added Rs. 2875 on account of wells for which the applicant was entitled to compensation, and Rs. 577 for scattered trees. The sum total allowed by him was Rs. 50,525 as the valuation of Debi Din's proprietary rights in this ahata.

Debi Din in due course took the matter to the tribunal and the learned members of the tribunal have, after framing a number of issues and discussing all the points which were necessary, affirmed the amount of compensation allowed by the Land Acquisition Collector. In such an appeal as the present one the only points which are really open to consideration are points of law. Sub-section (2) of S. 3, Town Improvement (Appeals) Act provides that: "An appeal under cl. (b) of sub-s. (1) shall only lie on one or more of the following grounds, namely : (i) the decision being contrary to law or to some usage having the force of law ; (ii) the decision having failed to determine some material issue of law or usage having the force of law ; (iii) a substantial error or defect in the procedure provided by the said Act which may possibly have produced error or defect in the decision of the case upon the merits."

It is not suggested that cls. (2) and (3) have any application to the present case. The main ground taken and in fact the only ground taken and argued arises out of the decision on issues 3 and 6. Issue 3: "Is the open land to be regarded as building site or as agricultural land?" Issue 6 : "At what rate should the open land be valued? What is its market value?" Before dealing with the argument we must make clear the state of law. The relevant section of the Land Acquisition Act is S. 23 with the modifications which have been effected in that section by the Town Improvement Act, 8 of 1919. Section 23, Land Acquisition Act (Act 1 of 1894) provides :

"(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

first, the market value of the land at the date of the publication of the notification under S. 4, sub-section (1)."

We are not concerned with clauses "secondly" to "sixthly" of this sub-section. This clause has been modified by para. 10 of the schedule to the United Provinces Town Improvement Act. That schedule has reference to S. 58 of the same Act which provides:

"For the purpose of acquiring land under the said Act for the trust — (b) the said Act (the Land Acquisition Act) shall be subject to the further modifications indicated in the schedule."

By para. 19 (3) of this schedule it is provided as follows :

"At the end of S. 23 of the said Act, the following shall be deemed to be added, namely :

(3) For the purposes of cl. (1) of sub-s. (1) of this section —

(a) the market-value of the land shall be the market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause."

We need not here refer to the other additions (b) to (g) added with (a) as sub-s. (3) to S. 23, Land Acquisition Act by this schedule. The learned members of the tribunal have referred to this section and have said : "It is clear from these words that we have no option and we have to value the land according to the actual use to which it was put at the time of notification."

They went on to refer to the Full Bench case of this Court, 26 A. L. J. 69,[1] to which we shall in due course refer, and they held that in the light of the wording of the clause and of the interpretation by the Full Bench of S. 23 as amended, it was not open to them to consider the potential value or what they called the "actual" value, and they were only entitled to consider the value as calculated from the net income actually being received by Debi Din at the date of the notice, that is 10th October 1930. Learned counsel for the appellant has sought most diligently to persuade us that the course adopted by the tribunal is incorrect and that in spite of the provision to which we have referred, potential value or market value in the more general sense of the amount which a willing seller could obtain in the open market from a willing purchaser, must necessarily be considered. We are of opinion that there is no force whatever in this contention. The matter is now entirely concluded by the decision of the Full Bench above referred to by which we are bound and with which, in any case, we must say with the greatest respect that we have no hesitation in agreeing. The question referred to the Full Bench was a very comprehensive question, namely:

"(1) What is the correct interpretation of S. 23, sub-s. (1), cl. (1), Land Acquisition Act (Act 1 of 1894) as amended by para. 10, cl. (3) of the Schedule to the United Provinces Town Improvement Act, 1919 (United Provinces Act 8 of 1919)?"

The judgment of the Full Bench was pronounced by Lindsay J., who remarked at an early stage on page 73 :

"It is therefore not possible for the purposes of this Act to take into account any potential value of the land; no valuation can be made with reference to what has been called 'the most advantageous disposition of the land'."

1. ('28) 15 A.I.R. 1928 All. 147 : 107 I.C. 587 : 50 All. 470 : 26 A. L. J. 69 (F.B.), Secretary of State v. Makhan Das.

(This was with reference to a quotation from a judgment of the House of Lords which laid down principles which have been held to be applicable to cases falling under the Land Acquisition Act as free from the amendments of the Town Improvement Act.) He went on :

"The consideration of potential value being excluded, the question is what factors can be considered when assessing the market-value according to the use to which the land was put at the material date." "The basis of compensation should be the value to the owner at the date of the notification, and prima facie this would depend upon the profit which on that date the owner is deriving from the land, and that profit could be estimated from the use to which, at that point of time, the land was being actually put. No great difficulty could arise in dealing with a case where, at the material date, the land is actually being used."

He went on to discuss the cases in which the land was not being put to any use, but in that connexion also he made some remarks which are of value in considering the arguments raised in the present case. At page 74 he remarked :

"The language of the section is rigid. The governing words are "according to the use to which the land was put, etc." The determining factor is the actual use of the land at the date in question, and any use of the land prior to that date is to be disregarded. "In view of this phraseology, it appears to be impossible for the purpose of assessing the market-value, to resort to any other facts such, for example, as the history of the land, its physical features or its situation; for while data of this nature might otherwise be of weight as indicating the value of the land to the owner, they could only be of service in estimating a potential value based upon the use to which the land might most profitably be put. But the section expressly excludes all consideration of potential use by laying down that the determining factor in the assessment of the market-value is the actual use to which the land is being put on the date of the notification; and from this the conclusion appears to be that either intentionally or through inadvertence the Legislature has declared that in certain conditions the market-value of the land on the material date may be nil."

The effect is that the only matter which is to be taken into consideration by the Land Acquisition Collector and the tribunal in applying S. 23, Land Acquisition Act, as modified by para. 10 of the Schedule of the Town Improvement Act which adds a sub-s. (3) to S. 23, Land Acquisition Act, is the use to which the land was put and the income which was derived by the owner of the property by means of that use. In effect one might almost add to cl. (a) which we have quoted above the words "by the person entitled to receive compensation", so that the clause would read: "The market-value of the land shall be the market-value according to the use to which the land is put by the person entitled to receive compensation at the date with reference to which the market-value is to be determined under that clause." In the light of the wording of the clause and its interpretation by the Full Bench of this Court we are of opinion that there is no force in the arguments put forward suggesting that by one means or another we should take into consideration a market-value calculated in any other way or with an eye to any other considerations than the income which was actually being derived from the property acquired by the person who is entitled to receive compensation. If that property is land, it will be calculable on the basis of the rent of the land, if it is a building it will be calculable on the rents received from the tenants of that building subject to certain other rules laid down, for example in cl. (f) of the same para. 10 (3) of the Schedule.

The only other argument which has been addressed to us relates to the multiple, that is the number of years' purchase which has been adopted by the tribunal. In this respect learned counsel wanted to rely on the decision of the tribunal presided over by Mr. White in the Ghosiana case, but we are of opinion that this judgment is not admissible under the Evidence Act and even if it could be regarded as an exemplar, exemplars do not come into the scheme of clause "firstly" of S. 23, Land Acquisition Act, as modified by the Town Improvement Act. For the same reason there is no evidentiary force in the sale deeds which were put before the Court on behalf of the appellant, even though they related to pieces of land which abut on or are even part of the land which is now being acquired. Some reliance was however sought to be put upon some cases of this Court and particularly a decision of another Bench of this Court in a similar Improvement Trust Case. In one of the cases quoted, a higher multiple was allowed upon the ground that Cawnpore was "a growing town". Such a higher multiple is clearly something based upon potential value and not upon actual market-value as we are bound to calculate it for the purposes of the present case. Reliance was placed in this connexion on a Bench decision in F. A. No. 512 of 1929 but we have to note that in the judgment of that case a reference is made to "fair market-value" and to "improvement in value over a certain period," but with great respect we are of opinion that "fair market-value" is not in terms what has to be arrived at in a case under the Town Improvement Act. What has to be arrived at is market value as calculated in accordance with what was described in the Full Bench case as the rigid language of the section.

The Land Acquisition Collector, whose view was followed by the Tribunal, applied a flat rate, although he was of opinion that something different might have been arrived at had he chosen to value the different classes of property according to the individual rates which he obviously considered to be proper ; for example he said that kucha houses being flimsy huts are usually only liable to be valued at 10 years' purchase, on the principle of course that their life cannot be regarded as greater than ten years, and presumably at the end of ten years there is very little left of the original house. Similarly, he took the view that he could have capitalised the yield of fruits at 8 years' purchase on the view that the life of the trees was short and the yield uncertain. The effect of so doing would have been to make a very heavy reduction in the capitalised value of the kucha houses which were the main foundation for the calculation of a capitalised value. He ultimately calculated the capitalised value on a basis which would give the appellant a sum calculated at 6 per cent. per annum to give him the same return which he was now getting on the whole of this property, although some of it was of only a semi-permanent value. It seems to us that this calculation is definitely more than fair to the appellant and it would be impossible to accept the view that the rents received from the kucha houses should be capitalised at a higher rate than 16-2/3 years' purchase, giving a return of 6 per cent. per annum. It may be that the line of reasoning followed by the lower Court is not in every respect sound but on the whole we are satisfied that this rate is a fair rate, and if it errs in any direction it errs in favour of the

appellant. Indeed it is obvious that the Tribunal felt that the appellant, the applicant before them, was rather hardly treated by the provisions of the Act and the Tribunal did its best to interpret those provisions in favour of the applicant. In our judgment, therefore there is no force in the present appeal which must therefore fail and be dismissed with costs.

We have before us a cross-objection on behalf of the Secretary of State asking that this Court will be pleased to set aside the order of the Tribunal disallowing the costs of the Secretary of State, on the ground that the Tribunal has erred in not awarding costs to the Secretary of State. The ground upon which the Secretary of State's costs have been disallowed by the Tribunal, despite the fact that the appellant's application or suit was dismissed, are stated in the following terms :

" On account of the above findings the objector is entitled to no compensation over and above the one awarded to him by the Trust. The objector is losing a very valuable land for a very low compensation and if correct value were to be allowed he would get nearly Rs. 90,000 as compensation. He is claiming one lakh only. So under the circumstances we are not going to allow any costs to the Secretary of State."

It is clear that the costs of the Secretary of State were disallowed on purely sentimental grounds. Incidentally, we may note that the statement in the judgment that the applicant appellant was claiming one lakh only was incorrect. He was claiming one lakh further in addition to the sum of roughly half a lakh which had already been awarded to him. The applicant was in the position of a plaintiff who had instituted a suit to recover a large sum and whose suit to recover that sum was found not to be entitled to success under the provisions of the law relating to the subject. We can see no ground upon which the Tribunal was entitled to deprive the Secretary of State of the costs to which he was entitled under the ordinary provisions of the law. We accordingly allow this cross-objection and set aside the order refusing to allow the Secretary of State his costs of the proceedings before the Tribunal. The Secretary of State will therefore have his costs which were disallowed by the Tribunal and he will also be entitled to his costs of the cross-objection in this Court.

G.N./R.K. *Appeal dismissed.*

C. P. C.—

(a) ('40) Chitaley, Ss. 100 & 101 N. 28 Pt. 3.
('41) Mulla, S. 100 P. 366, Note 'No appeal lies on the ground of an erroneous finding of fact.'

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ALLSOP AND VERMA JJ.

Jai Narain Singh and others — *Plaintiffs — Appellants*

v.

Collector of Aligarh, Manager of Estate of Kunwar Sri Niwas — *Defendant — Respondent.*

First Appeal No. 393 of 1934, Decided on 8th January 1942, from decision of Sub-Judge, Aligarh, D/- 14th May 1934.

(a) Hindu law—Debts — Widow — Necessity — Bonds executed by widow in 1874 and 1875 containing recital that debt was borrowed for prosecuting suit to recover her husband's property — Another debt stated to have been incurred for buying seed — Debts challenged in 1934 — Debts held binding on estate.

The bonds executed by the widow in 1874 and 1875 contained a recital that the money was being borrowed for the purposes of the suit which was instituted by the widow to recover her husband's estate. There was another debt stated to be due under a decree passed in a suit for the recovery of money alleged to have been advanced for the purpose of buying seed. The suit by the reversioner for possession of the property alienated by the widow for satisfying the aforesaid debts on the ground that they did not bind the reversion was brought in 1934 :

Held that as the suit for the prosecution of which the money was borrowed was pending at the time of the execution of the bonds and the widow probably had no means to prosecute it, the Court must after a long lapse of time accept the recital as true and hold that the debt was binding on the estate.

[P 191 C 1]

Held further that the Court could presume that the second debt was also borrowed on behalf of the estate.

[P 191 C 1]

(b) Hindu law—Debts—Widow—Necessity—Usufructuary mortgage by widow for Rs. 500 of her life interest in property — Widow selling property to redeem mortgage and to obtain sum of Rs. 100 — Loan held in absence of evidence could not be presumed to be justified by legal necessity merely because it was taken many years before suit challenging it was instituted.

About the year 1875, the widow sold the property in order to redeem a usufructuary mortgage for Rs. 500 of her life interest in the property itself. The deed of sale was in effect a transfer of property subject to the mortgage for the purpose of discharging the widow's liability to the mortgagee and obtaining a further sum of Rs. 100 in cash. The bond in favour of the mortgagee contained no recital to show why the widow borrowed the money from him :

Held that had the redemption of the mortgage justified the alienation, a failure to prove the necessity for the loan of Rs. 500 would not be a matter of great importance, and the sum of Rs. 100 would be negligible if the alienation was justified but since no advantage could be said to have accrued to the estate or the widow herself by the redemption of the mortgage the loan of Rs. 500 could not be presumed in the absence of any evidence at all to have been justified by legal necessity merely because it was taken many years before the suit was instituted. The burden of proof must remain on the person who alleged necessity and to say that a suit by a reversioner to recover property alienated by a Hindu widow must fail in the absence of any evidence about the necessity of the loan would be in effect to abrogate the rule of limitation that he was entitled to institute a suit for the recovery of the property within 12 years of the date of the death of the limited owner. There was nothing to lead to the conclusion that there was any necessity for the loan except the passage of time and possibly the allegation that the widow was not well off : ('32) 19 A.I.R. 1932 Mad. 762, *Ref.*

[P 191 C 2]

Held further that the fact that there was a famine was by itself no indication that the widow must necessarily have required Rs. 500 to support herself or to pay revenue in the absence of any recital to that effect in the deed under which she borrowed the money.

[P 192 C 1]

(c) Hindu law—Debts—Widow—Necessity—Widow incurring debt on personal responsibility to pay debt binding on estate — Whether debt incurred by widow binds estate—Test—It is question of fact — Widow can pledge her credit or use her own money to pay debt binding on estate and can recoup herself subsequently from estate—But there must be clear intention to that effect.

The question whether a debt incurred by the widow on her personal responsibility in order to pay a debt binding on the estate is itself binding on the estate so as to justify a transfer of that estate, is one of fact. If in the circumstances of a particular case a person advancing money in order to discharge a liability against the estate is led to believe and quite reasonably concludes that the widow is acting on behalf of the estate, the estate would be bound; while, on the other hand, if it appears that the advance was made personally to the widow and there was no suggestion that she was borrowing the money on behalf of the estate the widow alone would be bound and the creditor would have no remedy against the estate : 19 All. 300; 30 All. 394 and ('36) 23 A.I.R. 1936 Bom. 59 (F.B.), *Expl.* [P 193 C 1]

No doubt a widow might pledge her own credit, or use her own money, for the payment of debts binding upon the estate and then at some later time might recoup herself as it were from the estate. But in such a case it would have to be made clear that she intended to advance her own money to the estate with the intention ultimately of recovering the money from the estate. [P 193 C 2]

P. L. Banerji, K. N. Katju, Nanak Chand and S. B. L. Gour —, for Appellants.

N. P. Asthana and Din Dayal —, for Respondent.

ALLSOP J. — The plaintiffs in the suit which has given rise to this appeal were Ch. Jai Narain Singh and two others. They instituted the suit with the object of recovering possession of certain immovable property alleged to have been alienated by Mt. Lachhman Kunwar and Mt. Chhattar Kunwar, the widows of Ch. Tej Singh. Ch. Jai Narain Singh is the grandson of Ch. Tej Singh's brother and is now admitted to be the nearest reversioner to Ch. Tej Singh's estate. The other two plaintiffs purchased a share in the property in suit from Ch. Jai Narain Singh on the assumption that he had acquired a title to it. The property was described in the plaint under four heads, namely, (1) a 4 and 2/3rds biswa share in Akrabad, (2) a half share in a specific area of 61 bighas 13 biswas in the town of Akrabad, (3) a 4 and 2/3rds biswa share in Akrabad, and (4) a 4 biswa share in Dhuri. It was explained that the fractions described under the first and third heads were at the time of the institution of the suit expressed in the register in somewhat different terms. This fact was doubtless due to partitions and re-measurements, but it gave rise to some controversy in the Court below about the property under the third head. According to the plaint the share described under that head included holdings Nos. 1 and 2 of the register of that time. The defendant contended that holding No. 2 comprising an area of 1 bigha 8 biswas had never belonged to Ch. Tej Singh and ultimately the plaintiffs withdrew their claim to it. We may explain that there was some confusion in the lower Court about this matter. Issue 11 framed was "whether the plaint property (No. 3) did not belong to Tej Singh" and the finding was that the plaintiffs had given up their claim to property No. 3 and the issue no longer arose. The fact is that the defendant in para. 9 of the written statement raised an issue only about holding No. 2 in item 3 and that B. Sohan Lal, pleader for the plaintiffs, stated :

"The plaintiff withdraws his claim in respect of the property aforesaid, i. e., the property which is entered in the khewat as holding No. 2, comprising an area of 1 bigha 8 biswas."

It is to be understood, therefore, that the property now in suit is that mentioned under headings one, two, three and four of the plaint with the exception only of holding No. 2, mentioned under heading three. This property is in the possession of the respondent, that is, the Collector of Aligarh in his capacity as manager, on behalf of the Court of Wards, of the estate of Kunwar Shri Newas and it is necessary to set forth how that possession was acquired in order to explain the issues which arise in this appeal. Ch. Tej Singh died in the year 1873 leaving him surviving the two widows, Mt. Lachhman Kunwar and Mt. Chhattar Kunwar and a brother, Ch. Jawahir Singh, who had two sons, Ch. Jai Ram Singh and Ch. Sital Singh. A dispute arose about Ch. Tej Singh's property between the widows on one hand and Ch. Jawahir Singh on the other. The latter claimed it by right of survivorship on the allegation that he and his brother were members of a joint Hindu family. The widows maintained that there had been a partition and that they had a title to the property by right of succession. They took possession of some buildings but the Collector, pending the settlement of the dispute, placed under his direct management the villages on which revenue was payable to the Government. The widows therefore instituted a suit, No. 28 of 1873, against Jawahir Singh in which they asked for a declaration that they were entitled to the buildings and sought possession over the other property which consisted of shares in several villages and certain specific areas of land, part of which had been inherited and part granted by the Government. The part inherited included a share of one-third out of 10 biswas in Akrabad and the part granted by Government a share of 10 biswas in Dhuri, a share of 6 biswas out of 10 biswas in Akrabad and an area of 61 bighas 5 biswas presumably in the latter village. The widows were successful in their suit and were therefore each entitled during their lifetime to half the property, that is, among other shares, to 5 biswas in Dhuri, 1 and 2/3rds, plus 3 biswas, or in all 4 and 2/3rds biswas, in Akrabad and a half of the specific area.

On 30th January 1889, Mt. Lachhman Kunwar executed a deed of sale in favour of Gulab Singh. She transferred her share of 4 and 2/3rds biswas in Akrabad and her share in the mahal abadi or residential part of the same village. It is not possible to identify the area given in the sale deed with the area given in the decree in favour of the widows in the suit of 1873 or with the area given in heading two of the properties mentioned in the plaint but this appeal has been argued before us upon the assumption that the properties mentioned in headings one and two of the plaint were transferred by this deed and there is no suggestion in the pleadings that the property in heading two came into the possession of the defendant by any other means. We suppose that some confusion or difficulty may have been caused by the creation of a new mahal abadi and by re-measurements and will assume that the properties mentioned in headings one and two in the plaint came into the possession of Gulab Singh by means of this deed. These properties were put to sale by Qadir Bakhsh in execution of a decree against Gulab

Singh and were purchased by Sujan Singh on 20th
a June 1892. Sujan Singh executed a deed on 31st October 1892, in which he admitted that he was only a benamidar and that Beche Lal was the real purchaser. Kunwar Shri Newas is the grandson and representative of Beche Lal.

On 7th July 1892, Mt. Chhattar Kunwar executed in favour of Th. Tikam Singh a deed of mortgage by which she hypothecated her 4 and 2/3rds biswa share in Akrabad and 4 biswas out of her 5 biswa share in Dhuri, the properties described in headings three and four of the plaint. Th. Tikam Singh sold his mortgagee rights to Beche Lal in 1897. Chiranji Lal, son of Beche Lal, brought a suit on the basis of the mortgage in 1910, obtained a decree and himself purchased the property in execution thereof on 20th January 1914. Kunwar Shri Newas is the son and successor of Chiranji Lal. The defendant was thus in possession under a title which
b can be traced back to the deed of sale executed by Mt. Lachhman Kunwar on 30th January 1889, and the deed of mortgage executed by Mt. Chhattar Kunwar on 7th July 1892, and the main question in the suit was whether these transfers were executed for legal necessity and were binding upon the reversioner and his representatives in interest. The learned Civil Judge found in favour of the defendant and dismissed the suit. The plaintiffs have appealed and we have to consider whether we can uphold the decision of the lower Court. In doing so, we shall first deal with the deed executed by Mt. Lachhman Kunwar. The consideration for the sale mentioned in this deed is (1) a sum of Rs. 2800 left with the vendee for payment to Sant Lal and Moti Lal, the purchasers at an auction sale of the mortgagee rights of Jai Ram Singh, (2) a sum of Rs. 500 with interest due to the vendee, Gulab Singh, on the
c basis of a deed of mortgage executed in his favour by Mt. Lachhman Kunwar on 4th May 1884, and (3) a sum of Rs. 100 received in cash.

The first item refers to a deed of usufructuary mortgage executed by Mt. Lachhman Kunwar on 19th June 1879, in favour of Jai Ram Singh and Sital Singh, the sons of Jawahir Singh. The property mortgaged was the 4 and 2/3rds biswa share in Akrabad and the consideration consisted of the payment of Rs. 260-11-9 in cash to the lady herself and the payment of her half share of four debts, namely, Rs. 2169-3-0 due to Bhikha Lal, Rs. 2000 due to Bhup Singh, Rs. 127-5-6 due to Phul Chand and Makkhan Lal and Rs. 782 due to Jai Ram and Sital Singh themselves, the half shares being rupees 1084-9-6, Rs. 1000, Rs. 63-11-9 and Rs. 391. The first debt was due on a bond executed by the two widows in favour of Bhikha Lal on 16th February
d 1875, and the second on a bond executed by them in favour of Bhup Singh on 1st February 1874. In each bond there is a recital that the money is being borrowed for the purposes of the suit which was instituted by the widows to recover their husband's estate and as we know that the suit was pending and the widows probably had no means to prosecute it, we must after so long a period accept the recitals as true and hold that these debts were binding on the estate. The debt due to Phul Chand and Makkhan Lal was under a decree passed in a suit for the recovery of money alleged to have been advanced for the purpose of buying seed and we may presume that that money was also borrowed on behalf of the estate. It does not appear why the remaining debt was incurred or why the cash was paid but the sums involved are comparatively small and we would have been willing to hold that Mt. Lachhman Kunwar was justified in alienating her husband's estate by means of the mortgage if she had
e in fact done so but what she did was to mortgage only her life interest. She said in the deed that 'she had executed these few presents by way of a mortgage deed of her life interest in the property.' We cannot see what necessity there could possibly have been for her to sell the property in order to redeem a usufructuary mortgage of her life interest in the property itself or what advantage could have accrued to the estate or for that matter to herself. The deed of sale was in effect a transfer of property subject to the mortgage for the purpose of discharging the widow's liability to Gulab Singh and obtaining a further sum of Rs. 100 in cash.

That being so, we have to consider whether the debt due to Gulab Singh was binding on the estate and whether it was necessary for the widow to get the sum of Rs. 100. The bond in favour of Gulab Singh contains no recital to show why the widow
f borrowed the money from him. The defendant produced a witness called Ishri Singh who pretended to remember that the money had been borrowed 50 years before for the payment of revenue. He said that he had been Mt. Lachhman Kunwar's servant for two or two and a half years about the time when the bond was executed, but he did not know the names of her brothers or nephews or other male relations. The learned Judge did not believe him and we agree that his evidence is worthless. The result is that there is no evidence at all that this debt was incurred for any legal necessity.

The learned Civil Judge held that the defendant had failed to prove legal necessity for the loan but he said that the plaintiffs had failed to prove that there was no legal necessity and he, therefore, presumed that there was legal necessity on the principle that presumptions are permissible to fill in
g details which have been obliterated by time. He quoted as his authority the case in A.I.R. 1932 Mad. 762[1] and mentioned that the widows were not well off. If we could hold, as the learned Judge has held, that the redemption of the mortgage justified the alienation, we would agree with him that a failure to prove the necessity for the loan of Rs. 500 would not be a matter of great importance, but we have found that no advantage accrued to the estate or the widow herself by the redemption of the mortgage and in these circumstances we cannot think that it is in consonance with the principles of Hindu law to say that the loan of Rs. 500 should be presumed in the absence of any evidence at all to have been justified by legal necessity merely because it was taken many years before the suit was instituted. The burden of proof must remain on the person who alleges necessity and to say that a suit by a reversioner to recover property alienated by a Hindu
h widow must fail in the absence of any evidence about the necessity of the loan would be in effect to abrogate the rule of limitation that he is entitled to institute a suit for the recovery of the property within twelve years of the date of the death of the limited owner. There is, in this case, nothing to lead to the conclusion that there was any necessity for the loan except the passage of time and possibly the allegation that the widows were not well off.

The learned Judge in discussing the financial position of the widows has been considerably influenced by the decision of this Court in a previous suit by the reversioners to set aside another alienation. This decision, as far as we can see, was not relevant to the suit which has given rise to the

1. ('32) 19 A.I.R. 1932 Mad. 762 : 139 I. C. 766, Kumarasami Mudaliar v. Narayansami.

appeal, but we assume that the learned Judge in- a tended to adopt the arguments which were used in that decision and we, therefore, propose shortly to deal with it. It was a case in which Jai Narain Singh sought to recover some property which had been transferred by Mt. Lachhman Kunwar by two mortgage deeds and had come into the possession of Munna Lal and others. There were recitals in the deeds to the effect that the property was being transferred in order to obtain money for the payment of revenue and for subsistence in the year 1897. The Subordinate Judge decided that the transfer was for necessity and this Court dismissed the appeal against his decision. Recitals are important in cases of this kind not so much because they prove the existence of a necessity but because they may be held to establish that the person who advanced the money was led to believe that such necessity existed and may have had good reasons for thinking that b the representations made to him were true.

The learned Judge of this Court who decided the appeal mentioned incidentally that one of the reasons for believing that the transfer was binding upon the reversioners was that the widows were left only with a 10 biswa share in one village, that the revenue of that village was about Rs. 658 and consequently that the net income could not be more than a thousand rupees a year which would mean that each widow was in receipt of about Rs. 40 a month. This may have been an additional reason for thinking that the persons who advanced the money on the basis of the mortgages had reason for thinking that it was really required for the purpose of paying off revenue due upon the village and for the support of the widow. The learned Judges mentioned that there had been a serious famine in the year 1896 which is a notorious fact. We do not c think that that alone is a good reason for thinking that Mt. Lachhman Kunwar must necessarily have required Rs. 500 to support herself or to pay revenue in the year 1884 in the absence of any recital to that effect in the deed under which she borrowed the money. In order to create the impression that the case before us was analogous to the previous case decided by this Court we have been referred to the Gazetteer of the district in which it is stated that there was some scarcity in the years 1877 and 1879 on account of the failure of rain, but the Gazetteer does not indicate that the situation was a very serious one and we do not think that there is any real analogy between the two cases. Our own opinion is that an income of Rs. 40 a month was adequate for the support of a Hindu widow in view of the standard of living which is expected of widows and which they ordinarily adopt and in view of the d prices of commodities which prevailed at the time when the transactions took place. There is, in our judgment, no reason for holding that it can be inferred from the financial condition of Mt. Lachhman Kunwar at that time that she must have been in need of money either to support herself or to pay the revenue due on the estate.

There remains the item of Rs. 100 which was paid in cash to Mt. Lachhman Kunwar on the date when the deed of sale was executed. There is no recital to show for what purpose this money was paid. It would be a negligible sum if there were reasons for thinking that the alienation was justified on other grounds, but as it is, we must go into the question whether this advance by itself was justified. It is certainly stated in the deed that the property was under attachment for the payment of revenue, but it must not be inferred that the attachment was one preparatory to the sale of the property. We have examined the original document. The term which has been translated by the word "attachment' is e 'qurq tehsil' which implies that the property had been taken under the direct management of the Collector under the provisions of the Land Revenue Act so that he could collect the rents and credit them to the payment of the revenue. There is no indication that the sum of Rs. 100 was to be used for the payment of the revenue. The property was in no danger of alienation. As soon as the rents had been collected and the revenue paid by the Collector, he would have returned the property to the person entitled to it. It has been suggested that the widow was personally liable, but we do not believe that there was any likelihood at all that the Collector, after having taken the property under his direct management so as to pay the revenue, would have taken any steps for the sale of the widow's personal property or for her arrest. Our conclusion is that there was no justification for the sale of this pro- f perty and we think that the plaintiffs were entitled to a decree.

We must now deal with the transfer by Mt. Chhattar Kunwar. She mortgaged the property in consideration for the payment of Rs. 2000 in cash which she admitted to have received. This money was borrowed according to the deed for the purpose of redeeming a mortgage executed by Mt. Chhattar Kunwar on 5th October 1890, in favour of Sant Lal and Moti Lal to secure a debt of Rs. 2862-8-0. This money was advanced to her according to the deed in order to redeem a prior mortgage for Rs. 2800 and to pay a sum of Rs. 62-8-0 arrears due by tenants payable by her. According to the deed executed on 5th October 1890, this prior mortgage had already been redeemed and the property delivered to her. We, therefore, assume that the sum of Rs. 62-8-0 g was on account of rent due to the prior mortgagees which Mt. Chhattar Kunwar had undertaken to pay, the prior mortgage being a usufructuary mortgage. This mortgage had been created by a deed executed by Mt. Chhattar Kunwar in favour of Kunwar Jai Ram Singh and Kunwar Sital Singh on 19th June 1879. It was in the same terms as the deed executed by Mt. Lachhman Kunwar on the same date to which we have already referred. We have explained that we are satisfied that the widows would have been justified in alienating their husband's estate in order to pay the debts which were due to them but that they purported not to alienate their husband's estate but to alienate their life-interest in the property. By the deed of 5th October 1890, Mt. Chhattar Kunwar created a simple mortgage in order to redeem the usufructuary mortgage of her life-interest and the question is whether she h was entitled to do so. We have held that the original debts were binding upon the estate, but these were discharged by the usufructuary mortgage of the life interest. By the terms of this usufructuary mortgage, it is clear that the mortgagees had accepted as their security the interest of the widow and had discharged the original debts on that assumption. The question is whether a debt incurred by the widow on her personal responsibility in order to pay a debt binding on the estate is itself binding on the estate so as to justify a transfer of that estate. We have been referred to certain authorities. In 19 All. 300[2] it was held that the creditors of a Hindu widow could not after her death have recourse to ancestral property in the hands of the reversioners, in respect of which property the widow had enjoyed only a

2. ('97) 19 All. 300 : 1897 A.W.N. 69, Dhiraj Singh v. Manga Ram.

widow's life estate, if in fact no instrument charging the property beyond the widow's lifetime had been executed by the widow, even though the debt sued upon was incurred for legal necessity and was one in respect of which such property might have been made liable beyond the widow's lifetime.

In 30 All. 394[3] it was held that a decree on the basis of a debt incurred by a widow and the sale of the property of the widow's late husband in execution of such a decree bound only the widow's estate where the money had been lent to the widow on her personal security. On the other hand, in 60 Bom. 311[4] it was held that an estate in the hands of a reversioner was bound by an unsecured debt contracted by a Hindu widow as representing the estate, if the debt was for legal necessity. It was suggested to us that it was not possible to reconcile these decisions and that we should follow the later one of the Bombay High Court. In our judgment it is not necessary to conclude that a different rule of law was laid down by the High Courts at Allahabad and Bombay. The question seems to us really to be one of fact. If in the circumstances of a particular case a person advancing money in order to discharge a liability against the estate is led to believe and quite reasonably concludes that the widow is acting on behalf of the estate, we suppose that the estate would be bound, while, on the other hand, if it appears that the advance was made personally to the widow and there was no suggestion that she was borrowing the money on behalf of the estate the widow alone would be bound and the creditor would have no remedy against the estate. In the Bombay case to which we have referred the finding was that the debt was incurred by the widow in order to obtain money for the cultivation of her husband's land and for payment to the servants working on it, and it might well have been understood both by the widow and by the person who advanced her money that the money was being advanced to the widow as the representative of the estate and not to her in her personal capacity.

In the two Allahabad cases the facts are not clear from the judgments but there may have been reason to think that the transaction was one between the creditor and the widow in her purely personal capacity. In the case which has given rise to this appeal the deed of usufructuary mortgage makes the matter perfectly clear. The widows said in so many words that they were hypothecating their personal life estate and the mortgagees could not have been under any misapprehension that they were advancing the money to the widows as the representatives of the estate. It seems to us that they having accepted the security of the life estate, could not possibly afterwards turn round and allege that they had any right to hold the property against the reversioners till such time as the mortgage was redeemed. We do not think that the persons who advanced the money to redeem the mortgage could be in any better position than the mortgagees themselves. Those who advanced money to Mt. Chhattar Kunwar did so in order to enable her to recover her life estate. That was purely a personal matter. They did not advance the money in the interest of the reversioners who would have been entitled in any event to take the property on the death of the widow free from the mortgage. In our judgment, therefore, the debt of the simple mortgagees of the year 1890 was not binding on the estate and the money borrowed to pay that debt was a personal liability of the widows and did not justify the alienation of the husband's estate.

We may mention that another point was raised in the course of arguments. This was that a widow might pledge her own credit, or use her own money, for the payment of debts binding upon the estate and then at some later time might recoup herself as it were from the estate. We can understand that there may be circumstances in which a widow might act in this way but we think it would have to be made clear that she intended to advance her own money to the estate with the intention ultimately of recovering the money from the estate. There is nothing in the case with which we are dealing to suggest that either of the widows had any intention of this kind. Mt. Lachhman Kunwar, as we have already said, acquired no advantage by transferring the equity of redemption by the deed of sale. Mt. Chhattar Kunwar did apparently recover her life interest in the property transferred by the deed of usufructuary mortgage and hold it for a certain time, but she acquired no ultimate advantage because she eventually lost not only the property in which she had mortgaged her life interest but also a large part of her share in the village of Dhuri. However that may be, she had discharged the liability due from the estate by the usufructuary mortgage of her life interest and it does not appear that at that time she was intending to make a temporary advance to the estate out of her own personal interest so that she might be justified in alienating the estate in order to recoup herself. Our conclusion is that the alienation of the estate by Mt. Chhattar Kunwar under the simple mortgage was not justified by any necessity and that the mortgagees on the slightest enquiry could have discovered the true position of affairs. We find that the suit in so far as it relates to the property alienated by Mt. Chhattar Kunwar should also be decreed.

We may mention that the learned Judge of the lower Court also considered that the plaintiffs could not recover the property because the reversioner for the time being had in the year 1898 ratified the transfers. He referred to a deed which was executed by Mt. Lachhman Kunwar, Mt. Chattar Kunwar and Kunwar Jairam Singh on 2nd May 1898. It was a sale deed in favour of Thakur Chattar Singh and others by which the two widows alienated their right of redemption of a mortgage of certain villages with which we are not concerned. This mortgage was executed by the two widows on 16th April 1877, in favour of Kunwar Jairam Singh and Kunwar Sital Singh to secure a debt of Rs. 14,000. The mortgage was usufructuary. Kunwar Jairam Singh executed the deed of sale. He said in the deed that he was executing it "for this reason that in future the vendee may not have any kind of dispute or apprehension for a claim and that all the property may be transferred with my consent." The widows themselves in the body of the deed said that they had divided the property between them in equal shares as they were not on very good terms and that they had been appropriating the income and transferring the property as need arose. We do not think that the execution of this document by Kunwar Jairam Singh can be held to be an acquiescence on his part in the transfer of the properties with which we are dealing. He certainly consented to the transfer of the right of redemption in the villages which were sold by the deed of 1898 but he did no more than that. There is nothing else to suggest that the nearest reversioner at any time consented to the

3. ('08) 30 All. 394 : 5 A.L.J. 367 : 1908 A.W.N. 173, Kallu v. Faiyaz Ali Khan.
4. ('36) 23 A.I.R. 1936 Bom. 59 : 160 I. C. 1046 : 60 Bom. 311 : 38 Bom. L. R. 6 (F. B.), Dhondu Yeshwant v. Mishri Lal.

transfers which were in question in the suit which has given rise to this appeal.

The appellants have also raised the point that the transfers by the widows were not binding even if they were executed for necessity because neither widow could alienate without the consent of the other. The learned Judge of the lower Court repelled this argument holding that the deed of 1898 to which we have just referred suggested that each widow had consented to all alienations made by the other. We agree with the learned Judge upon this point. Apart from the recitals in the deed of 1898 there is the fact that both the widows on the same date executed the two deeds of usufructuary mortgage to secure a debt of Rs. 2800 each and that these deeds were in the same terms and were executed in order to discharge the respective liabilities of the two widows in the same debts due in the main from the estate. We may mention that certain other points were raised in the lower Court but have not been argued before us. Only one of these points is mentioned in the grounds of appeal and that was that the widows were induced by fraud to transfer the property. The learned Judge found that there was no definite allegation of fraud in the plaint and no argument has been addressed to us upon the point. The defendant raised some points about technical defects in the plaint about limitation and about the right of the plaintiffs to sue. These were decided in favour of the plaintiffs and it has not been suggested in the course of arguments that the decision of the learned Judge of the lower Court was wrong.

The result is that we find that the alienations were not justified by any legal necessity and we consequently direct that a decree should be drawn up awarding the plaintiffs possession of the property mentioned in the plaint with the exception of holding No. 2 comprising an area of 1 bigha 8 biswa described in heading No. 3 of the details of the zamindari property given in the plaint. The suit in respect of that item of property is dismissed, but as the claim to it was withdrawn our decision should not affect the decree for costs There was also a claim for Rs. 1500 on account of mesne profits, but the learned Judge of the lower Court has not come to any decision about the amount which is due under this head. We therefore direct that the plaintiffs shall be entitled to mesne profits and that an enquiry shall be held by the lower Court as to the amount due for the three years next before the institution of the suit and for pendente lite and future mesne profits under the provisions of O. 20, R. 12 (b) and (c), Sch. 1 to the Code of Civil Procedure. A final decree shall then be passed by the Court below in accordance with the provisions of O. 20, R. 12 (2) of the Code. The appellants shall get their costs in both Courts.

G.N./R.K. *Order accordingly.*

Hindu Law—
(a) ('40) Mulla, P. 186 Pt. (w).
('38) Gour, P. 513, N. 1315 and P. 1079 Pt. 2.
(b) ('40) Mulla, P. 186 Pt. (P).
(c) ('40) Mulla, P. 206, N. 195.
('38) Gour, P. 1109, N. 2589.

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* A. I. R. (29) 1942 Allahabad 194

SPECIAL BENCH

COLLISTER, BAJPAI AND BRAUND JJ.

K. B. Syed Muhammad Isa and another — *Applicants*

v.

Commissioner of Income-tax, Central and United Provinces —

Opposite Party.

Case No. 667 of 1937, Decided on 17th February 1942.

*** Income-tax Act (1922), Ss. 2 (1), 4 (3) (viii) —Person as mutwalli receiving agricultural and non-agricultural income and after performing functions of his office allowed to appropriate residue in lieu of his services — Person held beneficiary — Agricultural income held did not cease to be so when received by him as beneficiary — Method of determining amount to be treated as agricultural income out of total fund stated.**

Under two deeds, a person was appointed mutwalli and he was to receive both the agricultural and non-agricultural income, and after performing the functions of his office, was allowed to appropriate the residue of the amount received in lieu of his services. The whole of the amount received by him was sought to be assessed on the ground that once the income of the agricultural properties reached the hands of the assessee in his primary character as mutwalli, its character as "agricultural income" was exhausted and therefore when the residue, after satisfying the prior trusts, was appropriated by the assessee in his secondary capacity as beneficiary, it has ceased to be "agricultural income" and had lost the protection of S. 4 (3) (viii):

Held that so long as the services were and are performed the assessee was and will be, beneficially interested in the surplus income of the properties and was, and will be, a beneficiary in respect of that surplus under the trusts of waqf. And the agricultural income which he received as mutwalli did not change its character when he received the residue as beneficiary: *Case law referred.* [P 197 C 2]

Held further that in determining the amount of the agricultural income in such residue which would be exempt from assessment, the principle to be applied was that the prior charges on the mixed income fund should be apportioned between the component parts thereof rateably and in consequence the surplus which remains should be rateably attributed to agricultural and non-agricultural income. Therefore the method to apply was to treat the residue in the hands of the assessee as being composed of agricultural and non-agricultural income in the same ratio as the total of these two classes of income bore to each other at the time when they passed into the common fund: (1780) 1 Bro. C. C. 503; (1830) 1 Russ. & M. 752; (1808) 14 Ves. 537; (1833) 1 My. & K. 665, *Rel. on*; ('41) 28 A. I. R. 1941 Cal. 598, *Ref.* [P 196 C 2; P 199 C 1, 2]

Gopi Nath Kunzru — for Applicants.

N. P. Asthana — for Opposite Party.

COLLISTER J. — This is a reference under S. 66 (2), Income-tax Act. On 31st January 1935, K. B. Mohammad Isa was assessed to income-tax on an income of Rs. 5405. The original source of part of this income was agricultural property while the

original source of the other part was non-agricultural property. On appeal the Assistant Commissioner held that the income from non-agricultural property only was assessable, and this he found to be Rs. 1848, which is below the assessable minimum. I do not understand how precisely this figure was arrived at; but it is immaterial. Subsequently that officer's successor referred the matter to the Commissioner of income-tax who, in the exercise of his revisionary powers under S. 33 of the Act, restored the Income-tax Officer's assessment. Thereafter the assessee moved the Commissioner to refer five so-called questions of law to this Court, but the Commissioner found that only one question of law arose. He accordingly referred the following question to this Court :

"Whether in the circumstances of the case the sums received by the applicant out of the income of the trusts either as remuneration for services rendered as one of the trustees or in his capacity as a beneficiary could be regarded in his hands as agricultural income within the meaning of S. 2 (1), Income-tax Act ?"

The Commissioner is of opinion that the question should be answered in the negative. There is a parallel reference in respect to the assessee's brother, Syed Mohammad Umar; but we need not concern ourselves about that, for the Commissioner says that the facts and the question of law involved are identical. There was a third brother, but he is dead. On 7th September 1886 a man named Sheikh Karim Baksh made a waqf-alal-aulad in respect to certain properties, and under the provisions of the trust deed the assessee and his brothers—who are the sons of a daughter of the founder's sister's son—ultimately became the mutwallis. In para. 4 of the deed of trust it was provided that, after applying the income of the dedicated property to the purposes of the trust, the mutwalli should "utilise the balance for their personal expenses." The trust property consisted of zamindari and house property.

On 17th April 1906 one Sheikh Abdus Samad made a waqf of a similar character; and under this deed also the assessee and his brothers—who are the sister's sons of the founder—became the mutwallis. In para. 3 it was provided that after the purposes of the trust had been fulfilled, the mutwallis should appropriate "whatever is saved from the profits of the trust property . . . . . in lieu of their services." Here too the property dedicated was both agricultural and non-agricultural. A third deed of trust was executed by this same Abdus Samad on 1st September 1908—but it is unnecessary to consider this trust because it involves no agricultural property. In order that a proper answer be given to the question referred to us I propose first to ignore the income from house property; that is to say, I shall deal with the trust deeds of 7th September 1886 and 17th April 1906 on the footing that all the income is from agricultural and revenue paying property.

Section 4 (3) (viii) of the Act provides that agricultural income shall not be included in the total income of the person receiving it. In the case which is before us the assessee received the income in his capacity as mutwalli and, after discharging the obligations of the trust, he appropriated the balance to himself. Under the first trust deed, as we have already seen, he was authorised to utilise this balance for his personal expenses and under the second trust deed he was allowed to appropriate it in lieu of his services. The language used in the two trust deeds is thus different; but I am inclined to think that the intention in each case was the same. The mutwalli was required to perform the functions of his office and, so long as he did so, he was entitled, in consideration for these services, to appropriate the residue of the profits. In each case he was a beneficiary with an obligation attached to his enjoyment of the benefit. He had two capacities, one as mutwalli and the other as beneficiary. The question for determination is whether the assessee, when as beneficiary he appropriated the money from the fund held by himself as mutwalli, he "received" it as agricultural income within the meaning of S. 4 (3) of the Act or whether, in the process of passing through his hands as mutwalli into his hands as beneficiary, it lost its character of agricultural income; whether in other words, a new source was created, the effect of which was that the money which passed into his hands as beneficiary ceased to be agricultural income.

In 52 Mad. 827[1] a Full Bench of the High Court of Madras held that the fact that a pecuniary legacy bequeathed by a zamindar had to be paid by his executor out of agricultural income did not make the legacy an "agricultural income" within the meaning of S. 2 (1) of the Act. The judgment is very brief and no reasons are given for the decision. In 5 I.T.C. 493[2] a widow was in receipt of an allowance by way of maintenance from the executor of her late husband's estate and she claimed—but did not prove—that the estate consisted of agricultural land. A Bench of the High Court of Bombay held that this allowance was liable to income-tax. Beaumont C. J. observed :

"She is not given a part of the estate or a part of the income, but she is given out of the estate a monthly sum of Rs. 900. It may be payable out of the income or it may be payable out of the corpus and the mere fact that, if it is payable out of the income, that income itself may not be subject to tax seems to me to be wholly irrelevant."

Another decision relied upon by the Advocate-General is 9 Luck. 115.[3] In that case a maintenance allowance had been provided for a widow by will out of her husband's estate—but it is not clear whether it was to be paid exclusively out of the income or whether the corpus of the property was also liable. Subsequently there was a compromise in an interpleader suit under which the lady accepted an annuity of Rs. 4000 per mensem; and it was held that this allowance was not agricultural income within the meaning of S. 2 (1) (a) of the Act and was therefore not exempt from income-tax under S. 4 (3) (viii). In that case the annuity derived from the intervening compromise whereas in the case which is before us the bounty or remuneration or whatever it may be called is directly referable to the trust-deed; it merely passed under the terms of the instrument through the hands of the mutwalli into the hands of the assessee after the obligations of the trust had been discharged. In 9 I.T.R. 292,[4] there was a scheme of administration which was embodied in a compromise decree and which defined the duties of the mutwalli of a wakf and fixed his remunera-

1. ('29) 16 A.I.R. 1929 Mad. 598 : 119 I. C. 387 : 52 Mad. 827 : 57 M.L.J. 36 (F.B.), Zamindari of Tiruvar v. Commissioner of Income-tax.
2. ('31) 5 I.T.C. 493 (Bom.), Sundrabai Saheb v. Commissioner of Income-tax, Bombay.
3. ('33) 20 A. I. R. 1933 Oudh 475 : 146 I. C. 651 : 9 Luck. 115 : 10 O. W. N. 1003, Commissioner of Income-tax, Central and United Provinces v. Rani Saltanat Begam.
4. ('41) 28 A. I. R. 1941 Cal. 598 : 196 I. C. 883 : (1941) 9 I. T. R. 292 : 45 C. W. N. 647, In re K. Habibulla.

tion at a specific sum to be paid out of the waqf estate, the payment being conditional upon the proper discharge of his duties as mutwalli; and it was held by a Bench of the High Court of Calcutta that this remuneration was not exempt from income-tax. Derbyshire C. J. observes :

"The assessee's remuneration is conditional upon his proper discharge of his duties as mutwalli and is remuneration for such work; it is money earned by performing his office not rents and profits of agricultural land coming to him simply as a beneficiary under a settlement. Under those circumstances I hold that the remuneration that he received as mutwalli is remuneration for discharging the duties of his office and as such comes within S. 3 (2) (viii), Income-tax Act, 1922, being a receipt arising from the exercise of his vocation, whether the fund from which he is paid comes originally from an agricultural source or not."

Panckridge J. did not agree with this view. He says :

"I am inclined to the view that agricultural income does not lose its right to exemption because it can be brought under one of the heads of income set out in S. 6. To my mind the important thing is that the consent decree does not purport to provide for payment of any rent or revenue to the assessee. What it provides for is the payment of a specified sum in currency. It is not necessary to decide what the position would be if the decree provided that the assessee should be remunerated by the rents and profits of a portion of the waqf properties or by a proportion of the entire rent of the waqf properties. I am not, as at present advised, inclined to agree with the submission put forward on behalf of the income-tax department that rents payable to the assessee under an arrangement such as I have mentioned would not be entitled to exemption. I think it is significant that under cl. (15) of the scheme of arrangement the remuneration is payable from the waqf and not from the rents and revenues of the waqf; that is to say, the assessee may appropriate to himself in discharge of his remuneration either income or corpus."

Upon the facts of the case this learned Judge agreed with the conclusion of the learned Chief Justice, but not on identical grounds. The facts of that case are distinguishable from the facts of the case which is now before us in two respects. In the first place the remuneration received by the mutwalli took its origin from a scheme of administration which was drawn up under a compromise decree; and in the second place the remuneration was payable either out of income or out of the corpus. In the present case the balance of the income from the zamindari property goes through the mutwalli to the beneficiary (who happen to be one and the same person) by virtue of an obligation imposed under the terms of the trust deed itself upon the income of the property. The mutwalli is the channel through which the beneficiary received the money, and the latter is to all intents and purposes the direct recipient. There is thus no change of source and no alteration in the character of the income; it remains agricultural income after it has passed into the hands of the beneficiary. In my opinion therefore the money received by the assessee—on the assumption that it all originated from zamindari property—was agricultural income in the hands of the assessee within the meaning of S. 2(1) of the Act.

This finding, however, does not dispose of the reference, for, in this particular case, there are two classes of income, one from zamindari and the other from urban property. Presumably the two sets of income formed a composite fund in the hands of the mutwalli; it is not suggested that two separate funds were maintained by him and that payments therefrom were separately made and recorded. Assuming, therefore, that there was a composite fund for the income from zamindar and for the income from non-agricultural property, the question which falls for consideration is whether the agricultural income, having once passed into this common fund, lost its character as agricultural income and passed out of it as assessable income. In the case from Calcutta which I have already mentioned Panckridge J., observes :

"I cannot think that the assessee can avoid taxation by selecting one source of the remuneration payable to him rather than the other. Although it is admitted that the properties of the waqf are entirely agricultural, yet there may be cases where waqf properties consist both of agricultural properties and urban properties. Again I cannot think that the mutwalli in such a case could escape tax by electing to take his remuneration from the rents of the agricultural properties alone, nor do I think that the law can contemplate any sub-division of his remuneration according to the proportion which the agricultural income of the wakf bears to the non-agricultural income."

For my own part, I find it difficult to appreciate why the assessee should be penalised by having his whole bounty treated as assessable to income-tax. Supposing there was a composite fund in the hands of a mutwalli containing agricultural income amounting to Rs. 10,000 and non-agricultural income amounting to Rs. 500, it would be exceedingly hard on the assessee beneficiary if the whole balance which he was entitled to appropriate after the purposes of the waqf were satisfied were to be treated as non-agricultural income. The Act makes no provision for such a case as the present and it seems to me that some equitable method must be evolved which will operate justly both as regards the assessee and as regards the Department. In my opinion the obvious method to apply is to treat the residue in the hands of the assessee as being composed of agricultural and non-agricultural income in the same ratio as the total of these two classes of income bore to each other at the time when they passed into the common fund. This method has the merit of simplicity and is eminently fair ; and it contravenes no provision of law. I would answer the reference in the terms proposed by my brother Braund, whose judgment I have had the advantage of seeing.

BAJPAI J.—I have had the advantage of reading the judgments of my brethren Collister and Braund and I find that I can add nothing useful to what has been said by them and I am in entire agreement with their views. I may, however, refer to the case in 1935 A. L. J. 978[5] where at p. 981 their Lordships of the Privy Council while discussing the sub-s. (3) of S. 4, Income-tax Act, say:

"The result, in their Lordships' opinion, is to exclude 'agricultural income' altogether from the scope of the Act, howsoever, or by whomsoever it may be received . . . . The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, contrasting thus with the exemption con-

5. ('35) 22 A.I.R. 1935 P.C. 172 : 157 I.C. 289 : 14 Pat. 623 : 62 I.A. 215 : 1935 A.L.J. 978 (P.C.), Commissioner of Income-tax, B. & O. v. Kameshwar Singh.

ferred by the same sub-section on the 'income of local authorities'."

In the case before us nothing has happened to remove the indelible impression of the agricultural income received by the assessee as a mutwalli and then retained by him as a beneficiary.

BRAUND J.—This is a reference by the Commissioner of income-tax of the Central and United Provinces under S. 66 (2), Income-tax Act (11 of 1922). The assessee, one Khan Bahadur Syed Mohammed Isa, (hereinafter called the "assessee"), is a mutwalli under three instruments in the nature of waqf-namas. Under the first of these which is dated 7th September 1886, the settlor Sheikh Karim Bux, divested himself of certain properties in Allahabad, partly agricultural and partly non-agricultural, and constituted a perpetual waqf of them. So far as the trusts of the waqf are concerned they may be shortly stated. After limiting the succession of mutwallis, of whom the assessee is now one, the settlor by para. 4 directed them to keep down the Government revenue, expenses of management and litigation and other expenses out of the income, subject thereto to apply the income in making the payments for charitable and other purposes set out in Sch. 2 and finally, subject to both the foregoing trusts, to "utilize the balance for their personal expenses." There were at the material time two mutwallis of whom the assessee was one and in effect, therefore, this ultimate trust of the residuary income of the properties amounted to a direction to divide the surplus income between themselves.

Under the second waqf-nama, which is dated 17th April 1906, the settlor, who in this case was Sheikh Abdus Samad, constituted a waqf consisting of both agricultural and non-agricultural properties in the Allahabad District and, after limiting the succession of mutwallis under which the assessee at the material time held that office, declared certain trusts of the income under which, after payment of the Government revenue and management expenses and making various charitable and other payments, the residue of the income was to "be appropriated by the mutwalli or mutwallis at the time, in lieu of their services." It is not necessary to refer to the third waqf-nama because, for reasons which I shall presently explain, it is not now material. It is sufficient for the present purpose to observe that under the first two iustruments the assessee became entitled under the settlement to, and received, the residuary income of the respective sets of waqf properties (in each case consisting of a mixed corpus of agricultural and non-agricultural properties) after satisfying the prior trusts of the income declared by the respective instruments of waqf. In the one case, he received this residue of the income "for personal expenses," and in the other case "in lieu of . . . services."

To put the matter shortly, the Income-tax Officer assessed the assessee for the year in question (1932-33) to income-tax on, inter alia, the sums he received in respect of the residuary income under each waqf. The assessee appealed to the Assistant Commissioner who held that the assessee was liable to tax only on "such part of the income from non-agricultural sources as were received by him . . . ." and reduced the assessment accordingly. Ultimately this reduced assessment was again revised by the Commissioner himself under his revisional powers and the original assessment of the Income-tax Officer was restored on the ground that the assessee "would certainly be liable to be taxed on the income which he received as a remuneration for his services once the income materialized," notwithstanding that in its origin the income out of which this "remuneration" was derived was in part produced by agricultural property and was therefore by derivation "agricultural income." The Commissioner appears to draw a distinction, which is no doubt for most purposes a sound distinction, between the capacity of the assessee as a mutwalli and his capacity as a 'beneficiary' and on that ground brings into charge the income received by him "as remuneration for his labours irrespective of the source of the income once it has materialized." I think that in effect, the Commissioner's contention may be stated by saying that he adopts the view that, once the income of the agricultural properties reached the hands of the assessee in his primary character as mutwalli, its character as "agricultural income" was exhausted and therefore when the residue, after satisfying the prior trusts, was appropriated by the assessee in his secondary capacity as beneficiary, it has ceased to be "agricultural income" and had lost the protection of S. 4 (3)(viii), Income-tax Act.

I regret that I do not think that this is the correct view. Before examining the alternative view, however, it is desirable to refer to the terms of the residuary limitations of income. Neither is expressed to be a "salary", nor do I think it true to say, as the Commissioner has done, that either entitled the assessee to receive "a specific sum" as remuneration for managing the trust property. It would, however, be idle to deny that the motive, or perhaps, the condition, of his receiving the share of residuary income at all was in both cases the performance of his duties as mutwalli, and indeed, in one case, it is expressed to be 'in lieu of services.' I must concede therefore that the interest of the assessee is at any rate in the nature of remuneration, though hardly in strictness a "salary". But, in my view, this circumstance makes no real difference to the principle which we have to apply. Whatever the motive of the settlor's bounty towards the assessee or whatever the condition attached to it, it does not alter the fact, that so long as the services were and are performed, the assessee was and will be, beneficially interested in the surplus income of the properties and was, and will be, a 'beneficiary' in respect of that surplus under the trusts of the wakf. I wish to make this clear, because I am unable to accept it that the circumstance that the assessee is required to perform the service of a mutwalli by itself alters in any way in this case his intrinsic character as a 'beneficiary' under the instrument of wakf. I think therefore that in both cases the assessee is entitled to be treated as a 'beneficiary' and not as a servant of trust by contract. The position would, I think, have been quite different, had the assessee been a mere employee of the wakf by contract deriving a 'salary' which was payable (ordinarily, at least) out of the income of the wakf properties.

The matter, to my mind, resolves itself into two questions, to the first of which the circumstance that the corpus from which the income was originally derived was a mixed corpus consisting of both 'agricultural' and 'non-agricultural' properties is immaterial. Assuming that the whole of the corpus has been 'agricultural' and the entire income of the wakf had, in its origin, been 'agricultural income' one asks first whether in the circumstances the mutwalli, who is entitled under the trusts of the settlement to the surplus income after keeping down the prior trusts, can be said to receive that surplus

income still in its character as "agricultural income," or whether it has undergone some change and lost that character before it is appropriated, or retained, by him beneficially. I can see no reason why it should have lost its character as "agricultural income." Nor can I perceive why the fact that the settlor has chosen to make it dependent on the mutwalli continuing to discharge the duties of his office should have changed its character. For the purpose of handling the income of the wakf properties, the mutwalli is, in my view, indistinguishable from an ordinary trustee. Wherever the legal estate may technically be vested, the duty of the mutwalli was to collect and receive the income, to pay out of it the prior charges and to distribute the residue to the ultimate beneficiaries. Nor can it make the least difference that the mutwalli himself occupied both positions. The result was merely that, instead of paying over the ultimate surplus income to a third person, he appropriated and retained it to himself.

We have been referred to a number of authorities both in support and in opposition to this view. In 52 Mad. 827[1] three Judges of the Madras High Court took the view, without giving fully their reasons for it, that a pecuniary legacy expressed to be payable out of agricultural income is not itself "agricultural income." In 5 I.T.C. 493[2] two Judges of the Bombay High Court have held that an annuity by way of maintenance had, notwithstanding that it was paid out of agricultural income, lost its character. It is possible, I think, that some distinction may be capable of being drawn between an executor charged with the administration of an estate and a mutwalli who merely acts as the recipient of the income of a dedicated corpus, and between a legacy or annuity, created by a will, and a mere surplus of the income of an estate which the trustee or mutwalli has nothing to do but to pass on or retain. I do not think it necessary to venture, even if I would, to differ from these two cases. The third case to which the learned Advocate-General has referred is A. I. R. 1933 Oudh 475[3] in which a lady entitled to maintenance out of an estate, it not being specified whether she was entitled to it out of income or corpus and compromised her claim for an annuity of Rs. 4000 a month. Here again, it was held that the annuity had lost its character as "agricultural income." But that, with respect, I find it easy to understand on the ground that the source of the annuity was the compromise agreement which had intervened and created it de novo. It was not a mere handing on of the income, or of part of the income, of settled property under the terms of the settlement itself.

I venture to think that the case in 9 I.T.R. 292[4] in the Calcutta High Court is more helpful in the circumstances of the present case. Here, a mutwalli had become by sanction of the Court entitled to a monthly "salary" of Rs. 2,500 a month and the question was the same as the one with which I am now dealing—whether, the original source of it being agricultural income, it was itself "agricultural income." This case was obviously a far stronger one from the point of view of the Commissioner than the one now before us, in which the mutwalli is entitled not to a fixed sum, but to the surplus of the available income itself after the other charges on it have been satisfied. While the learned Chief Justice of the Calcutta High Court found it impossible to regard this "salary" as being itself "agricultural income," notwithstanding its source, Panckridge J. was inclined to the opposite view. He says: "I decline to the view that agricultural income does not lose" its right to exemption because it can be brought "under one of the heads set out in S. 6. . . . ." If that is the true view, as, with great respect, I am inclined myself to think it is, then it completely disposes of the Commissioner's finding that, because of its character as remuneration, it has lost its character as agricultural income. As I have already said, the case before us is a much stronger one in the tax payer's favour than was this Calcutta case and I think myself, without venturing to suggest which of the learned Judges may have been right in the Calcutta case on its particular facts, that in the present case in which a mere surplus of the same income that was receivable by the assessee as mutwalli was retained by him as beneficiary, there has been no such change in it as can have altered its essential character. It was in my view, still "agricultural income" when it reached the hands of the assessee as beneficiary.

In a case in our own Court 50 All. 495[6] three learned Judges considered whether a mortgagee, who was a professional money-lender and who, having taken a usufructuary mortgage of property had at once leased it back again to the mortgagor in consideration of an annual rent charge which covered both principal and interest was assessable to income-tax or not on the rent. The property was ancestral property and it was successfully contended that the rent charge was itself agricultural income being still derived out of agricultural property. This case is a very strong one for the purposes of showing that a merely technical change of form is insufficient to deprive income of its agricultural character. The late Sir Shah Sulaiman says that the "income received by a usufructuary mortgagee is really agricultural income, though it just happens to be also a return for the capital invested by him." The learned Judges refused to treat it as profits of the money-lending business, although it no doubt might justly be regarded as the produce of the business as well as being agricultural income. The case is a strong one, I think to illustrate the principle that income does not alter its character merely because it changes its form, and to that extent, but no further, it is helpful in the present case. To the same effect is another money-lending case 62 I. A. 215.[5] The same principle appears to underlie this case as well.

The second of the two questions to which this reference has given rise is in my view the more difficult. It involves considering the effect of the income in this case being produced by a mixed corpus consisting of both agricultural and non-agricultural property. The difficulty is this. The prior trusts of income are limited to take effect on the whole income irrespective of its source. The fund of income in the hands of the mutwalli forms one fund, out of the whole of which the prior trusts have to be satisfied irrespective of its source. Now, how is it possible to say out of what particular part of this income fund, the prior charges have been satisfied? And, if it is not possible to do that, how can the residue or surplus be attributed to the agricultural rather than to the non-agricultural income or in what proportions is it to be attributed? In other words, is it possible, as a practical matter, to identify what is left? If it is not possible, then the result can be suggested that, on the mixing-up of the income fund, it lost its identity altogether and cannot afterwards recover it, because it is practically

6. ('28) 15 A. I. R. 1928 All. 81 : 107 I.C. 683 : 50 All. 495 : 26 A. L. J. 280 (F. B.), In re Makund Sarup.

impossible to disentangle it again. Panckridge J., thought the point did not actually arise, drew attention in the Calcutta case to which I have already referred to this difficulty which might arise where the income fund was mixed for the purpose of satisfying the prior trusts. He says :

" Although it is admitted that the properties of the wakf are entirely agricultural, yet there may be case where the wakf properties consist both of agricultural properties and of wakf properties. Again, I cannot think that the mutwalli in such a case could escape tax by electing to take his remuneration from the rents of the agricultural properties alone, nor do I think that the law can contemplate any sub-division of his remuneration according to the proportion which the agricultural income of the wakf bears to the non-agricultural income."

I agree with the learned Judge that this does present a difficulty. It is obviously impossible that it should be left to the beneficiary himself to elect to discharge the prior trusts out of that part of the mixed income fund which attracts tax and to appropriate the part which does not attract tax to his own interest. That would, in effect, be permitting the assessee to determine whether he would pay income tax or not. Moreover, in ninety-nine cases out of a hundred in cases of this kind, there is, of course, no conscious payment out of one part of the fund rather than out of the other. I should, however, desire to reserve my view in a case, should ever one occur, in which a mutwalli actually segregated one part of the fund from the other. It is, I think, equally impossible to accept the view that the taxing authority can elect which part of the mixed fund to attribute to the prior trusts and which to attribute to the beneficial interest, for that conversely, would be permitting the taxing authority to determine whether income-tax should be paid or not. The difficulty is a real one, as the learned Judge has pointed out. But I venture respectfully to think that he has suggested the true answer, though he has himself rejected it. In my view, it is consistent both with practical good sense and with established principles of law and equity that the prior charges on the mixed income fund should be apportioned between the component parts thereof rateably and in consequence that the surplus which remains should be rateably attributed to agricultural and non-agricultural income. To take the simplest case, I will suppose that the mixed income fund is composed as to half of agricultural income and as to half of non-agricultural income. In that case, half the prior charges would be borne by each kind of income and it follows that of what remains half would still be agricultural income and the other half non-agricultural income.

Not only does this appeal to me as the fair and sensible solution, but it is, I think, supported by sound principle. As I view it, the collection and mixture of the income fund in the hands of the assessee as the mutwalli in the first place was for the purpose of creating an aggregate fund on which the payment of the primary trusts of income could be charged. As each item of income was received, it was charged first with the satisfaction of the prior trusts and the whole fund; and every part of it was so charged. But when these trusts were satisfied the purpose of the mixed fund ceased and, in my view, there is nothing inconsistent with well-recognized principles that, the purpose having ceased, the fund should in equity be deemed to have resumed its original elements. This is the foundation of the well-known principle in (1780) 1 Bro. C. C. 503.[7] And an apportionment of the outgoings between the two elements of the mixed fund is equally consistent with established equitable principles where charges have to be met out of a mixed mass of pure and impure personalty the residue of which is deemed subsequently to devolve in its original form : *See* (1808) 14 Ves. 537,[8] (1830) 1 Russ. & M. 752[9] and (1833) 1 My. & K. 665[10].

I can see no reason why the same principles should not be applicable in the present case and why the expenses, cost of litigation and the charitable and other outgoings, should not be deemed to have been discharged rateably out of the agricultural and non-agricultural income leaving the residue to resume its normal character in the same proportions. This involves in all cases a calculation which is both possible and easy over any given period and produces a result which is eminently just. I venture to think that this is the proper solution in the present case and, consistently both with convenient practice and sound principle, the result should be that, after discharging the prior trusts, the remaining surplus of the income fund in the hands of the mutwalli ought to be attributable to agricultural and non-agricultural income respectively in the same proportions as those two elements bore to each other in the first place. The result of this will be that the prior trusts will have been satisfied rateably out of the agricultural and non-agricultural income. Moreover, in the view that I have thought it right to take upon the first question, that proportion of the surplus income which is attributable under the foregoing calculations to agricultural income will resume its character and will be appropriated to himself by the mutwalli in his capacity as a beneficiary still in its character of agricultural income. As regards the third of the waqf-namas in respect of which the present question has been raised, I think it has been included by mistake. The fact seems to be that non-agricultural property only was settled by this waqf-nama and, accordingly, no question can arise in respect of the immunity from income-tax of the recipient of any part of its income. The actual question which has been propounded to this Full Bench is :

"Whether in the circumstances of the case the sums received by the applicant out of the income of the trusts either as remuneration for services rendered as one of the trustees or in his capacity as a beneficiary could be regarded in his hands as agricultural income within the meaning of S. 2 (1), Income-tax Act ?"

The answer that I would accordingly give is :

"In the circumstances of this case, so much of the sums received by the applicant which represent his share of surplus income in the year of assessment under the waqf-nama dated 7th September 1886 and the waqf-nama dated 17th April 1906 as bears the same proportion to the whole of such sums received by him as aforesaid as the agricultural income of the waqf properties respectively bore to the non-agricultural income of the waqf properties in the year of assessment must be regarded in his hands as agricultural income within the meaning of S. 2 (1), Income-tax Act."

Thus would I answer the reference to us.

K.S./R.K. *Reference answered.*

7. (1780) 1 Bro. C. C. 503, Ackroyd v. Smithson.
8. (1808) 14 Ves. 537, Curtis v. Hutton.
9. (1830) 1 Russ. & M. 752, Roberts v. Walker.
10. (1833) 1 My. & K. 665 : 2 L. J. Ch. 197 : White & Tudor's Leading Cases in Equity, Edn. 8 Vol. 1, p. 400, Jessopp v. Watson.

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ALLSOP AND VERMA JJ.

Shiam Lal and another —
Plaintiffs — Appellants
v.
Bashir Khan and others —
Defendants — Respondents.

First appeal No. 254 of 1939, Decided on 20th January 1942, from decision of Civil Judge, Agra, D/- 5th January 1939.

U. P. Agriculturists Relief Act (27 of 1934), S. 30 — Mortgage by agriculturist — In execution of money decree against mortgagor property mortgaged sold subject to mortgage— Purchaser selling property to another and part of consideration left with latter to pay off mortgage — Latter paying off mortgage partly and for balance executing mortgage to original mortgagee — Suit by mortgagee on this mortgage—Loan held different from original loan to mortgagor agriculturist.

A an agriculturist mortgaged his property. In execution of a money decree against *A* the property was sold subject to the mortgage. The purchaser sold the property to *B* and left part of the consideration with *B* to pay off the mortgage. *B* paid part of the amount due to the mortgagee and for the balance executed a fresh mortgage to him. In a suit by the mortgagee on this mortgage, the defendants claimed reduction of interest on the ground that this mortgage was a renewal of the original mortgage by *A* :

Held that the suit not being based on the mortgage deed executed by *A* the fact that *A* was an agriculturist could not be of any avail to the defendants. The suit was for the recovery of a totally different loan namely a loan which the plaintiffs must be held to have advanced to *B* and as such the defendants were not entitled to any reduction of interest under S. 30 : ('37) 24 A. I. R. 1937 All. 297 ; ('36) 23 A. I. R. 1936 All. 697 and ('40) 27 A. I. R. 1940 All. 337, *Disting.* [P 201 C 1]

K. N. Katju and R. N. Verma—for Appellants.

B. Malik and Gopal Behari—for Respondents.

VERMA J.—This is an appeal by the plaintiffs in a suit for sale based on a deed of simple mortgage dated 13th June 1935 executed by defendant 1, Bashir Khan, in favour of the plaintiffs for a principal sum of Rs. 11 000. The amount claimed in the suit was Rs. 12,492. The Court below has reduced the interest and has decreed the suit for the recovery of Rs 8156 only on the ground that the contesting defendants were entitled to claim reduction of interest under the provisions of S. 30, U. P. Agriculturists' Relief Act (27 of 1934). It has also directed that future interest shall run in accordance with the provisions of the said Act. The facts material to the only point which arises for consideration are these. On 6th March 1930, one Shafi Khan, who was the owner of certain house property in the City of Agra, executed a deed of simple mortgage in favour of the present appellants hypothecating that house property. The sum of money borrowed by Shafi was Rs. 10,000. The property aforesaid was sold on 11th September 1931, in execution of a money decree passed against Shafi and was purchased by one Munir Khan, who thus became the owner of the property subject to the encumbrance which had been created on 6th March 1930. On 13th June 1935, Munir sold the property for Rs. 16,000 to defendant 1, Bashir Khan, and, out of the sale consideration, left a sum of Rs. 13,900 with Bashir for payment to the mortgagees, namely the appellants before us. Bashir paid a sum of Rs. 2900 to the appellants and for the balance, Rs. 11,000, gave a mortgage to the appellants over the property purchased by him from Munir. This deed of mortgage was executed on the same day on which the sale deed by Munir in favour of Bashir was executed, namely 13th June 1935. The interest which was agreed upon between Bashir and the appellants was 9 per cent per annum compoundable every three months. Defendant 2, Shiva Narain, is a subsequent mortgagee of the property in question by virtue of a deed of mortgage executed in his favour by Bashir on 4th December 1936. Defendant 3 has purchased the property in execution of a decree and is now its owner.

The suit was contested by defendants 2 and 3 who raised a variety of pleas. The only pleas with which we are now concerned are those covered by issue 5—"Is the rate of interest claimed by the plaintiffs high and unreasonable? — and by issue 6 — "Was the mortgagor an 'agriculturist' and the plaintiffs a creditor under the Agriculturists' Relief Act? If so, did the plaintiffs fail to keep and supply correct accounts? If so, how does it affect the suit?" The Court below did not record the finding on issue 5 on the ground that it had come to the conclusion that the Agriculturists' Relief Act applied and that the interest would have to be reduced in accordance with the provisions of that Act. Under issue 6, it was found that Shafi, the original owner of the property, was an "agriculturist" but that Munir and Bashir were not "agriculturist." It may be mentioned that the contesting defendants, namely defendants 2 and 3, did not claim to be "agriculturists" themselves, but based their claim for relief on the ground that Shafi, Munir and Bashir had all been "agriculturists" and that the contesting defendants were consequently entitled to claim the benefits which the Agriculturists' Relief Act conferred upon "agriculturists." The Court below further held that the contesting defendants were not entitled to ask for instalments under S. 3 of the Act. It was also held that the plaintiffs were not bound to maintain and supply accounts under S. 32 of the Act. With regard to the claim for reduction of interest under S. 30, the Court held that, although the contesting defendants themselves were not "agriculturists" and although Bashir and Munir were not proved to have been "agriculturists," the contesting defendants were entitled to reduction of interest in accordance with the provisions of that section. The appeal is against that decision. There is also a cross-objection by defendant 2 in respect of costs. The Court below has given the following reasons for holding that defendants 2 and 3 were entitled to claim reduction of interest :

"The plaintiffs, in case of necessity, can fall back upon the mortgage dated 6th March 1930, and can use it as a shield in their favour. The rights between the mortgagor and the mortgagee are reciprocal. The defendants can also trace the origin of the debt in their favour. The bond in question was nothing but a partial renewal of the bond dated 6th March 1930."

The learned Judge relied on the ruling in 1937 A. L. J. 363.[1] Learned counsel for the plaintiffs-

1. ('37) 24 A. I. R. 1937 All. 297 : 168 I. C. 655 : I.L.R.(1937) All. 514: 1937 A.L.J. 363, Bireshwar Das Bapuli v. Uma Kant Panday.

appellants has contended that the Court below has erred in holding that on the facts found, defendants 2 and 3 could claim the right to have interest reduced in accordance with the provisions of S. 30, Agriculturists' Relief Act. He has pointed out that the suit is not based on the mortgage deed of 6th March 1930, and has urged that the fact that Shafi was an "agriculturist" can therefore be of no assistance whatsoever to the contesting defendants in this case. His contention is that the mortgage of 13th June 1935, which is the basis of the suit, was an entirely new mortgage, and that it was not a renewal of the mortgage of 6th March 1930. He has urged that the suit is not for the recovery of the loan which had been advanced to Shafi on 6th March 1930, but for the recovery of the loan which, in the eye of the law, the plaintiffs advanced to Bashir on 13th June 1935, and has contended that here there is no question of the plaintiffs being able to fall back on the mortgage of 6th March 1930, or to use it as a shield, nor of the defendants being able to trace the origin of the debt as the origin of the debt in this case was on 13th June 1935, and there was nothing to trace. He has argued that, the suit not being on the basis of the mortgage of 6th March 1930, or a renewal thereof, or for the recovery of the loan advanced to Shafi on 6th March 1930, the decisions in cases of the type of 1937 A. L. J. 363[1] and 1936 A. L. J. 1250[2] are not applicable. In our judgment the contention of learned counsel for the plaintiff-appellants is well founded. The suit not being based on the mortgage deed executed by Shafi on 6th March 1930, the fact that Shafi was an "agriculturist" cannot, in our opinion, be of any avail to the contesting defendants. We agree with the contention of the appellants' learned counsel that the suit is for the recovery of a totally different loan, namely, a loan which the plaintiffs must be held to have advanced to Bashir on 13th June 1935. In our opinion, the reasons given by the Court below for deciding against the plaintiffs on this point are not sound.

Learned counsel for defendant 2, who alone is represented before us, has referred to the case in 1940 A. L. J. 257.[3] The facts of that case, however, were entirely different and the case is not applicable to the facts of the case before us. We have, for the reasons given above, come to the conclusion that the decision of the Court below that the contesting defendants were entitled to reduction of interest under the provisions of S. 30, U. P. Agriculturists' Relief Act, must be set aside. We may mention that learned counsel for the respondents challenged the correctness of the finding of the Court below that Bashir was not an "agriculturist," at any rate, at the relevant date, namely, 13th June 1935. We have examined the evidence and have come to the conclusion that the finding of the Court below is perfectly correct.

The next and last argument of the learned counsel for the respondents is that, the Court below not having decided issue 5, it was necessary to call for a finding on that issue. We are unable to accept this contention. The rate of interest mentioned in the mortgage deed in suit is less than 12 per cent. per annum. Further, it is not shown that the amount of interest, on calculation at the rate given in the deed, would come within the rule laid down in cl. (ii) of proviso 1 added to the Usurious Loans Act of 1918 by the Usurious Loans (U. P. Amendment) Act, 23 of 1940. It is not denied that the Usurious Loans Act of 1918, as it stood before the amendment made by the Provincial Legislature, would not apply to the transaction in question. Learned counsel for the respondents has entirely failed to show that the provisos added by the amending Act mentioned above have any application to it. It is therefore not necessary to remand the case for a finding on issue 5. We have heard learned counsel for the respondents on the cross-objections. In our opinion, the order of the Court below as to the costs is perfectly correct. The result is that we allow the appeal, modify the decree of the Court below, and decree the suit in full. Let a fresh preliminary decree under O. 34, R. 4, Civil P. C., be prepared. The defendants shall have time to pay the amount due to the plaintiffs up to 18th July 1942. The appellants are entitled to their costs in both Courts. The cross-objections are dismissed with costs.

K.S./R.K. *Decree modified.*

2. ('36) 23 A. I. R. 1936 All. 697 : 165 I. C. 210 : 1936 A.L.J. 1250, Misri Lal v. Alexander Gardner.
3. ('40) 27 A. I. R. 1940 All. 337 : 189 I. C. 864 : I.L.R. (1940) All. 334 : 1940 A. L. J. 257, Faiyaz Ahmad v. Jamal Uddin.

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FULL BENCH

COLLISTER, BAJPAI AND HAMILTON JJ.

Ganesh Prasad — Plaintiff — Appellant

v.

Lala Hazari Lal and others — Defendants — Respondents.

First Appeal No. 283 of 1934, Decided on 22nd April 1942, from decision of Second Subordinate Judge, Cawnpore, D/- 12th March 1934.

(a) Hindu law—Father — Self-acquired property — Undivided sons succeed by inheritance and not by survivorship (Per *Collister and Hamilton JJ.*; *Bajpai J.* contra).

(Per *Collister and Hamilton JJ.*) — As to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation therefore of a right to take such property by survivorship falls. The father has an absolute power of disposal over his self-acquired property. The undivided sons succeed to the self-acquired property of their father by inheritance and not by survivorship : 9 M. I. A. 539 (P. C.) ; ('21) 8 A. I. R. 1921 Mad. 168 (F. B.) ; 12 M. I. A. 523 (P. C.) and 20 All. 267 (P. C.), *Rel. on.* [P 204 C 1, 2; P 215 C 1]

(Per *Bajpai J.*) — Survivorship can under circumstances exist even when there is no right of partition and no right to restrain alienations. Even in the case of self-acquired property of the father the succession in the case of a joint son is by some sort of survivorship : ('35) 22 A. I. R. 1935 Mad. 775, *Rel. on.* [P 212 C 1, 2]

(b) Hindu law—Father — Self-acquired property—Sons succeed as joint tenants with right of survivorship inter se — Property becomes ancestral in their hands (Per *Collister and Bajpai JJ.*).

When two or more undivided sons succeed as heirs to the self-acquired property of their father they take the property as joint tenants with rights of survivorship inter se. The property becomes ancestral in their hands : 25 Mad. 678 (P. C.) and 20 W. R. 189, *Rel. on.* [P 204 C 2; P 212 C 2]

a **(c) Hindu law—Joint family — Ancestral and self-acquired property — Succession to — Distinction** (Per *Collister J.*).

Succession to ancestral property and inheritance of self-acquired property are on an entirely different footing. In respect to ancestral property there is community of interest, unity of ownership and unity of possession among the undivided coparceners, and succession is by survivorship among the coparceners : ('41) 28 A. I. R. 1941 P. C. 120, *Rel. on.* [P 205 C 1,2]

As regards self-acquired property of the father it goes by inheritance, but it becomes joint property in the hands of the sons with a mutual right of survivorship. In ancestral property the sons acquire an equal right by birth, in self-acquired property they also have a certain right or interest by birth, but it is very different from the right which they have in b ancestral property, and consists in a moral and spiritual injunction upon the father not to squander the property to their detriment. The right of succession which sons have to their father's property, whether it be ancestral property which goes by survivorship or self-acquired property which goes by inheritance is by virtue of their filial relationship. On the father's death the self-acquired property devolves by inheritance. If the father and the sons were undivided at the time of the former's death, the sons will succeed to it as joint owners with benefit of survivorship. If there are no undivided sons, the divided son or sons will take it as tenants in common to the exclusion of the widow if any : 2 Mad. 182 (F. B.), *Rel. on.* [P 205 C 2; P 206 C 1]

(d) Hindu law — Succession — Self-acquired c **property—There is no difference between Dayabhaga and Mitakshara** (Per *Collister J.*).

There is no difference as regards succession to self-acquired property between the Dayabhaga and the Mitakshara Schools of law. [P 206 C 2]

(e) Hindu law — Saraswati Vilasa though authority in southern India can be applied to Benares in absence of other authority — Viramitrodaya is of high authority in Benares (Per *Collister J.*).

Saraswati Vilasa, though an authority on Southern India can be applied to Benares in the absence of other authority : ('31) 18 A. I. R. 1931 P. C. 268, *Rel. on.* [P 207 C 1]

Viramitrodaya is of high authority in Benares : 12 M. I. A. 397 (P. C.) and ('16) 3 A. I. R. 1916 P. C. 104, *Rel. on.* [P 207 C 1]

d * **(f) Hindu law—Succession — Sons — Self-acquired property of father — Undivided sons exclude divided son** (Per *Collister and Bajpai JJ.*; *Hamilton J.* contra).

(Per *Full Bench, Hamilton J.* contra) —Under the Mitakshara law on the death of a Hindu leaving self-acquired property, the undivided sons succeed to such property to the exclusion of the divided son. [P 217 C 1]

(Per *Collister J.*)—The legal position as regards self-acquired property under the Mitakshara is that (1) Re-united and therefore also undivided brothers have a preference over divided brothers in succession to each other's self-acquired property where the deceased brother has left no son. (2) A son born after separation inherits the father's self-acquired property to the exclusion of divided sons. (3) Re-united sons share this preference with such after-born son over divided sons; and a fortiori undivided sons will share such preference with the after-born son. Hence there is a superior right or virtue attaching to uninterrupted unity with the father, in consequence of which the divided sons are postponed to the undivided sons, who succeed to the father's self-acquired property as coparceners with benefit of survivorship.

On the death of a Hindu father leaving self-acquired property the undivided sons succeed to the self-acquired property of the father in preference to a divided son, whether such property was acquired before or after such separation and whether the divided son was or was not given a share in such property at the time of separation : ('21) 8 A. I. R. 1921 Mad. 168 (F. B.) and ('28) 15 A. I. R. 1928 Rang. 206, *Rel. on; Case law, Hindu law texts and commentaries discussed.* [P 208 C 1,2]

(Per *Bajpai J.* concurring)—The divided son ceases to be a member of the coparcenary and although coparcenaryship in the narrower sense of f community of interest and unity of possession may not exist between the father and his joint sons in respect of self-acquired property, there is still a coparcenaryship in the wider sense of the term and the divided son not being a member of the coparcenary can take no share in the self-acquired property of the father. By reason of the interest which a son gets in the father's self-acquired property also from birth, the principle of coparcenaryship can be extended to the case of a father and his joint sons in respect of the father's self-acquired property and such sons can be given the right to inherit in a manner akin very much to the right of survivorship. This is the reason for giving preference to the joint sons over the divided sons who are not members of the coparcenary. This preference to the undivided son over the divided son can be given on a g more solid ground by way of analogy afforded from the cases of the after-born son and re-united son. Hence on the death of the father the undivided sons exclude the divided son in the matter of succession to this self-acquired property : ('21) 8 A.I.R. 1921 Mad. 168 (F. B.) and ('28) 15 A. I. R. 1928 Rang. 206, *Rel. on; Case law, Hindu law texts and commentaries discussed.* [P 212 C 1; P 214 C 2]

(Per *Hamilton J.* contra) Under the Mitakshara the father is as regards his self-acquired property from the beginning just as separate from sons who are joint with him in ancestral property as from sons who are not and partition of ancestral property will have no bearing on his self-acquired property. The united son is no better than the re-united son and there is clear and ancient authority to the effect that when there is no son born after partition h the re-united and non-reunited share equally. There is no coparcenary of father and sons in the self-acquired property of the father and therefore no reason to prefer an undivided to a divided son but if there has been division of the father's self-acquired property so that the divided son has got something it may be that at the death of the father the property has to be so divided that the sons finish up with equal shares. If however there is some kind of coparcenary then partition of ancestral property does not put an end to it. Therefore, under the Mitakshara on the death of the father the undivided sons do not exclude the divided son in the matter of succession to his self-acquired property : ('30) 17 A.I.R. 1930 Oudh 77, *Approved*; *Case law and Hindu law texts discussed.* [P 215 C 2; P 217 C 1]

(g) Precedent—Absence of previously reported case on certain question leads to no inference (Per *Hamilton J.*).

The fact that there is no previously reported case on a certain question leads to no inference either one way or the other. [P 216 C 1]

(h) Evidence Act (1872), S. 35—General power of attorney printed through and through purporting to have been executed in presence of Government Notary Public—Document cannot be relied upon in absence of Notary Public and register of Notary Public (Per *Division Bench*).

In a general power of attorney *R*, *H* and *G* were described as owners of a firm and they appointed *D* as a general attorney. The power of attorney was not an original document and was a printed paper through and through. It purported to have been executed and signed in the presence of the Government Notary Public. The document was sought to be relied upon for proving that *G* was a partner of the firm. But the document was not printed for the purpose of showing that *G* had also a share in the firm :

Held that no reliance could be placed upon the document in the absence of the register of the Notary Public and in the absence of the evidence of the Notary Public. [P 218 C 2]

(i) Will — Oral will — Proof (Per *Division Bench*).

The onus of establishing an oral will is always a very heavy one and the oral will must be proved in a very strict manner. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove with the utmost precision, the words on which he relies, with every circumstance of time and place : 12 M.I.A. 1 (P.C.); ('31) 18 A.I.R. 1931 P.C. 285 and ('37) 24 A.I.R. 1937 P.C. 174, *Rel. on.* [P 219 C 1]

G. S. Pathak, S. N. Seth, J. K. Srivastava and J. Swarup—for Appellant.

P. L. Banerji, B. Malik, J. C. Mukherji, B.N. Misra, Shah Habeeb and Jai Keshen Lal — for Respondents.

COLLISTER J.—The following question of law has been referred to this Full Bench :

"On the death of a Hindu leaving self-acquired property, do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara law ?"

There is a sharp conflict of opinion between the High Courts of Bombay and Madras on the one hand and the Chief Court of Oudh on the other. There is also an old case from Calcutta dating back to 1820, which I shall mention first. In Macnaghten's Principles and Precedents of Hindu Law," Vol. II, in the chapter headed "Inheritance" we have the following question put to the law officers in Case No. XII of 1820 :

"A person having assigned a moiety of his self-acquired landed estate to his sons by one wife separated himself from them, and with the other half continued to live in a state of union with his son by another wife. On the death of the father, are the sons entitled to an equal portion of the estate left by him ?"

The answer was in the following terms :

"Under the circumstances stated the disposition of the estate made by the father will hold good, if not made through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons or through partiality for the child of a favourite wife, in either of which cases each of his sons would be entitled to an equal share of the estate; otherwise on his death the sons who were separated from him during his lifetime have no claim to the inheritance."

In 22 Bom. 101,[1] it was held that as between united sons and a separated grandson the succession, on the grandfather's death, to the self-acquired property left by him goes in preference according to Hindu law, to the united sons. In that case the property was apparently acquired before partition. At page 103 Ranade J. says :

"The succession of the male issue is by right of survivorship to joint estate and must be confined to sons who are united coparceners and cannot include the appellant, who is separated from the grand father and the uncles. In the case of a joint succession the sons succeed by survivorship and sons who have separated from their father and his family are passed over in favour of sons who have remained united with him — West and Buhler, page 68."

At page 104 this same learned Judge observes :

"The succession to a joint estate goes by survivorship to the coparceners and the separated grandsons cannot be regarded as coparceners with the grandfather at the time of his death."

Further on he says :

"A partition once made must be presumed to be final and complete. To hold otherwise would be to open the door to a flood of litigation, for in every case a separated son can always put forth the suggestion that a portion of his father's property was self acquired."

At p. 106 Jardine J. expresses the opinion that the claim of the separated grandson was "contrary to the spirit and presumptions of the Hindu law." This decision was followed in 32 Mad. 377,[2] where it was held that under the Mitakshara law, when a father dies leaving self acquired property an undivided son takes such property to the exclusion of a divided son, although the division took place after the acquisition of such property by the father. By implication this would apply a fortiori to property acquired by the father after the separation. At p. 383 the learned Judges consider the interest which sons have by birth in the self-acquired property of the father — a matter which I shall deal with at a later stage—and say :

"One final argument requires to be noticed. It is suggested that if sons have by birth an interest in their father's self-acquisitions, and if at the time when a son separates himself there are such self-acquisitions in existence, then inasmuch as at partition the son cannot obtain any share of the self-acquisitions, he would be entitled on the death of the father to regard them as property of which he could demand a share in the same way as if it were ordinary coparcenary property which, for some reason or other, had been omitted from the original partition. The answer is that while theoretically the sons have an interest by birth in their father's self acquisitions, still, as the father can dispose of those acquisitions at his pleasure they are not coparcenary property in the ordinary sense, and it is only the latter property that can form the subject of partition. After obtaining on partition his share of all the divisible property, the separating son loses all the rights which he had as a member of the coparcenary and it was only as a member of the coparcenary that he had by birth an interest in his father's self-acquisitions. All the right that re-

1. ('98) 22 Bom. 101, Fakirappa v. Yellappa.
2. ('09) 32 Mad. 377 : 2 I. C. 519 : 5 M. L. T. 67, Nana Tawkar v. Ramachandra Tawkar.

mains to him with regard to his father's property is the right by virtue of his sonship to inherit in the absence of undivided sons."

Here too the learned judges took the view that an undivided son takes his father's separate property by survivorship and that it becomes an addition to the joint property. They say :

" . . . . the succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than by inheritance and he who took by survivorship would exclude those, such as divided sons, who could only take in any case by inheritance."

In 44 Mad. 499,[3] a Full Bench of the High Court at Madras agreed with the decision in 32 Mad. 377[2] as regards the order of succession, but they held that the undivided sons take the property by inheritance and not by survivorship. At. p. 504 Oldfield J. says that the dictum about survivorship was unnecessary to the conclusion in 32 Mad. 377[2] and should not in his opinion be followed; and at p. 507 Kumaraswami Sastri J. says :

"It is difficult to see how there can be any coparcenary between the father and the sons as regards self-acquired property over which the sons have no legal claim or enforceable rights. Coparcenary and survivorship imply the existence of coownership and of rights of partition enforceable at law, and a mere moral injunction can hardly be the foundation of a legal right."

This learned judge expressed the view that the observations about succession to self-acquired property by survivorship "require re-consideration." Pro tanto, the Full Bench dissented from the earlier decision on this point, but as I have already said they agreed with it as regards the order of succession. While on the subject of the mode of succession, as distinguished from the order of succession, I may mention certain authorities which seem to indicate that the view taken by the Full Bench of the Madras High Court on this subject is correct. In 9 M. I. A. 539,[4] the Judicial Committee made it clear that ancestral property passes by survivorship and self-acquired property by inheritance. At p. 611 their Lordships say:

"But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore of a right to take such property by survivorship falls. . . . ."

In 12 M. I. A. 523[5] at p. 541 their Lordships say:

"In 9 M. I. A. 539[4] . . . . it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindu law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply the former must be resorted to." In 20 W.R. 189[6] it was held that self-acquired property becomes joint family property in the hands of the next generation. At page 191, Col. 2, the learned Judges say :

"As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a new root. And it continues to go down by one rule of descent only."

In Mulla's "Principles of Hindu Law," 9th Edn., p. 23, S. 31 (1) (a) the learned author says that two or more sons, grandsons and great-grandsons succeedings as heirs to the separate or self-acquired property of their paternal ancestor will take the property as joint tenants with a right of survivorship by which he presumably means a right of survivorship inter se. In Mayne's "Hindu law" 10th Edn., at p. 352 there is the following observation :

The Judicial Committee in 25 Mad. 678[7] pointed out that, where the sons succeed to the self-acquired property of the father, their inheritance is unobstructed and they take it by survivorship."

But I do not think that in the last mentioned case the Privy Council has expressed the view that the sons succeed by survivorship to the self-acquired property of their father. In that case a Hindu named Venkat Rao died, leaving a widow and a daughter. The daughter had two sons, and the litigation was between the sons of the latter. The property was the self-acquired property of Venkat Rao and the question of law which their Lordships had to determine is stated in the judgment as follows :

"If he (i.e. Venkat Rao) died intestate, did his property descend on the death of his daughter to her two sons jointly with benefit of survivorship or jointly in common without benefit of survivorship ?"

It was held by their Lordships that a Hindu daughter succeeds to her father's self-acquired property as a limited owner and on her death her sons stceed to it jointly with benefit of survivorship. At p. 687 they say : "Members of a joint family who succeed to self-acquired property take it jointly." This is not the same thing as saying that they take the property by survivorship. I find some difficulty in appreciating upon what principle, under the Hindu law, the sons can take by survivorship the self-acquired property of their deceased father and upon principle and upon authority, undivided sons succeed to the self-acquired property of their father by inheritance as joint tenants with a right of survivorship inter se. It is a case of joint succession by inheritance.

So much for the mode of succession. I will now return to the reported decisions as regards the order of succession. In 55 Mad. 577,[8] it was held that on the death of a Hindu leaving self-acquired property his undivided sons succeed to the property to the exclusion of a divided son. At p. 579 Waller J. — who delivered the judgment — after mentioning 5 Luck. 649[9] and Mayne' s comment upon it, says :

3. ('21) 8 A. I. R. 1921 Mad. 168: 62 I. C. 944: 44 Mad. 499: 40 M. L. J. 481 (F. B.), Vairavan Chettiar v. Srinivasachariar.

4. (1861-63) 9 M. I. A. 539: 2 W. R. 31: 1 Suther 520: 2 Sar 25 (P. C.), Katama Natchier v. Raja of Shivagunga.

5. ('67-69) 12 M. I. A 523: 12 W. R. 21: 3 Beng. L. R. 13: 2 Sar. 523: 2 Suther 243 (P. C.). Neelkishto Deb v. Beerchunder Thakoor.

6. ('73) 20 W. R. 189: 11 Beng. L. R. 397, Rajah Ram Narain Singh v. Pertum Singh.

7. ('02) 25 Mad. 678 : 29 I. A. 156 : 12 M.L.J. 299 : 8 Sar 286 (P.C.), Venkayamma v. Venkatramanayamma.

8. ('32) 19 A.I.R. 1932 Mad. 361 : 137 I. C. 765 : 55 Mad. 577 : 62 M.L.J. 436, Narsimha Rao v. Narsimham.

9. ('30) 17 A.I.R. 1930 Oudh 77 : 123 I,C. 861 : 5 Luck. 649 : 7 O.W.N. 1, Badri Nath v. Hardeo.

"In other words, the separate property becomes part of the joint property in the hands of the heirs, and as a divided member no longer belongs to the coparcenary and has no interest in the property he can take no share in it."

The case in A.I.R. 1941 Nag. 297[10] was concerned with brothers and it was held that a separated brother and a brother living with, but apparently not joint in status with, a third brother were entitled to inherit equally the third brother's self-acquired property. At p. 300 the learned Judge says :

"It must therefore follow that a son who does not fulfil the condition of being a coparcener with his father is not entitled to the father's self-acquired property. That accounts for the preference accorded to the undivided son."

Further on he observes :

"It will thus appear that, while the brothers are regarded as distinct individuals, the father and son are regarded as constituting one entity which can be broken up only by a partition. The natural and necessary result of the distinction is that, while the sons' interest in his father's self-acquired property arises by birth that of a person in the self-acquired property of his brother arises on the death of the propositus . . . ."

The above observations as regards the father and sons were unnecessary for the decision of the matter in controversy and are therefore obiter ; but they are nevertheless entitled to respect. Since I began this judgment, my brother Bajpai has drawn my attention to a Full Bench (?) decision of the High Court at Rangoon in 6 Rang. 367,[11] where it was held that the decision of the High Court at Madras in 32 Mad. 377[2] was an authority for holding that under the Mitakshara law, on the death of the father leaving self.acquired property, an undivided son takes such property to the exclusion of a divided son. The Chief Court of Oudh has taken a view which conflicts with the view expressed by the High Courts of Bombay, Madras and Rangoon and with the observations which were made obiter by a learned Judge of the High Court at Nagpur. In 5 Luck. 643,[9] it was held that undivided and divided sons equally inherit the self-acquired property of their father. It was held that, in the absence of any text to the contrary, self-acquired property is not subject to the rights of survivorship, but is governed by the general rules of inheritance, according to which all sons of the deceased shall succeed in equal shares, irrespective of any consideration of their being united or separate ; the rule is equally good in a case where a son has separated and the father acquires the property after such separation. It is a forcibly reasoned judgment but with respect I am inclined to think that it is somewhat weakened by the circumstance that the learned Judges relied on a decision of this Court in 17 A. L. J. 151,[12] which appears to me to be irrelevant inasmuch as in that case there was apparently no proof of severance of status.

So much for the reported decisions which bear directly on the question referred to us. There can be no doubt that succession to ancestral property and inheritance of self-acquired property are on an entirely different footing. I will first consider the position of undivided coparceners. In respect to ancestral property there is community of interest, unity of ownership and unity of possession, *vide* A. I. R 1941 P. C. 120[13] at p. 126, and succession is by survivorship among the coparceners. As regards self-acquired property of the father I have held that it goes by inheritance, but it becomes joint property in the hands of the sons with a mutual right of survivorship. In ancestral property the sons acquire an equal right by birth, in self-acquired property they also have a certain right or interest by birth, but it is very different from the right which they have in ancestral property. In Chap. 1, section 1, placitum 27 of Part 2 of Macnaghton and Colebrook's Mitakshara, relating to inheritance, it is stated :

"Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects, other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor. . . . ."

Sloka CXVIII of S. 4 of this same chapter says :

"Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend or a gift at nuptials does not appertain to the co-heirs."

Placita 9 and 10 of S. 5 of this chapter read thus:

"9. So likewise the grandson has a right of prohibition, if his unseparated father is making a donation or a sale of effects inherited from the grandfather, but he has no right of interference if the effects were acquired by the father. On the contrary he must acquiesce because he is dependant.

10. Consequently, the difference is this: although he has a right by birth in his father's and in his grandfather's property ; still, since he is dependant on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property, but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property."

It will be seen that there is a contradiction between placitum 27 of section I and placita 9 and 10 of section V. These placita were considered by this Court in 1 All. 394,[14] where it was held that although prohibition on moral or spiritual grounds may be implied by the texts, yet where it is not declared that there is absolutely no power to do such acts, those acts, if done, are not necessarily void and therefore the gift to one son by the father of self-acquired property is not illegal. This view was approved by the Privy Council in 20 All. 267.[15] It was there held that a father being a member of an undivided family subject to the Mitakshara can exercise full power of disposition over his own as distinguished from ancestral property. At p. 285 their Lordships say :

10. ('41) 28 A.I.R. 1941 Nag. 297 : 198 I.C. 393 : I.L.R. (1941) Nag. 598, Shamrao Bhaurao v. Krishnarao Bhaurao.

11. ('28) 15 A. I. R. 1928 Rang. 206 : 111 I. C. 839 : 6 Rang. 367, Raghubardayal v. Ramdulare.

12. ('19) 6 A. I. R. 1919 All. 223 : 49 I. C 620 : 17 A. L. J. 151, Kunwar Bahadur v. Madho Prasad.

13. ('41) 28 A.I.R. 1941 P. C. 120 : 196 I. C. 707 : I. L. R. (1941) Kar. P. C. 155 : I.L.R. (1942) Lah. 1 (P. C.), Commissioner of Income-tax, Punjab, North West Frontier & Delhi Provinces, Lahore v. Krishna Kishore.

14. ('75-77) 1 All. 394, Sital v. Madho.

15. ('98) 20 All. 267 : 25 I. A. 54 : 7 Sar. 279 (P. C.), Balwant Singh v. Rani Kishori.

"All these old text books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws."

In this connexion they quote Sir William Macnaghten's dictum about the *vinculum juris* and the *vinculum pudoris*. In Mayne's "Hindu Law," Edn. 10, at p. 352 the learned commentator says :

"So too in the case of ordinary partible property acquired by a father the sons' right by birth exists even though the other rights of a coparcener, such as the right to enforce a partition, cannot, owing to the power of control and the dominant interest of the father, co-exist. The right by birth in such property is not a mere spes successionis, but it can be renounced or surrendered so that, as has been held, a divided son loses his right of inheritance to it."

The learned author cites the Madras decisions which I have already mentioned. The position, therefore, is that Hindu sons do not acquire by birth a legally enforceable right as regards the self-acquired immovable property of their father, but they do acquire an interest in it which consists in a moral and spiritual injunction upon the father not to squander the property to their detriment. On the father's death such property devolves by inheritance. If the father and the sons were undivided at the time of the former's death, the sons will succeed to it as joint owners with benefit of survivorship. If there are no undivided sons the divided son or sons will take it as tenants in common to the exclusion of the widow if any : *vide* 2 Mad. 182.[16] The question which we have to decide, however, is whether the divided son has any right of inheritance where undivided sons exist at the father's death. There is no text of the Mitakshara which directly distinguishes between the right of inheritance of an undivided and of a divided son, and learned counsel for each party relies upon this fact. On the one side, it is said that the proposition that undivided sons will have preference is so obvious that there was no necessity to state it and on the other hand it is contended that in the absence of any text to the contrary divided and undivided sons must be held to have an equal right of inheritance by virtue of their relationship with their father, for it is this which determines their right to the property. In this connexion we are referred to the Mitakshara, Chap. 1, S. 2. placitum 3, which says :

"The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons."

The section is headed "Definition of Inheritance, and Partition." So too in the Virmitrodaya it is said : "Besides, ownership in the property of the father or other ancestor is to be held to be caused by sonship, etc., alone . . . . ." This will be found in Setlur's "complete Collection of Hindu Law Books on inheritance" in his translation of the Viramitrodaya at p. 437, cl. 12. There can be no doubt that the right of succession which sons have to their father's property, whether it be ancestral property which goes by survivorship or self-acquired property which goes by inheritance is by virtue of their filial relationship, but this does not settle the question whether united sons have or have not priority of inheritance over divided sons. In Sarvadhikari's "Hindu Law of Inheritance," page 775 we read :

"Sons legally separated from their father have not, on his death, any claim to inherit his property with a son not separated. Thus, where a father separates from his sons, an after-born son alone inherits the share which his father took on partition as well as any wealth acquired by the father subsequent to partition."

In Sarkar's "Hindu Law," Edn. 7 at page 494, it is said :

". . . . on the death of the father having self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the father."

In West and Buhler, 4th Edn. at p. 64 we read :

"Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him or were born after the separation. This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it or who, having been exceptions, have since ceased to be so are treated accordingly."

Gour's "Hindu Code," Edn. 4, S. 314 (2) reads :

"Sons who were joint with their father at the time of his decease inherit to the exclusion of those who were separate."

This is based on 22 Bom. 101[1] and 55 Mad. 577.[8] In Ghose's "Principles of Hindu Law," Edn. 3, Vol. I, page 85, the learned commentator says :

"Under the Mitakshara law the separated son is postponed to the associated son in respect of ancestral as well as of self-acquired property."

The decision in 32 Mad. 377[2] is referred to in this connexion. In 2 Mad. 182,[16] which I have already mentioned in another connexion, their Lordships say :

"Disputing the position that the right of sons is annulled by partition Jagannath declares, 'If a father, having made a partition with his sons, die after reuniting himself with any parcener whomsoever, it would follow that his property could not be inherited by the divided sons, but no other persons ought to take the succession while sons live, since none can, like them, have a present right to his property."

Jagannath may have been speaking of the Dayabhaga, but it is not suggested that there is any difference as regards succession to self-acquired property between the Dayabhaga and the Mitakshara Schools of law. Whether the pronouncement is or is not correct quoad re-united sons is a matter for consideration, but if Jagannath held this view as regards re-united sons, he must have held it a fortiori as regards undivided sons. This brings us to a consideration of re-union, for it is contended that an analogy can be drawn from the rules of succession relating to re-united brothers and re-united sons. Chapter 2, section 9, placitum 1 of the Mitakshara, which is headed "Re-union of Kinsmen after Partition," reads :

"The author next propounds an exception to the maxim that the wife and certain other heirs succeed to the estate of one who dies leaving no male issue."

Then comes sloka 138, which reads :

"A re-united brother shall keep the share of his re-united co-heir who is deceased, or shall deliver it to a son subsequently born."

This of course relates only to brothers who reunite, it does not relate to sons who have re-united

16. ('78-80) 2 Mad. 182 (F. B.), Ramappa Naicken v. Sithammal.

with their father. But at least it shows that re-united brothers have a preferential succession to each other's property where the deceased brother leaves no son and it seems to indicate that there is some privilege or priority in unity, at least so far as brothers are concerned. In 20 W. R. 197[17] at p. 200 the learned Judges say :

"It is admitted that the text of the Mitakshara is not exhaustive and that the principle and not the letter is to be followed . . . . ."

At p. 201 they say :

" We cannot suppose that the author of the Mitakshara looked upon family union with such favour that he held out special inducements to re-union after separation, while at the same time he gave no preference to the brothers who had never separated over the brothers who had dissociated themselves. The apparent difference seems to be reconciled by supposing him to treat every division of a family as a complete separation of all its members and the continuance in union of some after division and the separation of others as a re-union : in this view union and re-union, so far as concerns succession, are synonymous terms . . . . . "

Further they observe :

" It is evident that the material circumstances are family partnership and relation by blood. If any special effect were intended to be given to re-union as against unbroken union, one would have expected very clear rules on the subject."

In the case of sons, we are referred to the Viramitrodaya in which Manu's text is quoted, "To the nearest sapinda the inheritance next belongs ;" and also to Yajnavalkhya, who says, "The sons shall on the death of the parents divide their estate and debts in equal shares": *vide* p. 436 of Setlur's book. And the view is expressed that re-united and unassociated sons succeed equally to their father's property. At p. 437 we read :

" . . . . and as the sonship etc. belong to all the male issue, whether re-united or not, therefore the succession to their property of all the sons and the like without distinction is proper."

Sarkar in his Edn. 7 at p. 586 says that a son, grandson and great grandson inherit as in the ordinary case of succession whether they are separated or re-united. He says: " A son who is re-united cannot claim preference to another who remains separate." The learned author emphasises the great difference between an undivided member and a re-united member. He says : ". . . . . in the former case there was no severance of status, whereas in the latter there was severance, but by express agreement they re-united." Saraswati Vilasa says : " Therefore that the ownership of re-united and not re-united sons in the paternal wealth is equal is only reasonable." In 59 Cal. 576[18] at p. 581 the Privy Council observed that Saraswati Vilasa, though an authority on Southern India, could be applied in the case before their Lordships to Benares in the absence of other authority. It will be seen that Saraswati Vilasa's pronouncement is in conformity with the Viramitrodaya which has been held to be of high authority in Benares: *vide* 12 M. I. A. 397[19] at p. 438 and also 12 M. I. A. 448[20] at p. 466 and 43 Cal. 1031[21] at p. 1046-7. Thus, as regards sons the authorities would seem to indicate that re-united and divided sons are ordinarily on an equal footing.

But if a son is born after separation, it would appear that a re-united son acquires a preferential status vis-a-vis the divided sons. As regards the after-born son, there are clear provisions. Manu says : " But a son born after partition shall alone take the property of his father": *vide* Max Muller's "Sacred Books of the East," Vol. 25, Ch. 9, S. 216. This rule is mentioned in the Mitakshara, Ch. 1, S. 6, placitum 4, where it is said : "The same rule is propounded by Manu, 'A son born after a division shall alone take the parental wealth'." Placitum 6 says : " Thus, whatever has been acquired by the father in the period subsequent to partition, belongs entirely to the son born after separation. For it is ordained : 'All the wealth which is acquired by the father himself who has made a partition with his sons goes to the son begotten by him after the partition : those born before are declared to have no right'."

Then comes the provision for re-united sons where there is a son born after partition. Placitum 7 reads:

" But the son born subsequently to the separation must after the death of his father, share the goods with those who re-united themselves with the father after the partition: as directed by Manu ; or he shall participate with such of the brethren as are re-united with the father."

In the Viramitrodaya it is stated :

"But if some of the sons have been re-united with the father, then the after-born son is not entitled to the whole of the paternal property but he shall participate with them: *vide* Setlur, p. 344,

At p. 146 of the same book we find the following declaration of Saraswati Vilasa :

"The son born after partition shall divide with such of the brothers as lived in re-united with the father after partition."

On the same page there is the following pronouncement :

"Where a father has two or three or many sons and is divided with some and undivided with others, property acquired by him shall be divided after his death only among his undivided sons."

This comes under the heading "The Right of the son born after partition," and so it is contended that the sons referred to are all sons born after partition. Assuming this to be so, a useful analogy can nevertheless be drawn in respect to the question referred to us. In Ganganatha Jha's "Hindu law in its Sources," Vol. 2, p. 347 we read :

"If a son is born after partition, he shall receive the property of the father alone, or if any other sons had been re-united, he shall share it with them."

The learned author cites inter alia Manu and the Viramitrodaya. There are other authorities which deal with after born sons simpliciter; that is, without any reference to re-united sons. Ganganatha Jha at p. 351 of the 2nd Vol. quotes the following from Brihaspati :

"The self acquired property of the father divided from his sons goes entirely to the son born after

17. ('73) 20 W. R. 197, Sham Narain v. Court of Wards.

18. ('31) 18 A.I.R. 1931 P. C. 268 : 135 I. C. 637 : 59 Cal. 576 : 58 I. A. 372 (P.C.), Jatindranath Roy v. Nagendranath Roy.

19. ('67-69) 12 M. I. A. 397 : 10 W. R. 17 : 1 Beng. L. R. 1 : 2 Suther 135 : 2 Sar. 361 (P.C.), Collector of Madura v. Moottoo Ramalinga Sathurpathy.

20. ('67-69) 12 M. I. A. 448 : 1 Beng. L. R. 44 : 10 W. R. 31 : 2 Suther 160 : 2 Sar. 382 (P.C.), Girdhari Lal Roy v. Bengal Government.

21. ('16) 3 A.I.R. 1916 P. C. 104 : 37 I. C. 321 : 43 Cal. 1031 : 43 I. A. 151 : 12 N.L.R. 113 (P.C.), Mt. Girja Bai v. Sadashiv Dhundiraj.

that partition. Those born before have been declared to have no right over it."

In Ghose's "Principles of Hindu Law," 3rd Edn. Vol. 1, p. 85 we read : "According to the Rishis, a son born after partition with the sons takes all the wealth of the father." In 2 Beng. L. R. 103[22] the learned Judges, after quoting Manu and the Mitakshara, say :

"This shows that a son begotten after his father has been separated from his brothers alone inherits the share which his father took after partition, as well as any wealth acquired by his father himself."

This was a judgment by Sir Barnes Peacock C.J. and four other learned Judges. In 4 All. 427,[23] it was held that the property acquired by a Hindu governed by the Mitakshara law after a partition has taken place between him and his sons devolves, on his death, when he leaves a son born after partition, on such son to the exclusion of the other sons. The learned Judges cite Manu and Brihaspati and the Mitakshara Chap. I, S. 6, sloka 122, which is concerned with the rights of a son born after partition, and founding upon this decision and upon the decision in 2 Beng. L. R. 103[22] Sir Dinshaw Mulla in S. 310 (1) of his 9th Edn. says :

"Where the father has reserved a share to himself, a son who is begotten as well as born after partition is not entitled to have the partition reopened, but in lieu thereof he is entitled, after the father's death to inherit not only the share allotted to the father on partition, but the whole of the separate property of the father, whether acquired by him before or after partition, to the entire exclusion of the separated sons."

Thus, it is clear that an after-born son succeeds to the father's self-acquired property to the exclusion of the separated sons. It is also clear that, if there are any re-united sons, they will share with such after-born son, and this will apply a fortiori to undivided sons. It would also appear that re-united brothers—and therefore a fortiori undivided brothers—have priority of succession to each other's property where the deceased has left no son. I have some difficulty in appreciating why, if re-united sons are on an equal footing with undivided sons in the absence of an after-born son, they should be given priority over the divided sons in common with a son who may be born after separation; but this difficulty which I am experiencing will not affect my conclusion.

Upon the authorities, the legal position as regards self-acquired property, appears to be this : (1) Re-united — and therefore also undivided — brothers have a preference over divided brothers in succession to each other's self-acquired property where the deceased brother has left no son. (2) A son born after separation inherits the father's self-acquired property to the exclusion of divided sons. (3) Re-united sons share this preference with such after-born son over divided sons; and a fortiori undivided sons will share such preference with the after-born son. The question remains whether, in a case where there is no after-born son, the undivided sons will exclude the divided sons.

I must confess that, if the author of the Viramitrodaya is right when he says that re-united and divided sons are on an equal footing (in the absence of an after-born son), I have some difficulty in appreciating the grounds upon which union and re-union are distinguishable. Nevertheless, it seems to me that, notwithstanding the absence of any express text upon the question referred to us, there is good analogy to be drawn from the propositions which I have set out, and upon an anxious consideration of the ancient texts, the commentaries and the judicial authorities, I think it must be held that, there is a superior right or virtue attaching to uninterrupted unity with the father, in consequence of which the divided sons are postponed to the undivided sons, who succeed to the father's self-acquired property as coparceners with benefit of survivorship and in my opinion, this is in accordance with Hindu sentiment and the spirit of Hindu law. Moreover, it seems to me that if the opposite view were held, it might lead to anomalous and inequitable results. A divided son would only be liable for debts contracted by the father to the extent of his own share of the self-acquired property left by the father at his death, whereas the undivided sons would be liable to pay such debts both from the self-acquired property inherited by them and also from the ancestral property, if any, to which they have succeeded by survivorship. There is also another aspect of the matter, which is this : Supposing there are three sons and one separates and is given a one-third share of the self-acquired property of the father. On the latter's death there will be nothing to prevent such son, on the father dying intestate, from claiming a one-third share of the balance of the self-acquired property. This could, of course, be obviated by the father making a will, but it is—or at least it has hitherto been the exception rather than the rule for a Hindu to make a testamentary disposition of his property, and I am of opinion that, whatever may be said as regards the systems of law which govern other communities, the result which I have envisaged would be repugnant to Hindu law and Hindu sentiment. Here again, however, there is a difficulty arising out of the analogy of re-union as propounded in the Viramitrodaya.

The question referred to us is by no means easy of solution and there is much to be said for the opposite view, which in some respects may appear more logical, but upon the whole matter I have arrived at the conclusion that undivided sons will succeed to the self-acquired property of the father in preference to a divided son, whether such property was acquired before or after such separation and whether the divided son was or was not given a share in such property at the time of separation. I would, therefore, answer the question in the affirmative.

BAJPAI J.—A pure question of Hindu law has been referred by a Division Bench of this Court to the Full Bench and it is formulated thus :

"On the death of Hindu leaving self-acquired property do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara law ?"

The appellant contends for the proposition that the undivided and the divided sons share equally in such property while the respondent contends that the undivided sons exclude the divided sons. Mayne in his book of Hindu Law and Usage, Edn. 10, at page 645, commenting on the case in 22 Bom. 101[1] says :

"A grandson sued his grandfather and uncles for a partition. He obtained a decree as to all the joint property, but failed as to part which was held to be the separate property of the grandfather. On the death of the grandfather, he brought a fresh suit for a share of this, contending that by descent it had

22. ('69) 2 Beng.L.R. 103 : 11 W.R.O.C. 11 (F.B.), Kalidas Das v. Krishan Chunder Dass.

23. ('82) 4 All. 427, Nawal Singh v. Bhagwan Singh.

become joint property. This was perfectly true but the answer to the plaintiff was that he was no longer a member of the coparcenary. On the grandfather's death, his interest in the joint property passed to the remaining coparceners by survivorship. His own separate property passed to his united sons as heirs, and in their hands became an addition to the joint property, in which the divided grandson had no interest."

"This is merely an illustration of the rule that property, which is held separate in one generation always becomes joint in the next generation. If it is held by a father who is himself the head of a coparcenary, it passes at his death to the whole coparcenary, and not to any single member of it, all of them having under the Mitakshara equal rights by birth."

Again at p. 350 the learned author says :

"The sons's right by birth does not therefore extend to his enforcing a partition or interdicting an alienation of his father's property. The right, however, remains a real birth right, though dormant and enables the son to succeed to the property by survivorship or as apratibandhadaya.

It was accordingly held in 32 Mad. 377[2] that an undivided son takes his father's separate property by survivorship; and that an undivided son takes the self-acquired property of the father to the exclusion of the divided son. Dissenting from the first proposition a Full Bench of the Madras High Court has decided that an undivided son takes the self-acquired property of his father by inheritance and not by survivorship, Kumara Swami Sastri J. expressing the opinion that ancestral property is co-extensive with the objects of apratibandhadaya or an unobstructed heritage. This view is opposed to the clear statements in the Mitakshara and in the other works bearing on the point which expressly refer to the son's right in the father's wealth as unobstructed heritage.

The misconception was evidently due to the view based on the observation in 10 All. 272[24] relating to impartible estates that there can be no right by birth where there is no right to partition. But the right by birth in the father's property is expressly stated by all the Sanskrit authorities, and the observation in 10 All. 272[24] has itself no force after the reiterated explanation of it in subsequent cases that the existence of survivorship is quite consistent with the dominant interest possessed by the holder of an impartible estate and with the absence of a right to partition or to interdict an alienation on the part of the junior members. As Sir Dinshaw Mulla puts it in 59 Cal. 1399[25] at p. 1413, though the other rights which a coparcener acquires by birth in impartible property no longer exist, the birth right of the senior member to take by survivorship still remains. So, too, in the case of ordinary partible property acquired by a father, the sons' right by birth exists even though the other rights of a coparcener, such as the right to enforce a partition or to interdict an alienation, cannot owing to the power of control and the dominant interest of the father, co-exist. The right by birth in such property is not a mere spes successionis but it can be renounced or surrendered so that, as has been held a divided son loses his right of inheritance to it.

On principle, the position taken up in the Mitakshara that the son has a right by birth in the property acquired by the father is unassailable . . . . . The error lies in overlooking the difference between the son's right by birth and the son's equal ownership with his father in the grandfathers' property under a special text. The Judicial Committee in 25 Mad. 678[7] pointed out that where the sons succeed to the self-acquired property of the father, their inheritance is unobstructed and they take it by survivorship."

I shall have occasion to refer to 59 Cal. 1399[25] later at some length. In West & Buhler's Hindu Law, Edn. 4, we have the following passage at p. 64:

"Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him, or were born after the separation."

According to the learned authors :

"This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it, or who having been exceptions have since ceased to be so, are treated accordingly. Their rights of succession are, as to their mutual extent, their rights as they would be in a partition made immediately on the death of the propositus. This is brought out most clearly perhaps in the first section of the Daya Kramasangraha. It is in general rather assumed than propounded, as after providing for representation of sons by grandsons and great grand-sons, the discussions proceed on the basis of the deceased owners' having held separately, without which there would be no room for the several rules to operate, since in a partition on his death, the then joint owners with him would take the whole."

From p. 323 onwards the learned authors give a digest of Vyavastbas and at p. 347 there is question No. 19 relating to an after-born son. The question is :

"A man had two sons. The father divided his property between them, and reserved a portion for himself. He had afterwards a third son born to him. The father subsequently died. The question is, what portion of the property should be given to the third son ?

Answer.—It appears that when the father was alive he divided his property between his sons, and reserved a portion for himself. The father may have acquired some more property after the division took place. All the property which may thus have come into the possession of the father belongs to the son born after the division. The sons who separated cannot claim any portion of this property. The son born after the division will be entitled to it, and will be also liable for such debts of the father as he may have contracted since the separation of his two sons."

In Sarvadhkari's Hindu law of Inheritance, Tagore law Lectures, Edn. 1880, p. 886, it is said :

"Sons legally separated from their father have not, on his death, any claim to inherit his property with a son not separated. Thus, where a father separates from his sons, an after-born son alone inherits the share which his father took on partition, as well as any wealth acquired by the father subsequent to partition."

Ghose in his Principles on Hindu Law, Edn. 3, Vol. 1, at p. 85 says :

"According to the Rishis, a son born after partition with the sons, takes all the wealth of the father. Under the Mitakshara law the separated

24. ('88) 10 All. 272 : 15 I. A. 51 : 5 Sar. 139 (P.C.), Sartaj Kuari v. Desraj Kuari.

25. ('32) 19 A.I.R. 1932 P. C. 216 : 138 I. C. 861 : 59 Cal. 1399 : 59 I.A. 331 : 1932 A.L.J. 919 (P.C.), Shibaprasad Singh v. Rani Prayag Kumari Debi.

son is postponed to the associated son in respect of ancestral as well as of self-acquired property."

Sir Hari Singh Gour in his Hindu Code, Edn. 4 at p. 928 lays down certain rules of inheritance and says that the issues of the deceased inherit thus :

" (1) When there are more than one son, whether by the same or different mothers, they take equal shares ;

(2) Sons who were joint with their father at the time of his decease inherit to the exclusion of those who were separate."

Macnaghten in his Principle and Precedents of Hindu Law in the Vol. 2 where the precedents are mentioned, at p. 16 gives case No. 12 as follows :

Q. A person having assigned a moiety of his self-acquired landed estate to his sons by one wife, separated himself from them, and with the other half continued to live in a state of union with his son by another wife. On the death of the father are the sons entitled to an equal portion of the estate left by him ?

Reply.— Under the circumstances stated, the disposition of the estate made by the father will hold good, if not made through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favourite wife, in either of which cases each of his sons would be entitled to an equal share of the estate, otherwise, on his death, the sons who were separated from him during his lifetime have no claim to the inheritance."

It would thus appear that the well-known text-book writers on Hindu law are all in favour of the view that the undivided son has preference over the divided son. A somewhat discordant note, it is said, has been struck by Golap Chandra Sarkar Shastri in his Hindu Law, Edn. 7, at p. 586, where he says:

"Sons, grandson and great-grandson inherit as in the ordinary case of succession, whether they are separated or reunited. A son who is reunited cannot claim preference to another who remains separate. But it has been held in some places that according to the Mitakshara, a reunited son has a preferential right of inheritance to one who remains separate. The Madras High Court in a case in which the point did not arise went beyond the scope of the appeal and held that 'the rule being as above stated in the case of reunited son there can be no hesitation in applying the same rule in the case of sons who have never separated.' It is needless to point out that the learned Judges have entirely lost sight of the great difference between undivided member and reunited member ; in the former case there was no severance of status whereas in the latter there was severance, but by express agreement they reunited. In the former case, according to their Lordships, the principle of survivorship applies whereas in the latter, altered order of succession is expressly provided for in the texts."

The learned author by the above passage points out the difference between undivided member and reunited member. He was obviously referring to the case in 32 Mad. 377[2] and held the view that a preference could not be given to the reunited son, but I venture to think that his view was that a preference could be given to the unseparated son because he says that in the case of an unseparated son there is no severance of status and the principle of survivorship applies, but in the case of a reunited there was an express agreement for reunion and succession is expressly provided for in the texts. That this is his view is clear from another passage occurring at p. 494 which is as follows :

"But on the death of the father having self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the father. It is said that after obtaining on partition his share of all the divisible property the separating son loses all the rights which he had as a member of the coparcenary and it was only as a member of the coparcenary that he had by birth an interest in his father's self-acquisitions."

The decision in 32 Mad. 377[2] seems to be approved by Sarkar. The result of my study of the various text book writers is that all the authority is in favour of the view that the divided son is excluded. I now come to the cases that have arisen in the various High Courts of India. In 22 Bom. 101,[1] it was held that as between united sons and a separated grandson, the succession on the grandfather's death of the property, both ancestral and self-acquired, left by him goes in preference according to the Hindu law, to the united sons. Ranade J. and Jardine J. gave separate but concurring judgments and although no original texts were discussed reliance was placed on West and Buhler's Hindu law. In 32 Mad. 377[2] it was held that under the law of the Mitakshra on the death of the father leaving self-acquired property an undivided son takes his property to the exclusion of a divided son, although division took place after the acquisition of such property. In this case the learned Judges referred to the Bombay case in 22 Bom. 101[1] mentioned above and followed it. They discussed some of the text book writers to whom reference has already been made by me. Reference was also made to Vyavastha Chandrika, Vol. 2, among precedents of partition at p. 404 where it is stated :

"In a Hindu family where a re-union has taken place amongst certain members after partition the members of the reunited family and their descendants succeed to each other to the exclusion of the members of the unassociated or not reunited branch."

The learned Judges further said that the reasons given by Sarkar for his opinion were not easy of acceptation, and it was pointedly observed that the rule being as above stated in the case of reunited son and being based on certain texts of the Mitakshara and Vivadachintamani there could be no hesitation in applying the same rule in the case of sons who had never separated. The learned Judges probably had not the benefit of Sarkar's opinion at page 494. With this wealth of authority, a young lawyer (Mr. K. N. Katju as he then was, but who has now risen to great eminence in the domain of law and politics) courageously gave expression to his view in two articles contributed to the Allahabad Law Journal of 1914 dissenting from the opinions of the Madras and Bombay Judges and thought that he was fortified in his views by the opinion of Sastri Golap Chandra Sarkar. I have already pointed out that Sarkar was averse to giving a preference to the reunited son as the learned Judges of the Madras High Court gave (I shall discuss this point at some length later) but was of the opinion that the unseparated son did have a preference over the separated son.

Since then, there have been other cases in Madras and Nagpur where the view has been taken that the divided son is postponed to the undivided son. In 44 Mad. 499[3] a Full Bench of that Court approved of the decision in 32 Mad. 377[2] mentioned above so far as the rule regarding the order of succession between undivided and divided sons was concerned,

but held on the question whether a succession certificate was necessary or not that it was necessary inasmuch as the self-acquired property of the father did form part of the "effects" of the father within the meaning of S. 4, Succession Certificate Act. The learned Judges were inclined to the view that the undivided Hindu son took the self-acquired property of his deceased father by inheritance and not by survivorship. In 55 Mad. 577[8] it was held that "on the death of a Hindu leaving self-acquired property his undivided sons succeed to such property to the exclusion of a divided son." The same view was taken by Niyogi J. in A. I. R. 1941 Nag. 297.[10]

A different view was taken by Stuart and Bishesher Nath JJ. in 5 Luck. 649[9] where, relying on 9 M. I. A. 539,[4] their Lordships held that in the case of property acquired by a Hindu father after his separation from some of his sons, the sons who had separated from him will be entitled to share along with the sons who may be living jointly with him. These were all the cases that were cited before us at the bar and which have a direct bearing on the question at issue before us. There is yet another case where the same view was taken as is contended for by the respondent. In 6 Rang. 367[11] Pratt J. at p. 371 referred to the Madras case in 32 Mad. 377[2] and said that it "is an authority for holding that, under the Mitakshara law, on the death of the father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son although the division took place after the acquisition of such property by the father. Similarly, in the present case, the father left a wife and son in India and took up his residence in Burma, where he acquired a separate estate. The sons by one wife joined him and remained members of a joint family. The son by the other wife, plaintiff never joined his father and maintained no relations with him. Under the circumstances the undivided son would exclude the son who had separated and ceased to be a member of the joint family." And Carr J. at page 372 observed: "The Madras case in 32 Mad. 377[2] has been quoted as authority for the proposition that, when one son is divided from his father, an undivided son takes the father's self-acquired property to the exclusion of the divided son. That proposition may be accepted. . . . . ."

I am afraid that I have not the temerity to differ from the strong current of judicial decisions and views expressed by the learned text-book writers in favour of the proposition that on the death of a Hindu leaving self-acquired property the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara law. I shall now endeavour to discuss the original texts as contained in the Mitakshara and certain Privy Council decisions. The Mitakshara is a running commentary on Yajnavalkya Smriti and it is the law of inheritance with which we are concerned. It may further be made clear that the law of inheritance naturally concerns itself with self-acquired property though on occasion passing reference may be made to joint ancestral property and thus where the property has not been specifically designated it may be taken that the text deals with self-acquired property. It may be conceded that there is no definite text which speaks of the rule that the undivided son succeeds to the self-acquired property of the father in preference to the divided son, but the broad principles of the Hindu law as enunciated by the ancient Rishis might be the reason for the absence of a definite text on that point. The normal state of every Hindu family is that it is joint in food, worship and estate. This was held by their Lordships of the Privy Council in 12 M. I. A. 523[5] at p. 540, and in the olden days a great deal of sentiment attached to keeping the family in a normal state and the disruption of the family was regarded as something objectionable. Similar feeling and sentiments prevail even in modern times. If, therefore, there is some merit in remaining joint, the principle of the succession of an undivided son in preference to the divided son might be understood, and it may be only an extension of the fundamental principle that a joint and undivided succession of the descendants is the general rule.

It was said by their Lordships of the Privy Council as early as 1897 in 20 All. 267[15] that a father, being a member of an undivided family subject to the Mitakshara, can exercise full power of disposition at his own discretion over immovables which he has himself acquired as distinguished from ancestral property. Their Lordships effected a reconciliation between certain contradictory texts of the Mitakshara and observed that certain rules which were based on religious and moral considerations should not be construed as laying down positive laws, and, as was observed by Sir W. Macnaghten in his work on Hindu law, it by no means follows that because an act has been prohibited it should, therefore, be considered as illegal and the distinction between *vinculum juris* and *vinculum pudoris* should be kept in view and, therefore, those texts of the Mitakshara which prohibit the father from disposing of his self-acquired property which also was according to the texts subject to the control of the sons and grandsons were only moral injunctions and could not be given legal sanction. It is argued from this that when the father dies intestate all the sons, divided or undivided, inherit the father's self-acquisitions over which he had in his life-time an absolute power of disposal without interference by his sons, more particularly as it may be taken for granted that the sons have an interest even in the father's self-acquisition by birth, though in the case of self-acquired property they have no right of interdiction which they have in the case of ancestral property. In 12 M. I. A. 523[5] at p. 541 their Lordships said :

"In 9 M. I. A. 539[4] at p. 610 it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindu law two leading rules of inheritance, that founded on the religious duty and superior efficacy of oblation and sacrifice, and that of survivorship. Where the latter rule cannot apply, the former must be resorted to."

Now in the case of divided and undivided sons both are equally placed so far as religious duty and efficacy of oblation and sacrifice are concerned, but the question is whether on the principle of survivorship a preference cannot be made in favour of the undivided son. It is true that survivorship ordinarily follows coparcenership, for where a coparcener dies before partition of the coparcenary property his undivided interest in the property devolves not by succession upon his heirs but by survivorship upon the surviving caparceners and the essence of coparcenary under the Mitakshara law is unity of ownership. It was observed by the Privy Council in 9 M.I.A. 539[4] :

"There is community of interest and unity of possession between all the members of the family and upon the death of any of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."

The self-acquired property of the father is capable of being disposed of by him without the control of the son or the grandson during the father's life-time, but it becomes ancestral when it devolves at his death on his son.

"In otherwords, the separate property of the father becomes part of the joint property in the hands of the sons and as the divided son no longer belongs to the coparcenary he has no interest in the property of the coparcenary and can take no share in it" : *see* 55 Mad 577[8] at page 579.

It is said that the above proposition laid down by Waller J. is not sound because partition does not put an end to the right of inheritance and therefore the divided son must succeed to the father's self-acquired property equally with the undivided son, but the answer to this argument is that the divided son has ceased to be a member of the coparcenary, and although coparcenaryship in the narrower sense of community of interest and unity of possession may not exist between the father and his joint sons in respect of self-acquired property, there is still a coparcenaryship in the wider sense of the term and the divided son not being a member of the coparcenary can take no share in the self-acquired property of the father. Varadachariar J. in a very learned judgment (if I may say so with respect) in A. I. R. 1935 Mad. 775[26] at p. 778, where he was discussing the case of a disqualified person, refers to three principles of succession obtaining amongst three groups of heirs under the Mitakshara law, (1) the son, (2) the widow and other heirs, (3) the reunited parcener, and observes :

"It is obvious that the principles of succession are different as amongst these three groups. In the first, it is by survivorship (even in respect of the father's self-acquired property), according to the scheme of the Mitakshara. In the second it is by inheritance pure and simple. In the third group it is an anomalous rule of succession which has now been assimilated to the principle of survivorship..."

The learned Judge observes at page 779 :

"Founding himself on an observation of Lord Lindley in 25 Mad. 678[7] at p. 687 Mr. Sastriar contended that where there is no right to partition there can be no right to take by survivorship. It is sufficient answer to this to say that these general remarks are not without exceptions and recent decisions of the Judicial Committee as to succession by survivorship in the case of impartible zamindari furnish an instance of such exception : *see* particularly the observations in 59 Cal. 1399[25] at p. 1413 and 67 M. L. J. 274 at page 284 corresponding to 56 All. 468.[27]"

At page 780 he says :

"Once the conclusion is reached that a disqualified person may be 'coparcener' enough to take by survivorship, there is no reason why we should deny the possibility of such a severance of the joint status as would put an end to the right of succession by survivorship."

In the case of a divided son this is exactly what has happened, namely that there has been a severance of the joint status and his right of succession by survivorship (let me emphasise here what has been said before that even in the case of self-acquired property the succession in the case of a joint son is by some sort of survivorship) is gone. I wish at this stage to refer again to the case in 59 Cal. 1399 = 1932 A. L. J. 919.[25] At page 928 of the latter series Sir Dinshaw Mulla says :

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in 10 All. 272[24] and the *First Pittapur case*,[28] and so also the third as held in the *Second Pittapur case*.[29] To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains and this is what was held in *Baijnath's case*.[30] To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered."

It is true that their Lordships were discussing the case of an impartible estate but what I wish to emphasise is that survivorship can under circumstances exist even when there is no right of partition and no right to restrain alienations. The cases in 45 Cal. 590[31] and 50 Cal. 929[32] where it has been held that the right of a reversioner is a mere spes successionis are different because those are cases of Hindu widows and reversioners and there the right of a reversioner is undoubtedly a mere spes successionis. I need not here say anything much on the point that when two or more sons succeed as heirs to the self-acquired property of their father they take the property as joint tenants with rights of suruivorship. This seems to be well established for their Lordships of the Privy Council in 25 Mad. 678[7] at p. 687 quote with approval the view taken by Phear J. in 20 W. R. 189[6] that members of a joint family who succeed to self-acquired property take it jointly, and Mulla has so laid down in his Principles of Hindu Law, Edn. 9, at p. 23. It may be conceded that there is no definite text in the Mitakshara on the point at issue,

26. ('35) 22 A.I.R. 1935 Mad. 775 : 160 I. C. 624 : 69 M.L.J. 410, Venkateshwara Pattar v. Manakayammal.

27. ('34) 21 A.I.R. 1934 P. C. 157 : 150 I. C. 545 ; 56 All. 468 : 61 I.A. 286 : 67 M. L. J. 274 (P. C.), Collector of Gorakhpur v. Ram Sundar Mal.

28. ('99) 22 Mad. 383 : 26 I. A. 83 : 9 M.L.J.Sup. 1 : 7 Sar. 481 (P. C.), Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards.

29. ('18) 5 A. I. R. 1918 P. C. 81 : 47 I.C. 354 : 45 I. A. 148 : 41 Mad. 778 (P.C.), Gangadhara Rama Rao Bahadur v. Raja of Pittapur.

30. ('21) 8 A. I. R. 1921 P. C. 62: 60 I. C. 534 : 48 I.A. 195: 43 All. 228 (P.C.), Baijnath Prasad Singh v. Tej Bali Singh.

31. ('17) 4 A. I. R. 1917 P. C. 95 : 44 I. C. 408 : 45 Cal. 590 : 45 I. A. 35 (P. C.), Amrit Narayan Singh v. Gaya Singh.

32. ('23) 10 A. I. R. 1923 P. C. 189 : 74 I. C. 499: 50 Cal. 929 : 50 I. A. 239 (P. C.), Annada Mohan Roy v. Gour Mohan Mullick.

but there are certain rules laid down about the rights of a reunited kinsman and the rights of an after-born son. I shall first deal with the text dealing with the after-born son. In Chap. 1, S. 6, placitum 1, it is said :

"When the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution."

Placitum 4 makes this rule very clear and it is as follows :

"Thus same rule is propounded by Manu, "A son born after a division, shall alone take the parental wealth." The term parental (pitryam) must be interpreted 'appertaining to both father and mother : 'for it is ordained, that 'A son, born before partition, has no claim on the wealth of his parents, nor one, begotten after it, on that of his brother."

Placitum 5 says :

"The meaning of the text is this : One, born previously to the distribution of the estate, has no property in the share allotted to his father and mother who are separated . . . ."

Placitum 6 says :

"Thus, whatever has been acquired by the father in the period subsequent in partition, belongs entirely to the son born after separation. For it is so ordained : 'All the wealth, which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition : those, born before it, are declared to have no right."

Placitum 7 says :

"But the son, born subsequently to the separation, must, after the death of his father, share the goods with those who reunited themselves with the father after the partition : as directed by Manu ; 'Or he shall participate with such of the brethren, as are reunited with the father'."

Chapter 2, S. 9, deals with the reunion of kinsmen after partition, and it is important to note that almost all the placita in this chapter deal with brothers and give preference to the reunited brother or parcener, and therefore it may be argued that in the absence of a specific text a reunited son cannot claim preference to another who remains separate and therefore the principles governing a reunited brother against a separate brother should not be extended by analogy to a reunited son against a separate son, and this seems to be the view taken by Viramitrodaya in Setlur's Translation at p. 436 and by Golap Chandra Sarkar in his Hindu Law, Edn. 7, at p. 586. I can only speculate at this attitude and one reason that suggests itself to me is that the tendency to remain joint was great, so much so, that in the case of a son it was regarded a sin to separate from the father and this primal sin could not be expiated by reunion even, whereas in the case of brothers where separation was not so very wrong a *locus pœnitentiæ* was afforded.

But when we have specific texts giving preference to an after-born son over sons born before partition (and it must be remembered that this partition is not the partition of ancestral property but is the partition which a father effects in his lifetime qua his self-acquired property) to the extent of making him the sole inheritor of his father's wealth and when we find placitum 7 enjoining that the after-born son shall participate with such of the brethren, as are reunited with the father, there is no reason why some argument by way of analogy be not based regarding the rights of divided and undivided sons in the inheritance of their father in respect to self-acquired property. An after-born son excludes the sons who had been separated before and he gets the entire wealth of the father whether acquired before partition or after partition to the exclusion of the sons who had separated, but if one of the separated sons has reunited with the father then the after born son has got to share it with this reunited son. It is not reasonable to argue that if a father separates two of his sons and remains joint with two others, then the entire wealth of the father, that is to say, the rest of the self-acquired property, will be shared by the after-born son and the sons who have remained joint with him, or can it be argued that the after-born son will exclude those sons also who have not been separated. I think I am right when I say that the joint sons and the after-born son will share equally in the self-acquired property of the father after the father's death to the exclusion of the separated sons. It would be opposed to all principles of equity and commonsense if one were to hold that the after-born son will get the whole property to the exclusion of the sons who have remained joint with the father at the time when the after-born son came into existence but will have to share it with the re-united son.

The re-united son does not differ in principle from the son who was never separated at all, and if it be argued that the re-united son brings certain effects of his and throws them into the common stock of the father it may in some cases happen that the effects which the re-united son brings do not augment the share of the after-born son but really reduces it, since it may well happen that the property in the hands of the father which would go solely to the after-born son might be very much more than the effects which the re-united son brings back with himself. At page 381 Mulla in his Principles of Hindu Law, 9th Edn. says :

"Next, suppose that *A* does not separate from all the three sons, but separates from *B* alone and remains joint with *C* and *D*, and *F* is subsequently born to *A*. In this case on *A*'s death *C*, *D* and *F* will all take in equal shares the portion of the joint property allotted to *A*, *C* and *D* at the partition, and also *A*'s separate property, that is to say, the separate property of *A* and the portion of the joint family property allotted to *A*, *C* and *D* at the partition will be divided equally among *C*, *D* and the after-born son *F*."

The late Sir Gaganatha Jha in his book on Hindu Law in its Sources, Vol. 2 collects all the texts relating to after-born sons and re-united sons. At page 347 he says :

"If a son is born after partition, he shall receive the property of the father alone, or, if any other sons had been re-united he shall share it with them — (Manu, 9. 216; Narada, 13.43) (Quoted in Aparka, p. 729, Mitakshara, p. 651, Madanaparijata, p. 653, Vivadaratnakara, p. 538; Vivadachitamani, page 228, Vivadachandra, 20-1-8; Smritichandrika, page 711; Parasharamadhava, p. 340; Dayabhaga, pages 24, 130; Viramitrodaya, pp. 590, 591, Vyavaharamayukha, page 104.)."

At page 351 the learned author says :

"The self-acquired property of the father divided from his sons goes entirely to the son born after that partition, those born before have been declared to have no right over it. In regard to property as also to debts, gifts, pledges and purchases, they have no concern with each other, except in regard to impurity (due to death and birth) and water-libation—(Brhaspati, 25-19-20). (Quoted in Mitakshara, p. 653; Madanaparijata p. 655; Dayabhaga, p. 131; Vivadaratnakara p. 539; Vivadachintamani, p. 229; Smritichandrika, pp. 710, 711; Vyavahara-

mayukha, p. 104; Viramitrodaya, p. 590; Parasharamadhava, p. 340; Smrititatva 2, p. 168, Vibhagasara, 13.2.2)."

The rights of the after-born son have received judicial recognition: *see* the case in 4 All. 427.[23] There is a well-known book Saraswati Vilasa written by the King of Orissa, a book which is of great authority in Dravida or Madras School, but which has also been approved by their Lordships of the Privy Council in matters arising under the Mitakshara Law, *see* 59 Cal. 576[18] at p. 581, and in this book at page 146 in Setlur's Translation occurs para. 235 which runs as follows :

"Where a father has two or three or many sons and is divided with some and undivided with others, property acquired by him shall be divided after his death only among his undivided sons."

Prima facie this is a direct text on the point which we are discussing, but it is argued that para. 235 occurs in the paragraphs which deal with the rights of the son born after partition. I doubt very much if the Sanskrit text has got a heading like the one which we have in the translation, for the heading appears in italics but even assuming that para. 235 means that, where a father has two or three or more after-born sons and is divided with some and undivided with others of them property acquired by him shall be divided after his death only among his undivided after-born sons. This would then be a clear text for the proposition that as amongst the after-born sons the undivided sons will exclude the divided sons. There is no such magic in the after-born sons that as amongst them the undivided sons have preference over the divided sons, and the same principle will not operate when there is a competition between the divided sons and undivided sons, pure and simple.

A different result was obtained by the learned Judges of the Oudh Chief Court, but with all respect I venture to suggest that they laid undue emphasis upon what was observed by their Lordships of the Privy Council in 9 M. I. A. 539[4] where it was observed that "there was community of interest and unity of possession between all the members of the family" so far as the joint family property was concerned, and as there was no such community of interest and unity of possession between the father and sons joint with him in the case of self-acquired property the undivided sons did not exclude the divided ones and partition did not annul the filial relation nor the right of succession incidental to such relation. But as was observed by Niyogi J. in the Nagpur case, "the self-acquired property of the father though capable of being alienated at the will of the father becomes ancestral when at his death it devolves on his son. In so far as the son is undivided or reunited or born after partition between the father and his other sons, his status vis-a-vis his father is that of a co-owner. Consequently, the self acquired property left by the father would be in the nature of an accretion to his interest in the joint property and when it devolves on the undivided, the reunited or the son born after partition, it does so as if it were coparcenary property. Hence the preference accrued to the undivided son in respect of succession to the self-acquired property of the father .... the self-acquired property of the father is thus in its nature a coparcenary property vis-a-vis his (undivided) son who therefore takes it on his father's death as a surviving coparcener. It must, therefore, follow that a son who does not fulfil the condition of being a coparcener with his father is not entitled to the father's self-acquired property." The learned Judges of the Oudh Chief Court were further influenced in their decision by the case in 17 A. L. J. 151,[12] but a careful reading of that case makes it clear that the competition in that case was between the son living with his father and a son, living away from the father, and it was held in that case that the mere fact of separate living did not operate as a division and naturally the son living away was held equally entitled with those living with the father to succeed. Waller J. in 55 Mad. 577[8] discussing 17 A. L. J. 151[12] said :

"It is a legitimate inference from emphasis laid on the fact that there had been no partition that, had there been a partition, the decision would have been in the opposite sense."

From what I have said before it follows that by reason of the interest which a son gets in the father's self-acquired property also from birth, I am prepared to extend the principle of coparcenaryship in the case of a father and his joint sons and give to such sons the right to inherit in a manner akin very much to the right of survivorship. This is the reason for giving a preference to the joint sons over the divided sons who are not members of the coparcenary. I think I am on equally and perhaps more solid grounds when I am prepared to give this preference to the undivided son over the divided son by reason of the argument by way of analogy afforded from the cases of the after-born son and reunited son. I have given expression to such arguments in the earlier portions of my judgment. In 22 Bom. 101[1] Jardine J. referred to certain grievous inconveniences which would follow if the contrary view was taken and relying on the case in 9 M.I.A. 539[4] held that one is entitled to consider these inconveniences, and said :

"It would stimulate unpleasant litigation. It would interfere with the power of the father and the sons remaining in union with him to provide for a separating son by giving him when he demands partition something more than his proper share of the ancestral property. That can be reasonably done when the self-acquired property left with the father or in the coparcenary is sufficient to make good provision for those who do not choose to separate. But such reasonable family arrangements would be hampered if the father were at once obliged to protect himself by resorting to gift or will in order to prevent the separating son making claim on the death of the father to share in the self-acquired property. A partition would thus be complicated with the arrangements of a testamentary sort and premature."

I might add to the inconveniences and hardships enumerated by Jardine J. A father is possessed of self-acquired property and has four sons. One of his sons does not pull on well with the rest of the family and the father gives him a one-fourth share and separates him. Later on, the father dies intestate. It would not be fair to give to the separated son another fourth share out of the remaining three-fourths. It may be that when the son separates he gives a sort of undertaking that he would claim no further share in the inheritance at the time of the father's death, and if he is permitted to claim a share again, he would be resiling from the undertaking given before. Let it be understood here that I am not deciding the question as to whether in law he is entitled to resile from the undertaking or not, but I am only looking at the equitable aspect of the question. Again a father may separate one of his own sons after giving him a portion of his self-acquired property. Later he remains joint with his sons and on account of adversity and the

growing needs of the family he is compelled to part with a great deal of the property that was reserved by him for himself and his joint sons; and when the father dies, if the separated son is allowed to take a share in the balance of the property, his own share would be considerably augmented to the detriment of the sons who had the merit of remaining joint with the father. Then again only that portion of the property which has remained with the father will be liable for debts taken by the father after partition and the property taken away by the separated son will be immune. It may also be that the father who has separated one of his sons and has remained joint with the others has had his self-acquired property greatly augmented by the time of his death owing to the exertions of his joint sons, and it would obviously be inequitable that the separated son who has contributed nothing towards this augmentation should be permitted to share in the same after the father's death. I would, therefore, answer the question referred to us in the affirmative.

HAMILTON J.—The question which has been referred to the Full Bench is as follows :

"On the death of a Hindu leaving self-acquired property do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara Law ?"

There was at first a view that the sons had from birth an interest in the self-acquired property of the father so that he had not the power to deal with it as he liked and it was a coparcenary so that on his death the property devolved by survivorship and not by inheritance. In 20 All. 267[15] their Lordships of the Privy Council decided that there was a conflict between Mitakshara, Ch. 1, S. 1, cl. (27) and Ss. 4 and 5 and the latter prevailed with the result that the father had absolute power over his self-acquired property. The first text contained moral and religious consideration but the latter contained positive laws. In 9 M. I. A. 539[4] at page 543 their Lordships of the Privy Council dealt with the second contention and stated :

"But the law of partition shows that as to the self-acquired property of one member of a united family the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship falls."

The effect of decisions of their Lordships of the Privy Council was considered in 44 Mad. 499,[3] a Full Bench decision, where it was held that an undivided Hindu son acquires the self-acquired property of his father by inheritance and not survivorship. The view expressed in 32 Mad. 377[2] that an undivided son acquired by survivorship the self-acquired property of the father in preference to the divided son was dissented from as regards the manner of devolution but the point to be decided was whether a succession certificate was required and not the rights of a divided and undivided son. It is I think mainly if not wholly in the belief that survivorship and not inheritance applied that the Bombay and Madras High Courts decided that the undivided son excludes the divided son and modern writers accepted that view as correct with little or no independent reasoning. It has still been argued that in spite of those decisions of their Lordships of the Privy Council there is some kind of delayed action coparcenary, if I can use such an expression, so that the sons can do nothing when their father is alive but the coparcenary comes into activity when the father has died. I find myself unable to visualize such a peculiar coparcenary and learned counsel has not explained what would be the incidents of it on the death of the father.

The sons take by inheritance, and not by survivorship as in the Hindu coparcenary, and so does the grandson whose father is dead, and if the sons after getting the property can divide the property such division does not prove coparcenary. It appears from the judgment of Kumaraswami Sastri J. in 44 Mad. 499[3] that Lord Macnaghten considered that the son had a mere spes successionis and I find it difficult to see what more the son has. Supposing however that the son had some kind of interest by birth I still do not see why he should lose it by partition of the ancestral property in the lifetime of the father. If a son resides and eats apart from his father but does not at the same time partition the ancestral property he does not ipso facto lose his rights in that estate and if only part of the property is divided he does not lose all rights in the remainder and I suppose no one would argue that if there has been partition of the self-acquired property of the father the son who got a share would lose his rights in the ancestral estate.

If a son has by birth an interest in the self-acquired property of his father as he has in the ancestral property but that interest only becomes active at the death of the father why should he not exercise that right then, just as a coparcener who has only partitioned a part of the ancestral property? If on the other hand the son has no legal right by birth and there is only a moral duty laid on the father to secure an equal distribution of his self-acquired property among his sons either by dividing it in his lifetime or by avoiding a testamentary disposition why should not all the sons share? The position then appears to me to be that the father is as regards his self-acquired property from the beginning just as separate from sons who are joint with him in ancestral property as from sons who are not and partition of ancestral property will have no bearing on his self-acquired property.

It may be argued here that the position is not the same if there has been partition of the self-acquired property as the divided son has got his share and if such self-acquired property of the father as is in existence at his death is divided equally then the undivided son loses and it may further be argued that as with ancestral property if the divided son has got his share the undivided should take the rest. As regards the second argument there is the difficulty that there is inheritance and not survivorship and an heir cannot part with his rights in view of S. 6 (a), T. P. Act, even if he wishes to do so : *vide* 3 Bom. 54,[33] 45 Cal. 590,[31] 50 Cal. 929[32] and I.L.R. 1939 All. 950.[34] On the other hand, it does not necessarily follow that the self-acquired property at the death of the father should be divided equally. It may be that, if the sons should all take equally allowance should be made for what the divided son has already got.

Coming now to decisions of High Courts, they are 22 Bom. 101,[1] 32 Mad. 377[2] and 55 Mad. 577[8] which give preference to the undivided son and 5 Luck. 649[9] and (at any rate to some extent) 17 A. L. J. 161.[12]

22 Bom. 101[1]: Ranade J. relied partly on 9 M.I.A. 539[4] but this he appears to have misquoted to West

33. ('78) 3 Bom. 54, Balkrishna Trimbak v. Savitri Bai.

34. ('39) 26 A.I.R. 1939 All. 689 : 184 I. C. 531 : I. L.R. (1939) All. 950 : 1939 A. L. J. 824 (F.B.), Umashankar v. Ram Charan.

and Buhler and to the fact that no divided son had previously asserted such a right. I think this decision has been carefully considered in 5 Luck. 649[9] and I agree with what has been said there. I would however add that in my opinion the fact that there was no previously reported case on this question leads to no inference either one way or the other. As regards the judgment of Jardine J. I agree with what was said in 5 Luck. 649.[9]

32 Mad. 377[2] : This decision was based on the belief that sons took by survivorship.

55 Mad. 577[8] : This was based on the principle that the self-acquired property of the father becomes part of the joint property of united sons and as the divided son no longer belongs to the coparcenary he can take no share in it. With all respect to the learned Judges if the argument is what I understand it to be, it can only hold good on the presumption that there is what I have termed a delayed action coparcenary between the father and the sons and this appears to me to be negatived by their Lordships of the Privy Council at any rate as understood by Lord Macnaghten and the Madras Full Bench. So much of the self-acquired property of the father as does go to undivided sons may become joint family property when it has got there so that succession to one of those sons is by survivorship and in his life-time he may not have absolute power of disposal but the question which has to be decided first is what goes to the sons. The learned Judges referred to 17 A. L. J. 151,[12] but they were under a misapprehension as the family had no ancestral property at all.

5 Luck. 649[9] : This case was if I may venture to say so very carefully reasoned after considering other decisions and various placita of the Mitakshara.

17 A. L. J. 151[12] : As there was some doubt as to the force of the decision I examine the whole case. The plaintiffs alleged that they were joint with the father and the defendants were not and they claimed property left by the father. The defendants said that the property was ancestral and therefore they had a right as coparceners but if it was self-acquired property of the father they still were entitled as heirs and the plaintiffs were just as separated as they were. The first Court held that the property was self-acquired that the defendants lived entirely separate, maintaining themselves on property which they got from the widow of their grand-father's brother, while the plaintiffs lived jointly with their father. It decreed the suit apparently giving preference to sons whom it considered to be joint against sons whom it considered to be separate.

There had been no partition but there could not have been any, for there was no ancestral property and the self-acquired property of the father could not be partitioned, and there could not have been any greater separation in the circumstances. The learned Judges who decided the appeal held that if this property was ancestral then the defendants in the absence of a partition were still coparceners but if, as the first Court had found, the property was self-acquired then all the sons were equally entitled. As there had been no partition this case does not decide that a partitioned son takes equally with the others but I think that it does decide that a separated son takes equally with the others.

Finally there is a case, A.I.R. 1941 Nag. 297[10] in which it was held that a brother A, living with another B, and a third C separated from him (B) were entitled to equal shares in the self-acquired property of the deceased brother. A distinction was made between the case of a father and sons and the case of brothers and it was merely taken for granted, in view of the decisions referred to, that the undivided son was preferred. It has then been argued that an undivided son is in the same position as a reunited son and so should be preferred. The Viramitrodaya, however, distinguishes between the reunited son when there is a son born after partition and the reunited son when there is not. In Chap. IV, 12 it is stated :

"If it be argued that the reunited sons alone should inherit the estate of the father when there are both reunited and unassociated sons, the answer is that the argument is not tenable.

Besides, ownership in the property of the father or other ancestor is to be held to be caused by sonship, etc., alone, if not attended with degradation and the like disqualification, but not also if attended with reunion, by reason of multiplicity: and as the sonship, etc., belong equally to all the male issue, whether reunited or not therefore the succession to their property of all the sons and the like without distinction is proper.

Nor can it be said, that right (of the sons, etc. as such) to the property of the father and the other ancestors ceases by partition.

But if a son be born after partition, then (agreeably to what is said above, also) the sons who have been previously separated would have been entitled to the father's property, but they are debarred by the text of Brihaspati, namely—Those born before partition are not entitled to the share of the parents. Whatever is acquired by a father separated from the son belongs entirely to one born after partition."

It seems to me that there is good reason to distinguish between the case when there is a son born after partition and the case when there is not. In Mitakshara Chap. 2, S. 9, placitum 2 it is stated :

"Effects which had been divided and which are again mixed together are termed reunited. He to whom such appertain is a reunited parcener."

The reunited son would have mixed again with his father what he had obtained and what had been the self-acquired property of the father would reacquire that status. The son born after partition had he not been made to share with the reunited son would have excluded the reunited son but the partition would not be annulled by the birth of a son after it and the partitioned son would keep what he had obtained. The reunited son then would have been in the worst position. If however there is no son born after partition there is no one to exclude the reunited son. The rights of the son born after partition are also considered in the Sarasvati Vilas clauses 227-248 and the rights of reunited sons are also considered and the result as far as I can see is the same as in the Viramitrodaya. In clause 234 it is stated :

"The son born after partition shall divide with such of the brothers as lived in reunion with the father after partition, as Manu says: Let him divide with those who were reunited with him (the father). but at 758 if it be said that sons reunited with the father take his wealth and that sons not reunited with the father do not take his wealth, just as the son born after partition takes the wealth of the father and not other sons,

759 Not so . . . . . .

763 Therefore that the ownership of reunited and not reunited sons in the paternal wealth is equal is only reasonable."

In view of these texts I do not see how one can say that in the absence of a son born after partition the reunited son is to be preferred to the non-reunited and I do not see on what principle the

united son should be preferred to the reunited. If there was a united son a reunited son and a non-reunited son who had already got his share in the self-acquired property of his father why should the reunited son be the one who got nothing at all? To sum up I come to the following conclusions: The united son is no better than the reunited son and there is clear and ancient authority to the effect that when there is no son born after partition the reunited and non-reunited share equally. There is no coparcenary of father and sons in the self-acquired property of the father and, therefore, no reason to prefer an undivided to a divided son but if there has been division of the father's self-acquired property so that the divided son has got something it may be that at the death of the father the property has to be so divided that the sons finish up with equal shares. If, however, there is some kind of coparcenary then partition of ancestral property does not put an end to it. My answer to the reference is that undivided sons do not exclude the divided son.

BY THE COURT.—Having regard to the view taken by the majority of the Judges on this Full Bench, we answer the question referred to us in the affirmative.

(After receiving the opinion of the Full Bench the case came before the Division Bench who delivered the following judgment.)

JUDGMENT.—This suit of the plaintiff Ganesh Prasad for partition of what he alleges to be the joint family property of himself and defendants 1 to 7 and defendant 16 was dismissed by the second Subordinate Judge of Cawnpore and hence he has filed the present first appeal. There was a man by the name of Deoki Nandan who had four sons Ajodhya Prasad, Salik Ram, Sheo Dayal and Ram Sahai. These persons have all died. Ajodhya Prasad had four sons Hazari Lal, Darbari Lal, Ganesh Prasad and Har Prasad. Har Prasad is dead and his son is Krishna Rakhan. Hazari Lal's son is Jagannath Prasad. Darbari Lal's sons are Chhotey Lal and Kanhai Lal. The latter is dead. Sheo Dayal had two sons, Ram Charan and Ratan Lal both of whom are dead. Ratan Lal has five sons, Shyam Lal, Radhey Lal, Murli Dhar, Sunder Lal, Mathura Prasad and Mathura Prasad's son is Som Narain. Salik Ram and Ram Sahai left no issues. Ganesh Prasad is the plaintiff and he alleges that there was a separation between the branch of Ajodhya Prasad and Sheo Dayal and Sheo Dayal's grand-children were not members of a joint Hindu family with the children and grand-children of Ajodhya Prasad. He impleaded as the principal defendants to the suit Hazari Lal, Darbari Lal, Krishna Rakhan, Jagannath Prasad, Devi Dayal, Chhotey Lal and Mt. Mithana, widow of Ajodhya Prasad. These are defendants 1 to 7. Devi Dayal, son of Jagannath Prasad, was impleaded as defendant 5, but he died during the pendency of the suit and his name was, therefore, struck off. Mathura Prasad, Radhey Lal, Sunder Lal, Murli Dhar, Shyam Lal and Som Narain were impleaded as defendants 8 to 13 because they were alleged to be partners (not members of a joint Hindu family) in a certain firm in which the branch of Ajodhya Prasad had a share. In the same capacity were Lala Ram Lal, defendant 14, and Sri Thakur Ram Krishna Murarji, defendant 15 impleaded. Mt. Gomti, wife of Jagannath Prasad, was impleaded as defendant 16 at a later stage and she really comes in the same group as defendants 1 to 7.

The allegation of the plaintiff was that Lala Ajodhya Prasad as also his sons and grandsons were members of a joint Hindu family governed by the Mitakshara law and the property, business, residence and mess of all of them were joint. The moveable and immovable joint family properties were mentioned in Lists 1 to 9 attached to the plaint and the plaintiff said that his share in those properties was one-fifth. An ancestral nucleus was alleged and it was said that Ajodhya Prasad with the help of this nucleus obtained the plaint properties by entering into partnership in various firms like Lalman Ginnu Lal, Ratan Lal Hazari Lal and Ajodhya Prasad Raja Ram, but ultimately he entered into partnership in the firm Ajodhya Prasad Ram Lal and in this firm Ajodhya Prasad's share was 6 as. 6 ps., Ratan Lal's share was 2 as. 6 ps., Ram Lal's share was 6 as. and Sri Thakur Ram Krishan Murarji's share was 1 anna. Ratan Lal is the son of Sheo Dayal, a brother of Ajodhya Prasad and he was succeeded by defendants 8 to 13 whose share thus comes to 2 as. 6 ps. In para. 12 of the plaint it was said that the plaintiff had recently come to know that Hazari Lal and Darbari Lal, defendants 1 and 2 had given cash to defendants 8 to 13 for their share and therefore the share of Ajodhya Prasad's branch had become 9 as. Ajodhya Prasad died on 31st October 1927 and the plaintiff being one of the four sons of Ajodhya Prasad was entitled to a one-fifth share only in the properties in suit because one share would go to Mt. Mithana, the widow of Ajodhya Prasad. There was no regular partition in the family up till the institution of the suit, although for about a year or so the plaintiff on account of quarrels had been messing separately.

The various defendants filed separate written statements, but the main defence was on behalf of defendants 1, 4 and 5, Hazari Lal, his son Jagannath Prasad and the latter's son Devi Dayal (who, as we have mentioned before, died during the pendency of the suit). The allegation of the plaintiff was that Ajodhya Prasad had been entering into partnership with strangers not in his personal capacity but as representing the family and that was so even in the case of the firm Ajodhya Prasad Ram Lal, but this fact was strenuously denied on behalf of defendants 1, 4 and 5. It was said that Ajodhya Prasad was a partner in his personal capacity, that Ajodhya Prasad came to Cawnpore in a very helpless condition, his father Deoki Nandan having left no assets of any kind, and Ajodhya Prasad began to work as an ordinary broker in the firm Tula Ram Baldeo Prasad about the year 1879. Ajodhya Prasad then worked in partnership with several strangers and acquired property and money by his personal labour and till his death he was the exclusive owner in enjoyment of his property and the plaintiff or the other sons had no right as from birth in the properties owned by Ajodhya Prasad. He was very much displeased with Ganesh Prasad, so much so that the latter was turned out of the family with some goods and cash and on 17th April 1913 Ganesh Prasad executed a memorandum acknowledging the fact of his separation, but subsequently, about the year 1917, he was employed as a munim at the shop and remained a munim till about the year 1928. Darbari Lal, defendant 2 also had no interest in the properties acquired by Ajodhya Prasad and he too was separated and worked as an employee in the shop. From time to time, various sums of money on account of the salaries of Ganesh Prasad and Darbari Lal were entered in the account-books of Ajodhya Prasad. In para. 24 of the written statement, which has not been correctly translated, it was said that, excepting the amounts which stood credited in the various account-books in the names of his issues, Ajodhya Prasad was the owner of the

entire property and he willed his all in favour of his son Hazari Lal and he also gave a writing dated 29th August 1927 to his partner Ram Lal. Ganesh Prasad was guilty of an act of defalcation inasmuch as he stole currency notes of the value of Rs. 78,800 and a suit for the recovery of the said amount was instituted in the Court of the Subordinate Judge, but subsequently the suit was withdrawn and the major portion of the money was deposited through Mathura Prasad, and Ganesh Prasad himself made certain entries in the account books admitting his mistake. There were certain other defences, more or less of a technical nature, but it is not necessary to mention them in any detail. Defendants 2 and defendant 3 filed two separate statements and it is curious that they support defendant 1 thus alleging facts contrary to their interests. Defendants 8 and 13, namely Mathura Prasad and his son Som Narain also filed a written statement and they support defendant 1 and allege that the two annas six pies share of defendants 8 to 13 in the shop of Ajodhya Prasad Ram Lal was transferred to Hazari Lal. Defendants 9 to 12, the other sons of Ratan Lal, support the plaintiff and do not admit the validity of the transfer of the two annas six pies share to Hazari Lal. Defendants 14 and 15, Ram Lal and Sri Thakur Ram Krishna Murarji, support the main defence of Hazari Lal. Defendant 7, Mt. Mithana, the mother of Ganesh Prasad and Hazari Lal, supports the plaintiff.

The learned Subordinate Judge framed as many as fourteen issues in the case and decided practically all of them against the plaintiff and dismissed his suit. He, however, said that the plaintiff will be entitled to retain possession of the Mathuri Mahal house (list No. 6 of the plaint) and moveables (list No. 3 of the plaint), the finding being that these were the exclusive properties of the plaintiff which he had included in the suit dishonestly. The learned Subordinate Judge further held that the house in Lathi Mohal was the exclusive property of Ram Lal, defendant 14 and the family of Ajodhya Prasad had nothing to do with the same. According to the Court below Deoki Nandan, father of Ajodhya Prasad, was a poor man and no assets were left by him which could form a nucleus of ancestral property. The separation of Ganesh Prasad in the year 1913 was held to be established, so also the oral will of 1926, alleged by defendant 1 Hazari Lal to have been made by Ajodhya Prasad, by which Ajodhya Prasad left all his property to Hazari Lal. The issues regarding the insufficiency of court-fee, non-joinder of parties and omission of certain properties were all decided against the plaintiff.

In appeal it was not seriously contested that the finding of the Court below that Deoki Nandan left no assets was wrong, but it was said that Genesh Prasad had not separated from the family, that there was no will in favour of Hazari Lal and, even if it be held that Ganesh Prasad had separated from the family, he was entitled to share in the property left by Ajodhya Prasad if the oral will set up by Hazari Lal was not established, and the submission was that the oral will had not been established by the evidence on the record. We propose to take up the question of Genesh Prasad's separation at the very outset. [After going through the evidence their Lordships proceeded.] All this evidence leaves no room for doubt that Ganesh Prasad was separated in 1913 and remained separate all along. We have also no doubt that after the death of Ajodhya Prasad, Ganesh Prasad with the help of Darbari Lal attempted to create some evidence to the effect that he had a share in the firm Ajodhya Prasad Ram Lal. As the learned Subordinate Judge points out, this evidence was created behind the back of Hazari Lal, and although great reliance has been placed upon it by learned counsel for the appellant, like the Court below we are of the opinion that this was done surreptitiously and cannot help the plaintiff. Ajodhya Prasad died on 31st October 1927 and in his lifetime he had obtained certain decrees against some persons. At page 274 of our record, there is an execution application dated 28th November 1927 in which it is stated that after the death of Ajodhya Prasad the heirs entitled to execute the decree are Hazari Lal, Darbari Lal, Ganesh Prasad and Krishna Rakhan. There is also an affidavit of Darbari Lal of the same date to the same effect. A compromise was arrived at in that case and herein also Hazari Lal, Darbari Lal, Ganesh Prasad and Krishna Rakhan figure as the heirs of Ajodhya Prasad.

There are similar applications at pages 288, 294 and 300 of the record, but it appears that Darbari Lal was the general attorney and he obtained the signatures of Hazari Lal on blank printed execution applications and on blank printed vakalatnamas and subsequently his and Ganesh Prasad's signatures were put down without the knowledge of Hazari Lal and all this was done in order to create evidence. Sukhdeo Prasad, a clerk of Pandit Ajodhya Nath Tiwari, vakil, was examined on behalf of the defendant and he says that Ajodhya Prasad and Hazari Lal never came to Court in connexion with Court work, but that they used to send Darbari and Ganesh Prasad to do Court work and Darbari and Ganesh used to bring blank papers signed by Hazari. At page 307 of the record there is a general power of attorney dated 26th March 1929 drawn by Ram Lal, Hazari Lal, proprietors of the shop styled Ajodhya Prasad Ram Lal in favour of Lala Darbari Lal, and this shows that Ram Lal and Hazari Lal were alone the proprietors of the firm and Darbari Lal was only a general attorney. Great reliance is placed on a general power of attorney dated 15th December 1927 (p. 279) in which Ram Lal, Hazari Lal and Ganesh Prasad appear as owners of the firm Ajodhya Prasad Ram Lal and they appoint Darbari Lal as a general attorney, but this is not an original document and is a printed paper through and through and it purports to have been executed and signed in the presence of the Government Notary Public, Cawnpore, Mr. A. K. Chakrawarty. We can place no reliance upon this document in the absence of the register of the Notary Public and in the absence of the evidence of Mr. Chakrawarty. It appears that this document was not printed for the purpose of showing that Ganesh Prasad had also a share in the firm Ajodhya Prasad Ram Lal. The learned Subordinate Judge at pages 172-174 discusses the evidentiary value of these documents on which reliance is placed on behalf of the plaintiff, and we agree generally with his observations in this connexion.

We are thus in agreement with the finding of the Court below that Ganesh Prasad separated from Ajodhya Prasad in 1913. We need not discuss anything about the case of Darbari Lal. In his written statement he has admitted that neither he nor the plaintiff was ever a partner in the firm Ajodhya Prasad Ram Lal or in the firm Ram Lal Hazari Lal which came into existence after the death of Ajodhya Prasad. He also says that he and the plaintiff worked as employees in the firm Ajodhya Prasad Ram Lal and got their pay from the shop. We now come to the question of the will. The will alleged by the defendant is an oral will and according to

what has been stated by their Lordships of the Privy Council as early as 1867 in 12 M. I. A. 1[35] at p. 28, such a will must be proved in a very strict manner. Their Lordships say :

"But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place."

Again in 1931 A. L. J. 1131[36] their Lordships say :

"The onus of establishing an oral will is always a very heavy one, and in this connexion their Lordships may refer to the ruling of this Board for the guidance of Courts in India in dealing with oral wills in 12 M. I. A. 1[35] at p. 28, that they must be proved with the utmost precision, and with every circumstance of time and place."

The same view was reiterated by their Lordships of the Privy Council in 1937 A. L. J. 1014.[37] Bearing these observations in view we have come to the conclusion that although the witnesses produced by the defendants in this connexion may not be speaking the untruth, they do not prove the oral will set up by the defendants. We have already referred to these witnesses in an earlier portion of our judgment. They are Krishna Behari, Chandrabhan, Bhagwan Das and in an indirect manner Manmohan Dayal and Ram Lal also support the will. It is not necessary to discuss their evidence in detail, but a perusal of their evidence leaves an impression on one's mind that they do not prove the alleged will with precision and with every circumstance of time and place. In respect to the will, we arrive at a finding different from that at which the Court below arrived and hold that the contesting defendant has not been able to establish the oral will of Ajodhya Prasad. The plaintiff then contends that if the oral will is not proved then the plaintiff, although separated, is entitled to inherit the self-acquired property of Ajodhya Prasad along with the son or sons who remained joint with him. On 10th March 1942, we referred to a Full Bench the following question of law :

"On the death of a Hindu leaving self-acquired property do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara law ?"

The view of the majority of the Full Bench was that the undivided sons succeed to such property to the exclusion of the divided son, and that being so, the plaintiff is not entitled to succeed to the self-acquired property of Ajodhya Prasad, and it has already been held that the main items of the plaint property are the self-acquired property of Ajodhya Prasad. We have already said that the Court below dismissed the plaintiff's suit with certain reservations. It held that the plaintiff would be entitled to retain possession of the Mathuri Mahal house (list No. 6 of the plaint) and moveables (list No. 3 of the plaint). It also held that the house in Lathi Mahal was the exclusive property of Ram Lal, Defendant 14, and the family of Ajodhya Prasad had nothing to do with the same. No arguments have been advanced before us so far as this finding of the Court below is concerned, and we affirm the same. For the rest, in view of what we have said above this appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

35. ('67-69) 12 M. I. A. 1 : 9 W. R. 15 : 2 Suther 114 : 2 Sar. 348 (P. C.), Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee.

36. ('31) 18 A.I.R. 1931 P.C. 285: 133 I.C. 711: 58 I.A. 362 : 1931 A.L.J. 1131 (P.C.), Venkat Rao v. Namdeo.

37. ('37) 24 A.I.R. 1937 P.C. 174: 168 I.C. 418: 31 S.L.R. 379 : 1937 A.L.J. 1014 (P.C.), Mahabir Prasad v. Mustafa Husain.

Hindu law —
(a) ('38) Gour, Page 887 Pt. (4).
('40) Mulla, Page 25 Pt. (k); Page 238 Pt. (s).
(b) ('38) Gour, Page 890 Pt. (2).
('40) Mulla, Page 23 Pt. (d).
(c) ('38) Gour, Page 363 S. 114, Page 372 S. 115.
('40) Mulla, Page 237 S. 222; Page 238 S. 223.
(d) ('38) Gour, Page 899 Para. 2176.
(40) Mulla, Page 18 S. 24.
(e) ('38) Gour, Page 39, Para. 142, Page 68 S. 2; Page 70 Pt. (10); Page 72 Pts. 8-9.
('40) Mulla, Page 12 S. 24.
(f) ('38) Gour, Page 928 Pt. (2).
('40) Mulla, Page 33 Pts. (d), (e).
(i) ('38) Gour, Page 760 S. 238 (3).
C. P. C. —
(g) ('40) Chitaley, Preamble Note 15.

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FULL BENCH

IQBAL AHMAD C. J., GANGA NATH AND DAR JJ.

L. Kedar Nath and another —
Appellants

v.

H. Ali Ahmad and another —
Respondents.

Appeal No. 69 of 1938, Decided on 13th April 1942, from decision of Mulla J., in S. A. No. 27 of 1937, D/- 10th August 1938.

*** Provincial Insolvency Act (1920), Ss. 75 and 4 — Decisions other than those under S. 4— There is only one right of appeal — Order by trial Court granting conditional discharge does not come within S. 4—Revision and not appeal lies from appellate order of District Judge.**

Under S. 75 only one right of appeal is provided by the Provincial Insolvency Act so far as decisions other than decisions under S. 4 are concerned. The finality of the appellate order of the district Court in such cases can be challenged only by way of revision to the High Court as provided by the proviso to S. 75 (1). An order by the trial Court granting conditional discharge to the insolvent does not come within S. 4 and hence no appeal lies from the appellate order of the District Judge passed thereon. The appellate order can be challenged only by way of revision to the High Court under proviso to S. 75 (1). [P 220 C 1]

S. B. L. Gour — for Appellants.

N. P. Asthana — for Respondents.

IQBAL AHMAD C. J. — This reference to the present Full Bench arises under the following circumstances : In certain insolvency proceedings before the Small Cause Court Judge of Agra, the learned Judge passed a conditional order of discharge so far as the insolvent was concerned. Two of the creditors who are the appellants in the present Letters Patent appeal, filed an appeal to the District Judge against the last mentioned order of the Small Cause Court Judge. The District Judge

allowed the appeal and remanded the case to the Small Cause Court Judge for decision according to certain directions that were embodied in the judgment of the District Judge. Against the decision of the District Judge, a second appeal was filed in this Court and was entertained by a learned Judge who allowed the appeal, set aside the order of remand passed by the District Judge and restored the order of the Insolvency Judge. The present Letters Patent appeal has been filed against the judgment of the learned Judge of this Court.

The appeal came up for hearing before a Bench and the Bench in view of the conflict of opinion between this Court and the Madras High Court on the question as to whether under the provisions of the Provincial Insolvency Act, and in particular under S. 48 (2) of that Act, the insolvency Court has jurisdiction to direct the payment of interest by an insolvent at a rate higher than 6 per cent., referred the case to a Full Bench. This Court in 24 A. L. J. 441[1] answered the said question in the negative, whereas the Madras High Court in A.I.R. 1931 Mad 729[2] held that the insolvency Court has jurisdiction to direct payment of interest at a rate higher than 6 per cent.

A preliminary objection has been raised in this appeal by Dr. Asthana who appears on behalf of the insolvent. He contends that as the order passed by the Insolvency Judge was not an order under S. 4, Insolvency Act, no second appeal lay to the High Court. He proceeds to argue that as no second appeal lay to this Court, no Letters Patent appeal lies against the judgment of the learned Judge of this Court.

In our judgment this contention is correct and ought to prevail. By S.75, a right of appeal is given to the district Court by any debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a district Court. But it is further provided that the order of the district Court upon such appeal shall be final. In other words, only one right of appeal is provided by the Insolvency Act so far as decisions other than decisions under S. 4 of the Act are concerned. The finality of the appellate order of the district Court can be challenged only by way of revision to this Court. This is provided by the proviso to sub-clause (1) of S. 75.

It is clear, therefore, that no second appeal lay to this Court. The judgment of the learned Judge of this Court that is the subject of appeal before us cannot, therefore, be treated as a judgment in a second appeal. No Letters Patent appeal, therefore, lies under Cl. 10, Letters Patent. The preliminary objection is accordingly allowed and the present appeal is dismissed but in the circumstances of the present case, we direct the parties to bear their own costs of this appeal.

G.N./R.K. *Appeal dismissed.*

1. ('26) 13 A. I. R. 1926 All. 361 : 97 I. C. 556 : 24 A.L.J. 441, Ganga Sahai v. Mukarram Ali Khan.
2. ('31) 18 A. I. R. 1931 Mad. 729 : 134 I.C. 169, China Venkataraju v. Lakshmanaswami.

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SPECIAL BENCH

ALLSOP, VERMA AND HAMILTON JJ.

In re Tirathraj and others.

(Misc.) Case No. 717 of 1938, Decided on 31st March 1942, reference made by Special Judge, Second Grade, Basti.

Stamp Act (1899), Arts. 45, 46 and 12—Document not intended to divide properties mentioned therein but referring to previous partition and providing for division of certain properties afterwards by separate agreement — Document also providing for better management of previous partnership — Document not signed by any arbitrator but by parties themselves—Document held neither deed of partition nor deed of partnership nor award.

The document recited certain facts about a previous partition saying that certain houses were allotted at that partition to certain members of the family. There was also a reference to the rights of the parties as mortgagees and in respect of some zamindari property which was presumably ancestral. The reference was that the parties might by some separate agreement arrange for the partition of those properties. There was also a mention of a previous partition of certain zamindari properties which apparently had come to the parties by means of deed of sale. There was nothing to suggest that the instrument itself was intended to divide the properties mentioned in it. On the face of it, they had already been divided by a previous partition between the parties or were to be divided afterwards by a separate agreement. There were also certain arrangements mentioned in the deed for the management of the partnership business. There was a previous partnership which conducted a shop and the provisions in the deed itself were merely provisions for the better management of the firm and did not create any partnership or new partnership. The document was signed by the parties themselves :

Held that the document was not liable to the payment of stamp duty as it was neither a deed of partition nor a deed of partnership. Nor was it an award as it was not signed by any arbitrators.

[P 221 C 1,2]

A. M. Khawaja — for the Crown.

S. B. Johari — for Applicants.

ALLSOP J. — This is a reference under S. 60, Stamp Act, arising out of proceedings under the Encumbered Estates Act. In the course of those proceedings, a question arose whether certain property belonged to the applicants under the Act or to one Ram Charan who was a member of the same family. Ram Charan alleged that the property was his under the terms of a partition and in proof of his allegation he produced a witness called Kali Prasad. This man appeared in Court with a bahi in which were recorded certain terms which might be described as terms of a partition or terms of partnership. The opposite side immediately took the objection that the document was not admissible in evidence because it was not stamped. The learned Judge at the time heard the parties and examined the document and then recorded an order in which he said :

"I am satisfied that the document is a deed of partition and also of partnership. Munsarim to report on the amount of duty and penalty to be charged on it."

This order was dated 25th May 1938. After the order was signed, Ram Charan made an application asking that he should be allowed a further opportunity to be heard upon the point, as he wished to produce certain rulings. The learned Judge was apparently impressed with the need to give the parties a further opportunity to study the question and adduce their arguments, supported, if necessary, by authority. He therefore passed an order on the application that he would hear the parties again. Thereafter, there were certain adjournments because the Munsarim reported that the value of the property was not entered in the document and eventually the Judge who had passed the order of 25th May 1938, was transferred and another Judge took his place. When the question came up before the latter for argument whether the document was liable to be stamped, he made this reference to us. He has drawn up certain questions upon which he has asked for our decision. Of these questions 3, 4 and 5 raise the point whether the Judge who made the reference could reconsider the order, as he calls it, of his predecessor that the document was a deed of partition and partnership. We do not think that it is necessary for us to answer these questions. We have two reasons. The first is that the learned Judge has now made a reference to us and it is unnecessary for him to go into the question himself again and, therefore, it is not necessary for him to be informed whether he can or cannot go against the decision of his predecessor. Our second reason is that we do not think that there is really any question of revising the previous order. The first learned Judge's order merely was that the Munsarim should report on the amount of stamp duty to be paid. That order was carried out and nothing further is to be done. It is true the learned Judge recorded his opinion that the document was a deed of partition and a deed of partnership, but the fact that he himself would have allowed the parties to re-argue the question shows that he did not consider that his decision was final. In these circumstances we do not give any answer to questions Nos. 3, 4 and 5.

The remaining four questions really amount to one, namely, how much duty, if any, is to be paid upon the document. In order to decide that question, we have to decide the nature of the document. We have been taken through it and we have heard arguments on behalf of the Provincial Government. We are satisfied on an examination of the document that it is neither a deed of partition nor a deed of partnership. On the face of it, the document is neither of these. That it does not pretend to be a deed of partition is quite clear, because it recites certain facts about a previous partition saying that certain houses were allotted at that partition to certain members of the family. There is also a reference to the rights of the parties as mortgagees and in respect of some zamindari property which was presumably ancestral. The reference is that the parties might by some separate agreement arrange for the partition of these. There is also a mention of a previous partition of certain zamindari properties which apparently came to the parties by means of deed of sale. There is nothing to suggest that this instrument itself was intended to divide the properties mentioned in it. On the face of it, they had already been divided by a previous partition between the parties or were to be divided afterwards by a separate agreement. The document is not an award because it was not signed by any arbitrators; the parties themselves signed it. There are undoubtedly certain arrangements mentioned in the deed for the management of the partnership business, but we do not think that it amounts to an instrument of partnership. Apparently, there was a previous partnership which conducted a shop and the provisions in the deed itself are merely provisions for the better management of the firm. They do not seem to be provisions by which any partnership or new partnership was created.

We are satisfied that this deed is not liable to the payment of stamp duty and we direct that steps shall be taken under the provisions of S. 60, Stamp Act for sending the necessary copies to the Court below and the chief controlling revenue authority.

G.N./R.K. *Order accordingly.*

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FULL BENCH

ALLSOP, GANGA NATH AND VERMA JJ.

Bhagwana and another—Plaintiffs — Appellants

v.

Ch. Gulab Kuer and others—Defendants — Respondents.

Second Appeal No. 1086 of 1940, Decided on 7th April 1942, from decree of Additional Civil Judge, Bijnore, D/- 21st August 1940.

*** (a) Practice—New plea—Relief—Court may in proper case give relief not mentioned in plaint or on grounds other than those upon which it is claimed — On plaintiff's pleadings only question arising whether he established title by adverse possession—Finding that plaintiff failed to do so is sufficient to decide case — Alternative plea of customary right or easement in or over suit land being beyond and inconsistent with pleadings cannot be allowed to be raised in course of trial.**

No doubt in some cases, where the facts proved justify it, a Court may give a relief which is not mentioned in the plaint or give the relief mentioned on grounds other than those upon which it is claimed. But where, on the pleadings of the plaintiffs, the only question is whether they have established a title to the plots in suit by adverse possession the finding that they had failed to do so is sufficient for the decision of the suit which ought to be dismissed. The plaintiffs cannot be allowed to set up in the course of the trial in the absence of any definite pleadings an alternative plea that they had acquired some customary right or customary easement in or over the plots in suit as the plea is not only beyond their pleadings but is also, strictly speaking, inconsistent with them. [P 222 C 1, 2]

(b) Custom—Particular villager storing cowdung or tethering cattle or storing manure on particular part of land of landlord—Other residents of village cannot be said to be entitled to use that part of land in same way.

If a particular villager stores cowdung cakes or tethers his cattle or stores his manure on any particular part of the land belonging to the landlord that would not necessarily mean that other residents of the village were entitled to use that part of the land in the same way. [P 222 C 2]

(c) Civil P. C. (1908), S. 100 — Finding that plaintiff failed to establish title by adverse possession is of fact.

A finding that the plaintiff had failed to establish proprietary title to the suit land by adverse possession is a finding of fact. [P 222 C 1, 2]

C. B. Agarwala — for Appellants.

S. N. Seth — for Respondents.

ALLSOP J.—This second appeal arises out of a suit instituted by sixteen residents of the village of Moghalpure on behalf of the whole of the residents of the village under the provision of O. 1, R. 8, Civil P. C. The case for the plaintiffs was that certain plots in the village had become property of all the residents by adverse possession and that a cause of action had arisen because the zamindar, who was defendant 1, had sold certain trees growing upon these plots to defendant 2 who was proposing to cut them down. The plots were Nos. 401, which was the village itself, and 402, 403, 407, 408, 409, 410, 634 and 399. The plaintiffs sought an injunction against the defendants that they were not at any time to cut down the trees in the plots and that they were not to interfere with the possession and user of the plaintiffs and of other residents of the village over and in these plots. The learned Munsif, who tried the suit, found that the plaintiffs had failed to establish any title to the plots by adverse possession, but he went on to hold that the residents of the village had been in the habit of using these plots in various ways for a considerable time and that they had established some kind of right by custom to prevent the zamindar from interfering with their user and consequently from cutting down the trees, the shade of which was necessary for the proper user of the plots. The learned Judge of the lower appellate Court found that the cause of action alleged, namely the sale of the trees by the zamindar gave rise only to the question whether he was entitled to sell the trees and to have them cut down.

The learned Judge pointed out that there was no question, before the institution of the suit, of the zamindar's having prevented any of the residents of the village from making use of these plots in any way in which they might have been in the habit of using them. There were various types of user suggested. It was said that cattle were tethered on these plots, that threshing floors were established, that manure and cowdung cakes and other things were stored on the plots and that on occasions when marriage parties visited the village these plots were used by them while they were in the village. The learned Judge said that it was not established that the trees were necessary for any of these kinds of user and he held that it had not been established that the plaintiffs or residents of the village were entitled to prevent the zamindar from cutting down the trees. It seems to us that the learned Judge was right in his decision upon these points, but we would go further than he has gone. On the pleadings of the plaintiffs, the only question was whether they had established a title to the plots in suit by adverse possession and the finding of both the Courts below concurrently is that they had failed to do so. In our judgment, that was sufficient for the decision of the suit. The learned Munsif allowed the plaintiffs to rely upon the alternative plea that they had acquired some customary right or customary easement in or over the plots in suit, but that contention of the plaintiffs was not only beyond their pleadings but was also, strictly speaking, inconsistent with them. If the plaintiffs had become the proprietors of the land by adverse possession, they could have no other right by custom or by way of easement in or over the land. They did not plead that they had acquired any easement by custom or otherwise nor did they plead that they had acquired any other customary right.

We do not say that in some cases, where the facts proved justify it, a Court may not give a relief which is not mentioned in the plaint or give the relief mentioned on grounds other than those upon which it is claimed, but in the case before us we think it was inadvisable on the part of the learned Munsif to allow this alternative case to be raised in the course of the trial. In the absence of any definite pleadings, it is difficult to say exactly what the plaintiffs' alternative case was. It may be that certain individual residents in the village may have acquired some right by user in particular parts of the plots in suit, but that is a very different thing from saying that the whole of the residents of the village had acquired joint rights in the whole of the land. The nature of the various kinds of user was also quite different. If members of marriage parties made use of the land when they were in the village, they may have done so under special licence on each occasion and, if any right accrued, would it accrue to them or to the residents of the village ? If a particular person stored cowdung cakes or tethered his cattle or stored his manure on any particular part of the land, that would not necessarily mean that other residents of the village were entitled to use that part of the land in the same way. We are satisfied that the case should have been decided upon the pleadings of the plaintiffs and the finding of fact of the Courts below that the plaintiffs have failed to establish that the whole of the residents of the village had acquired a proprietary title in the whole of the land concludes the case. In our judgment the suit was rightly dismissed by the learned Judge of the Court below and consequently we dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

C. P. C. —
(a) ('40) Chitaley, O. 7 R. 7 Notes 1 and 2.
('41) Mulla, Pages 606 and 607 Notes "Relief" and "General or other relief."
(c) ('40) Chitaley, Ss. 100 and 101 N. 52 Pt. 4.
('41) Mulla, Pages 366-367 Note "No second appeal .... finding of fact."

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ALLSOP AND VERMA JJ.

Sheikh Mohd. Sharif — Plaintiff — Appellant

v.

Mt. Hajira Bibi and another — Defendants — Respondents.

First Appeal No. 162 of 1940, Decided on 5th February 1942, from order of Civil Judge, Ghazipur, D/- 13th April 1940.

Court-fees Act (1870, as amended by U. P. Act 19 of 1938), S. 7 (vi-A)—*A* suing for partition of his share and paying court-fee of Rs. 15 as required by unamended Act—On *A's* death, his brother *B*, one of defendants continuing suit by amending plaint so that partition should be not only of *A*'s share but also of *B*'s—Plaint amended after amendment of Act — Court-fee on plaint as amended by *B* held should be paid under amended Act.

A sued for partition of his share in certain property and paid court-fee of Rs. 15 as required by the unamended Act. Subsequently, on *A's* death his

brother *B* who was one of the defendants stepped into his shoes and sought to continue *A*'s suit but obtained an amendment of the plaint, so that there should be partition not only of *A*'s share but also of *B*'s six anna share. At the time of the amendment of the plaint the Court-fees Act had been amended :

Held that when the plaint was amended the position was the same as if there had been on that date a new plaint claiming partition of a six anna share in the property. The plaint as amended in accordance with *B*'s prayer, therefore, should be stamped under the amended Act. [P 223 C 1]

Madan Mohan Lal — for Appellant.

N. P. Asthana — for the Crown.

ALLSOP J. — This appeal raises a question of court-fees. One Sheikh Salimullah instituted a suit for partition of his six anna share in certain property. He died some time later and then his brother Sheikh Muhammad Sharif, the appellant, who had originally been impleaded as one of the defendants stepped into his shoes. Sheikh Muhammad Sharif sought to continue the suit instituted by Sheikh Salimullah but obtained an amendment of the plaint so that there should be a partition not only of Sheikh Salimullah's six anna share but also of Sheikh Muhammad Sharif's six anna share. The question arose what additional court-fee was to be paid after the amendment. When Sheikh Salimullah instituted his suit, the Court fees Act had not been amended and he paid a sum of Rs. 15 according to the provisions of that Act. When Sheikh Muhammad Sharif obtained an amendment of the plaint the amended Court-fees Act was in existence. The learned Judge of the lower Court, therefore, decided that the court-fees on the additional six anna share of Sheikh Muhammad Sharif should be paid according to the new law, that is ad valorem, on a value of one-fourth of the share. This decision is questioned in appeal. We have come to the conclusion that the learned Judge of the lower Court is right. When the plaint was amended, the position was the same as if there had been on that date a new plaint claiming partition of a six anna share in the property. Such a plaint would have required a stamp under the provisions of the new Act and therefore it seems to us that the plaint as amended in accordance with the prayer of Sheikh Muhammad Sharif should be similarly stamped. In our judgment there is no force in this appeal, and we dismiss it with costs to the Government.

G.N./R.K. *Appeal dismissed.*

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BRAUND J.

William Percy Bowman—Petitioner

v.

Harriet Dorothy Bowman —

Opposite Party.

Matrimonial Suit No. 4 of 1941, Decided on 6th February 1942.

(a) Divorce Act (1869), S. 11—S. 11 is intended to prevent collusive divorce—It makes it obligatory on husband to make adulterer co-respondent unless excused on grounds mentioned therein—Letter from wife to husband admitting adultery but refusing to divulge adulterer's name is not enough for purposes of S. 11—Husband must show that he made due efforts to discover name of adulterer.

Section 11 makes it obligatory on a husband when he petitions for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent, unless he is excused from doing so on one of three grounds mentioned therein. The object of S. 11 is to prevent any form of collusive divorce. It is, therefore, not a mere formality to dispense with the presence of the adulterer as a co-respondent. It is a matter of grave public importance that a person should not be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion : ('18) 5 A.I.R. 1918 Cal. 156, *Rel. on.* [P 223 C 2; P 224 C 1]

A letter from the wife to the husband admitting adultery but refusing to divulge the name of the adulterer is not enough for purposes of S. 11. The husband must show that he has made due efforts to discover the name of the adulterer. [P 224 C 1]

(b) Divorce Act (1869), S. 11 — Unless leave to dispense with presence of adulterer is obtained suit cannot proceed — Leave how and when should be obtained, stated.

Until leave to dispense with the presence of the adulterer as co-respondent has actually been obtained the suit cannot proceed. It is not sufficient to apply for leave at the trial. A formal application has to be made before the trial and it has to be supported by proper evidence that the conditions of S. 11 have been complied with. [P 224 C 1]

O. M. Chiene and Man Singh—for Applicant.

ORDER. — This is an application in a matter under the Indian and Colonial Divorce Jurisdiction Act which raises a point of importance. The husband has petitioned for a decree for dissolution of his marriage with his wife who is the respondent. The ground is the alleged adultery by the wife with an unknown man. The only allegation contained in the plaint with relation to this alleged adultery is in para. 9 which says, in effect, that the petitioner has received a letter from his wife in which she has confessed that she is now pregnant by a man who is not the petitioner. A copy of that letter has been filed with the petition. The letter also says that the respondent refuses to disclose the name of the father of the child. In the petition itself by the last line of the relief the petitioner asks to "be allowed to proceed with the suit without making the adulterer a co-respondent." No separate application has been made to dispense with the adulterer as a co-respondent and, presumably, the petitioner is relying on being granted that indulgence at the trial itself. This, in my view, is both contrary to law and contrary to the public interest.

The relevant section is S. 11, Divorce Act, which may be taken for this purpose to apply to this case. This section makes it obligatory on a husband when he petitions for dissolution of marriage on the ground of adultery to make the alleged adulterer a co-respondent, unless he is excused from doing so on one of three grounds. The section excuses him from doing this when his wife is leading the life of a prostitute and also when the alleged adulterer is dead. The third case in which he can be excused is when "the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it." When the legislature enacted that the co-respondent must be made a party to divorce proceedings at the instance of the husband, it did so for a very good reason, in order to prevent any form of collusive divorce. It is, therefore, not a

mere formality to dispense with the presence of the co-respondent. But the legislature has also recognised that in certain specific cases it may be impossible to know who he is. I entirely agree, with respect, with what fell from the learned Judge of the Calcutta High Court in precisely similar circumstances in 45 Cal. 525[1] when he said :

" . . . . It seems to me to be a matter of grave public importance that a person should not be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. . . . ."

In the present case all there is, is a mere letter written by the wife to the husband in which she refused to divulge the name of the co-respondent. There is no evidence whatever that the petitioner has made the slightest effort to discover who the co-respondent is. The matter does not quite end there because it has been established both by the practice of English Courts and by a long series of cases that until leave to dispense with the presence of the co-respondent has actually been obtained, the suit cannot proceed. It is not sufficient to apply for leave at the trial. A formal application has to be made before the trial and it has to be supported by proper evidence that the conditions of S. 11 of the Act have been complied with. For these reasons, I cannot treat the present suit as being in a fit condition to proceed to trial and I cannot, therefore, settle any issues in it. All I can do at this stage is to adjourn the settlement of issues for a period of six weeks, in order to enable a proper application to be made.

G.N./R.K. *Order accordingly.*

1. ('18) 5 A. I. R. 1918 Cal. 156 : 47 I. C. 510 : 45 Cal. 525, Charles Walter George Cox v. Emily Florence Cox.

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BAJPAI AND DAR JJ.

B. Ram Chandra Rai — Appellant

v.

Pt. Chandi Prasad Dubey and others— Respondents.

Second Appeal No. 1 of 1940, Decided on 3rd February 1942, from order of Dist. Judge, Gorakhpur, D/- 5th September 1939.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 7—Civil Court's decree transferred to Collector for execution—Even if Collector is not Court proceedings before him must be taken to be pending in civil Court—S. 7 applies.

Even if the Collector to whom a civil Court's decree has been transferred for execution cannot be regarded as a Court, the execution proceedings before the Collector must be taken to be pending then in the civil Court. The Collector, after all, acts under directions of the civil Court and if he cannot be regarded as an execution Court then the execution cannot remain in abeyance and proceedings must remain in execution in the civil Court. Hence the proceedings before the Collector can be stayed under S. 7. [P 225 C 1]

(b) U. P. Regulation of Sales Act (26 of 1934), S. 5—Until sale deed is executed and registered, property remains in landlord—Before sale S. 7, U. P. Encumbered Estates Act, coming into play—Proceedings must be stayed.

An order passed under S. 5 does not itself operate as a complete transfer. The order passed under S. 5 has got necessarily to be completed by a sale deed and till the sale deed is executed and registered the property remains still in the landlord and if before that sale S. 7, U. P. Encumbered Estates Act, comes into play the proceedings have got to be stayed and the sale cannot be effected : 1937 A. W. R. 119 (B.R.), *Approved.* [P 225 C 1]

V. D. Bhargava —for Appellant.

K. L. Misra — for Respondents.

BAJPAI J.—This a second appeal by a creditor in a proceeding under the Encumbered Estates Act. Ram Chandra and Markandey obtained a money decree against Chandi Prasad and Jwala Prasad in suit No. 725 of 1922 and this decree was put in execution by Ram Chandra and Markandey and as some agricultural land was sought to be attached and sold the execution came to the Collector. At the time when the execution was pending, Regulation of Sales Act No. 26 of 1934 came in operation and the creditors Ram Chandra and Markandey exercised option to purchase the property of Chandi Prasad and Jwala Prasad in lieu of the amount due to them under the decree. On 8th January 1936, an order was passed by the Collector accepting that the transfer be made in favour of Ram Chandra and Markandey and in pursuance of this order on 3rd March 1937, a sale was executed by the Collector in favour of Ram Chandra and Markendey.

On 6th May 1936, an application was made by Chandi Prasad and Jwala Prasad under S. 4, Encumbered Estates Act, which was transmitted to the Special Judge, Second Grade, Gorakhpur, by an order of the Collector dated 23rd July 1936. In these proceedings the landlords Chandi Prasad and Jwala Prasad disclosed the debt which was due to Ram Chandra and Markandey under the decree in suit No. 725 of 1922 and Ram Chandra and Markendey also appeared in encumbered estates proceedings. The contention raised by Ram Chandra and Markandey was that inasmuch as an order was passed by the Collector under Regulation of Sales Act on 8th January 1936, transferring the property in their favour their debt had ceased to exist and consequently in proceedings under the Encumbered Estates Act the property which was agreed to be transferred to them could not be taken into account, nor the debt could be taken into account. The Special Judge, Second Grade, Gorakhpur, did not accept the contention of Ram Chandra and Markandey. The view of the Special Judge was that inasmuch as the order which was made on 8th January 1936, was not completed by a registered sale before proceedings under the Encumbered Estates Act started there was no completed sale in favour of Ram Chandra and Markandey and the debt which existed in their favour was not satisfied and continued to exist and consequently in the proceedings under the Encumbered Estates Act the debt could be taken into account and the property sold could be treated as the property of the landlord. In support of this view the learned Judge relied upon a case in 1937 A. W. R. 119.[1] Ram Chandra and Markandey made an appeal to the District Judge of Gorakhpur and the learned Judge affirmed the judgment of the Special Judge, Second Grade. Ram Chandra has now made a second appeal in this Court and on his behalf Mr. Bhargava has raised two contentions.

1. ('37) 1937 A. W. R. 119 (B.R.), Sheobaran Singh v. Ranbir Prasad.

The first contention is that under S. 7, Encumbered Estates Act, proceedings could only be stayed which are pending in a civil or revenue Court and as in this particular case the proceedings were pending before the Collector, S. 7 was inoperative because the Collector could not be regarded as a Court. With regard to this contention, it is sufficient to say that even if the Collector could not be regarded as a Court the proceedings must be taken to be pending then in the civil Court and S. 7 enjoins the stay of proceedings in civil Court. Mr. Bhargava's contention is that in a case where proceedings are pending before the Collector with regard to the sale of an agricultural land automatically the execution ceases to exist in the civil Court and in a case like this S. 7, Encumbered Estates Act, has no application. We do not think that this is a correct interpretation of the section. The Collector after all acts under directions of the civil Court and if as Mr. Bhargava contends he cannot be regarded as an execution Court then the execution cannot remain in abeyance and proceedings must remain in execution in the civil Court. Mr. Bhargava's next contention is that it is not necessary under S. 5, Regulation of Sales Act, that an actual deed should be executed to vest a title in the purchaser. The order passed under S. 5 itself operates as a complete transfer. We do not think that this is a correct interpretation of the section. In our opinion, an order passed under S. 5 has got necessarily to be completed by a sale deed and till the sale deed is executed and registered the property remains still in the landlord and if before that sale S. 7, Encumbered Estates Act, comes into play the proceedings have got to be stayed and the sale cannot be effected. In our opinion the view taken by the Court below is correct. The appeal therefore fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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BRAUND J.

Kammoon and others — Appellants

v.

Emperor.

Criminal Appeal No. 263 of 1941, Decided on 24th September 1941, from order of Addl. Sess. Judge, Etawah, D/- 20th March 1941.

(a) Penal Code (1860), Ss. 147 and 149 — Person present on particular occasion — Two explanations of his presence one lawful and other unlawful — Unlawful intention cannot be assumed — Owner of cart asking his driver to drive party to particular place — On way party engaging in unlawful activity so as to constitute unlawful assembly — Driver of cart cannot be presumed to be member of unlawful assembly — What prosecution should prove stated.

If there are two explanations of the presence of a particular person on a particular occasion one of which is lawful and the other of which is unlawful, the Court cannot, as against an accused person, assume the unlawful intention. [P 227 C 1]

Consequently, where the owner of the cart asks his driver to drive a party to a particular place and on the way the party of passengers decide to engage in some such unlawful activity as would constitute them as an unlawful assembly the paid driver of the cart cannot be presumed to be a member of that unlawful assembly. His presence there is perfectly well explained by his capacity as the driver. If the prosecution desire to go further and to clothe him with some further responsibility, then the prosecution must prove, not merely that he was present there, but that he was present there with a positive intention and object which went beyond his intention to perform his duty in driving the cart. [P 227 C 1]

(b) Penal Code (1860), Ss. 147, 149 and 304— Unlawful assembly — Conviction under S. 304 on what depends stated.

In the case of an unlawful assembly conviction under S. 304 must depend upon one of two alternatives, either that the person convicted has been proved individually to have committed the offence or that the person convicted has been proved to have been a member of an unlawful assembly, that is to say of an association of persons having a common unlawful object. [P 227 C 1]

(c) Criminal trial — Sentence — Substantial term of imprisonment — Small fines at end of term need not be imposed.

There is no propriety in the imposition of small fines at the end of substantial terms of imprisonment. [P 227 C 2]

K. D. Malaviya — for Appellants.

Assistant Government Advocate — for the Crown.

JUDGMENT. — This is an appeal by five men Kammoon, Kalka Prasad, Hori Lal, Mathura and Ashiq Ali from their convictions by the learned Additional Sessions Judge of the Etawah District. They have all been convicted of rioting under S. 147, Penal Code, and in addition, three of them Kammoon, Mathura and Ashiq Ali, have been convicted also under Sec. 304 read with Sec. 149, Penal Code, and upon such last mentioned conviction sentenced to ten years' rigorous imprisonment each. The story is a somewhat involved one, but it has been well told in a remarkably clear judgment by the learned Sessions Judge. I need not, I think, deal in any way with the past history of the matter, that is to say with what happened prior to 28th May 1940 when the incident occurred, because it is to be found well set out in the learned Judge's judgment. It is sufficient to say that it is evident that there were two men who were and had been for some time bitterly opposed to one another. They were Bhagwati Prasad, the patwari, on the one hand, and Vishunath on the other hand. And, as is so frequently the case, each of these men had attracted to his own cause a band of supporters. This had led to a sequence of charges and cross-charges on trivial trumped up causes brought against each other and in the end there had been created in the locality a bitter enmity between these two factions which eventually ended in the tragedy which is the subject-matter of this case. In the morning of 28th May at about 8 A. M. it is said by the prosecution that Vishunath accompanied by a man named Ram Sewak and another named Rup Singh were on their way from their village of Bahadurpur to Dibiapur. The distance is only a mile or two and part of the journey was over the metalled road between Phaphund and Dibiapur. After Vishunath and his two companions had joined the metalled road about a mile from Dibiapur, it is alleged that they perceived approaching them from Dibiapur a bullock cart either containing or accompanied by some 10 or 11 persons who became the accused in this case. It was alleged that among them were Bhagwati Prasad, the five appellants and sundry others. The bullock cart was driven by the appellant, Ashiq Ali.

The prosecution story then goes on to the effect that Bhagwati Prasad when he saw Vishunath and his two companions welcomed this as a favourable opportunity for giving vent to his grievances. It is alleged that he said : "Well met, let us now beat them" or words to that effect. The learned Judge has accepted it that Bhagwati Prasad did say something of this kind and has drawn from it an inference, in which he was quite justified, that it goes to show that the meeting was a fortuitous one and not one which had been planned beforehand. Then battle was joined between them with the results that I shall disclose in a moment. The defence story is, of course, the direct opposite. According to this, the appellant, Hori Lal accompanied by the appellant, Mathura and by the driver, Ashiq Ali, had been into Dibiapur very early in the morning for the purpose of doing some business there. Having settled their affairs in Dibiapur, they were on their way back. It is not denied that the meeting with Vishunath did take place at the spot at which the prosecution places it but the circumstances according to this story are quite different. In the first place Hori Lal, according to this story, only had with him two companions, namely, the driver, Ashiq Ali, and Mathura. On the other hand, it is said that Vishunath accompanied by nine or ten companions, instead of being peaceful wayfarers on the road, as the prosecution says, broke out of the jungle when they saw Hori Lal and his two friends approaching and committed an assault on them with lathis in the course of which, and in defence of themselves, Hori Lal, Mathura and Ashiq Ali hit back and so caused the injuries which have given rise to this judgment.

The case is, therefore, one of pure fact whether, as the prosecution allege, Vishunath, Ram Sewak and Rup Singh were attacked by Hori Lal, Bhagwati Prasad and their party or whether, as the defence would have it, Hori Lal, Mathura and Ashiq Ali were alone and on their way back from Dibiapur when they were attacked by Vishunath and some nine or ten others. It is very important in this case to look and see what injuries were inflicted because they play a large part in it. Vishunath, according to the prosecution, when the attack began ran away. He was, therefore, uninjured. But of his two companions, Rup Singh and Ram Sewak, both were injured, Rup Singh so severely that he died. In addition to these two, a man called Ganga Ram who was working in the neighbouring field and had come to the rescue when the fight took place had himself been severely injured. In the result, therefore, there were three casualties on Vishunath's side, Ram Sewak, Rup Singh and Ganga Ram. Now the important thing to observe is that all these men suffered very considerable damage. As I have already said, Rup Singh died. He had three heavy blows on the head which had caused four fractures of the skull and he had traces of a severe blow on the chest. Ram Sewak had seven injuries, three of them on the head and the other four on the various other parts of his body. Ganga Ram had six injuries, three of them on the head. All these injuries are eloquent, at any rate, of this that the three men in question, Rup Singh, Ram Sewak and Ganga Ram, were very severely handled. Now, let us see what happened on the other side. There were three casualties, Hori Lal, Ashiq Ali and Mathura. Of these, only Hori Lal had any injuries which could, in any sense, be described as severe. He had one contused wound of not very large proportions on his head and two utterly trifling other injuries, one on his middle finger and the other on his fore-arm. The injuries sustained by Ashiq Ali and Mathura were altogether trivial, each consisting of one tiny bruise on the shin. Comparing the injuries, therefore, on Hori Lal's side with those on Vishunath's side, the latter were incomparably the greater.

To support two directly conflicting versions of the same affair, it is almost inevitable that the witnesses on one side or the other must be perjuring themselves. And for that reason, an ounce of evidence of uncontrovertible fact is worth more than a ton of evidence which has no fact behind it to support it. The learned Judge has attributed great importance to this evidence of the injuries on either side and I think he was perfectly right to do so. He came to the conclusion that, if not utterly inconsistent with the defence version, it at any rate, very strongly supported the prosecution story. That is true. It has to be remembered what the defence story was. It was, to put it in its simplest terms, that Hori Lal, Ashiq Ali and Mathura had been set on by nine or ten hooligans, dragged from their cart and beaten with lathis. Yet one of them sustained injuries which were by no means severe, while the other two sustained injuries which were utterly insignificant. I agree with the learned Judge in thinking that it is almost impossible to believe the defence version in view of the medical evidence. In addition to this, there is the evidence of the prosecution witnesses—some five in number—as to what actually took place. I have read the evidence carefully and although the usual charges are levelled against the witnesses of being prejudiced and of being in some instances inconsistent, there is nothing in their evidence which makes me think that they have necessarily told a story which is not true. It is fair to say that there are two witnesses for the defence who claim to have been eye-witnesses of what the appellants allege occurred. But, in view of the evidence, I have not the slightest difficulty in agreeing with the learned Judge that the three appellants Hori Lal, Mathura and Ashiq Ali took part in the fight and that their story of self-defence is wholly untrue.

As regards the other two appellant's Kammoon and Kalka Prasad, their case has been throughout that they were not there at all. They were not parties to the defence set up by Hori Lal, Mathura and Ashiq Ali simply because they said that they were not there at all. The learned Judge has found as a fact on the evidence that they were there and I agree with him. They were both named in the first information report and there is evidence that they were there. I need not, I think, say more. I agree with the learned Additional Sessions Judge in the view he took in that respect. As regards the convictions of Kammoon, Kalka Prasad, Hori Lal and Mathura, therefore, I think that this appeal must be dismissed. That, however, does not quite dispose of the matter because a point has occurred to me, though it has not been taken on behalf of the appellants, which raises in my mind some considerable doubt in respect of the appellant, Ashiq Ali. It has to be remembered that Ashiq Ali was the driver of the bullock cart in which the appellants had gone in the early morning to Dibiapur and returned later on. It was while they were returning that they fell in with Vishunath and his two companions and the affair took place. Now, the question was never directly raised as to the capacity in which Ashiq Ali was there. But it has been accepted on all hands, not only that Ashiq Ali was in fact, driving the cart at the material time, but that he was the regular cart driver of Hori Lal. The learn-

ed Judge himself has accepted that and refers to Ashiq Ali as Hori Lal's driver. That also appears in the first information report lodged by Hori Lal himself who describes Ashiq Ali as "my cart driver." As I say, no direct evidence has been adduced as to the capacity of Ashiq Ali but I cannot do otherwise than accept it as a matter of fact that he was the driver of Hori Lal and in that capacity his servant. Now the conviction in this case, so far as it relates to S. 304 must depend upon one of two alternatives —either that the person convicted has been proved individually to have committed the offence or that the person convicted has been proved to have been a member of an unlawful assembly, that is to say, of an association of persons having a common unlawful object. Hence, the conviction of Ashiq Ali must rest either upon his having been proved to have committed culpable homicide himself or upon his presence among the party being attributable to the common object to which he must be proved to be privy of something doing unlawful. Of the first alternative, there is no evidence whatever and the prosecution itself concedes that. None of the witnesses in this case have gone further than to say that they saw Ashiq Ali among the assailants. Of course he was among the assailants. He was driving them. None of the witnesses has said that they saw him committing an actual assault. That is a very different thing. Now we come to the second alternative, and I am faced with this difficulty. Ex hypothesi, Ashiq Ali was the paid servant of Hori Lal and was driving his cart — the service he was engaged to do. Am I therefore to attribute his presence to an intention to share in a common unlawful object rather than to the perfectly lawful intention of doing that which he was engaged to do, namely, to drive the cart. If there are two explanations of the presence of a particular person on a particular occasion one of which is lawful and the other of which is unlawful, I cannot, as against an accused person, assume the unlawful intention. His presence is perfectly well explained by his intention to perform his duty. I agree that if there were any other evidence that he went beyond the purposes of his duty and took an actual part in some illegal activity with those whom he was driving, that would be an entirely different thing. But, as I have said, there is no such evidence in this case. I will take an illustration. Supposing a man engages a motor bus to drive a party to a particular place. On the way the party of passengers decide to engage in some such unlawful activity as would constitute them as an unlawful assembly. Is there any reason why the paid driver of the motor bus should be presumed to be a member of that unlawful assembly? His presence there is perfectly well explained by his capacity as the driver. If the prosecution desire to go further and to clothe him with some further responsibility, then it seems to me that the prosecution must prove, not merely that he was present there, but that he was present there with a positive intention and object which went beyond his intention to perform his duty in driving the motor bus.

Now that, in my view, applies exactly to Ashiq Ali's case. He was present. There is a perfectly innocent capacity in which his presence can be explained and the prosecution has not shown that he exceeded that capacity. It appears to me therefore that he cannot be taken to have been a member of this unlawful assembly and that in the result he is guilty on neither charge and must be acquitted. As regards the sentences on the four men whose appeals have been dismissed, I do not think that I can interfere with the sentences under S. 147, Penal Code. As regards the sentences on Kammoon and Mathura under S. 304 read with S. 149, Penal Code, I think they are a little severe, having regard to their ages and I propose to reduce them to sentences of five years' rigorous imprisonment each. I do not believe in the imposition of small fines at the end of substantial terms of imprisonment and I propose at the same time to set aside the fines of Rs. 50 which have been attached to those two sentences. I regret in some respects to have taken a different view from that taken by the learned Judge as, if I may say so, his judgment was a well-balanced and good one. Kalka Prasad and Hori Lal must surrender to their bail.

G.N./R.K. *Order accordingly.*

Penal Code —
(a) ('36) Gour, Pages 503-504 N. 1348; Page 516 N. 1408.
('36) Ratanlal, Page 334 Note "Section 142."
(b) ('36) Gour, Page 517 N. 1413.
('36) Ratanlal, Page 353 Pt. 2.
(c) ('36) Gour, Page 223 Pt. 4.
('36) Ratanlal, Pages 88-89 Note "Fine."

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COLLISTER AND BAJPAI JJ.

In re Hon'ble Chief Justice Sir Iqbal Ahmad.

Income-tax Commissioner — Applicant

v.

Hon'ble Chief Justice Sir Iqbal Ahmad — Opposite Party.

Misc. Case No. 613 of 1940, Decided on 5th February 1942.

(a) Income-tax—Departmental rule does not affect legal claim.

A departmental rule of the income-tax department cannot affect a legal claim. [P 229 C 1]

Where a person was assessed in violation of S. 25 (3), Income-tax Act, an application by the assessee for refund six years afterwards was held maintainable even though there was a departmental rule to the effect that such claim could be admitted only if it was made before the end of the calender year. [P 231 C 2]

(b) Income-tax Act (1922), S. 66 (2)—Otherwise prejudicial—Assessee overcharged wrongly by department — Application by assessee under S. 33 disallowed—Order held prejudicial.

It cannot be said that the proviso to S. 66 (2) only relates to orders under Ss. 31 and 32, revised under S. 33. The effect of the proviso is this : A reference shall lie only when a question of law arises out of the order passed under S. 33 but if the matter is one which relates to an order under S. 31 or S. 32 a question of law which arose out of the previous order alone cannot be referred. [P 231 C 1]

The assessee was overcharged wrongly by the department and his application under S. 33 was disallowed by the Commissioner :

Held that the order of the Commissioner, whether right or wrong, was an order "otherwise prejudicial" to the assessee within the meaning of S. 66 (2) of the Act, and reference was therefore competent : ('39) 26 A. I. R. 1939 Mad. 709 (F.B.), *Foll.*; *Case law referred.* [P 231 C 2]

(c) Income-tax Act (1922), S. 25 (3)—Section imposes duty on Income-tax Officer not to assess.

The words "no tax shall be payable" impose a duty on the Income-tax Officer not to assess income between the end of the previous year and the date of discontinuance. [P 231 C 2]

(d) Income-tax Act (1922), S. 25 (3) —Verbal claim.

A claim for relief under S. 25 (3) need not be in writing, for there is nothing in the Act to justify such a conclusion. It may be "verbal claim." [P 232 C 2]

(e) Income-tax Act (1922, before amendment in 1939), S. 25 (3) — Claim for refund of tax wrongly assessed under S. 25 (3)—No time bar before amendment in 1939.

A claim for refund of tax wrongly assessed under S. 25 (3) cannot be barred except by statute and there was no such bar before the Amending Act. A bar of limitation cannot be read into the provisions of an Act in which no such bar is expressed. The amended sub-section itself goes to show that the Legislature was aware of the absence of any bar of limitation in the existing Act. [P 232 C 2]

(f) Income-tax Act (1922), S. 33 — Central Board of Revenue cannot legally control discretion of Commissioner.

A Commissioner of Income-tax has no option but to obey departmental orders of the Central Board of Revenue ; but it cannot possibly be said that his discretion can be "legally" controlled inasmuch as the discretion is vested in him by statute and there is no statutory control of such discretion. A Court or an official functioning as a Court must exercise its discretion judicially ; but that is the only form of control which is known to the law. [P 232 C 2]

K. N. Katju — for Applicant.

N. P. Asthana — for Opposite Party.

COLLISTER J. — This is a reference under S. 66 (2), Income-tax Act. The assessee was an advocate of the High Court. In 1932 he was appointed as an Acting Judge and he took his seat on 19th April of that year. He remained on the Bench until 27th July of that same year, when the High Court rose for the vacation. On 17th October 1932 he was appointed an Additional Judge and on 17th July 1933 he was confirmed as a Puisne Judge. The notification of his appointment was dated 20th July 1933 and was published in the U. P. Gazette dated 22nd July 1933. During the financial year 1932-33, the assessee practised as an advocate from 1st to 18th April and again from 28th July to 16th October 1932. For the year 1932-33 he was assessed under S. 23 (1) of the Act, on 22nd September 1932 upon his total income for the previous year. The total income was Rs. 89,865 of which Rs. 88,007 represented his professional earnings. For the year 1933-34 he was again assessed under S. 23 (1) of the Act, on 15th November 1933 on the total income of the previous year, which amounted to Rs. 53,218. The details were as below :

Salary ...	...	Rs. 27,917
Professional earnings	...	Rs. 21,940
Interest on securities	...	Rs. 1650
Other interest ...	...	Rs. 1711
Total		Rs. 53,218

The assessee did not appeal from either of these two assessments. On 28th April 1939 the assessee preferred an application for relief under S. 25 (3) of the Act, in respect to the assessment of 1932-33. Paragraph 3 of that application is in the following terms :

"That during the assessment year 1932-33 the petitioner practised the profession of law, as stated above, partly in April and partly between the months of July and 16th October 1932, after which date your petitioner discontinued the profession, and that during this period your petitioner's total income from the profession was Rs. 21,940 and his income as a Judge of the High Court was Rs. 27,917 for which the petitioner was assessed at source."

From para. 5 to the end the application reads as follows :

"5. That the petitioner having discontinued the profession in October 1932, no tax was payable by him in respect of the income for the period between the end of the previous year and the date of such discontinuance, and the income-tax department should not have assessed the petitioner for that period under S. 25 (3), Income-tax Act, 1922, but in point of fact the petitioner was so assessed and he paid the amount demanded from him on the assumption that he was rightly assessed.

6. That the petitioner has only recently discovered that the assessment on him was wrongly made by the income-tax department, and if the petitioner had discovered this at that time, he would have laid claim to a refund under S. 25 (3), Income-tax Act, 1922.

7. That the petitioner submits that in 1932-33 instead of being assessed in respect of his professional income of Rs. 88,007 he should have been assessed on Rs. 21,940, and the difference between these two figures should be returned to the petitioner.

8. That your petitioner submits that in fairness this is a proper case for the exercise of your power of review under S. 33, Income-tax Act, 1922, and that you have the power to revise the assessment made by the subordinate authority after consulting the Central Board of Revenue : *vide* para. 104, page 268 of the Income-tax Manual, 1937.

Wherefore your petitioner prays that you may be pleased in the exercise of your power under S. 33, Income-tax Act, 1922, to call for the record of the petitioner's assessment by the subordinate authority and order the refund to the petitioner of such amount as he may be found entitled to."

Section 25 (3) of the Act reads as follows :

"Where any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

By a letter dated 7th June 1939 the Commissioner of Income-tax, Central and United Provinces, referred the matter to the Central Board of Revenue. The Commissioner's view was that relief should not be granted. He says :

"The claim of the petitioner is extremely belated and he should have put in his claim for the benefits of S. 25 (3) during the course of the proceedings for the assessment year 1933-34. In fact according to para. 96 of the Income-tax Manual (Edn. 7), a claim to be assessed under S. 25 (3) could only be admitted, in this particular case, if it was made not later than the end of the calendar year 1933."

The rule to which the Commissioner refers is admittedly a departmental rule, which can in no way affect a legal claim. The Commissioner's letter then goes on to say :

"The petitioner however is a Judge of the Allahabad High Court who sits on the Bench to hear income-tax references and as he obviously considers that he has a fair claim on the department, I do not think it would be advisable to refuse his request."

This remark is open to the interpretation that, if the application were refused, the assessee might be expected in future to pass unfavourable orders on references by the income-tax authorities. If this is what the Commissioner meant, his observation would amount to a gross contempt of Court and we should have to take action upon it; but the learned Advocate-General explains the observation as meaning that since the assessee was one of the Judges hearing income-tax references, his opinion was entitled to respect and should be deferred to. If this is what Mr. Mullan—the then Commissioner of Income-tax — meant, he expressed his meaning in a singularly unhappy language. By a letter dated 28th July 1939 the Board regretted that it was unable to authorize the Commissioner to exercise his powers of revision in favour of the assessee. The matter again came before the Commissioner and by his order dated 29th August 1939 he declined to exercise his powers of revision under S. 33 of the Act. The Commissioner at this time was Khan Bahadur, M. A. G. Ansari, and he says :

"It is obvious from the wordings of S. 25 (3) that these claims could only be made in the course of the assessment for 1933-34. The assessee could claim that the income which he had earned during July to October 1932 from profession should not be assessed in 1933-34 at all and could further claim that the profits or gains of the previous year were to be deemed to have been the income, profits or gains of the said period. In fact, the Income-tax Officer himself was bound to exclude this income from the assessment of 1933-34, if he only could be aware of the discontinuance of the profession, but it appears that he had no idea of the discontinuance.

The application under S. 33 has, however, been made practically six years after the assessments in question were disposed of, and although no statutory period for such applications has been laid down in the Act, they are expected to be made within a reasonable time from the date the orders complained against are passed and instructions have accordingly been issued by the Central Board of Revenue to the effect that 'if a Commissioner of Income-tax desires to exercise his powers of revision in any case where more than a year has elapsed since the passing of the last order by the subordinate authority, he should not do so without first consulting the Central Board of Revenue': page 268, para. 104, Income-tax Manual (Edn. 7). In view of the above provision, my predecessor consulted the Central Board of Revenue if the application under S. 33 could be entertained, but the Board has replied to the effect that it is unable to authorize the Commissioner to exercise his powers of revision in this case.

I am, therefore, unable to exercise my powers of revision under S. 33, Income-tax Act."

On 18th September 1939 the assessee prayed for a reference to the High Court under S. 66 (2) of the Act. After that he apparently received a letter dated 12th January 1940 from the Commissioner and on 18th January he sent a reply to that letter, para. 3 of the reply reads as follows :

"In para. 2 of your letter you refer to S. 25 (5) of the Act and observe that as my claim for a refund under S. 25 (3) was made after 1st April 1939 it is time-barred under S. 25 (5). I am advised, however, that S. 25 (5) cannot affect my rights, which had accrued before the amending Act of 1939 was passed. You have also drawn my attention to proviso 1 to S. 50 of the Act. I am also advised that the proviso to S. 50, which is in Chap. 7 of the Act, has no application to the circumstances of the present case."

On 16th March 1940, the assessee again wrote to the Commissioner explaining the delay in applying for relief under S. 25 (3) of the Act. In that letter he said :

"It was towards the end of January or the beginning of February 1939 that I learnt from Hon'ble Mohammad Ismail J. that on account of the discontinuance of the profession by him by reason of his appointment to a seat on the Bench he was to be allowed by your department a refund of the income-tax paid by him. I then considered over my own case and got into touch with your Income-tax Officer at Allahabad. During a personal interview I explained to him the whole case and said that I was entitled to a refund of the income-tax paid by me as I had been appointed a Judge of the High Court and had discontinued my profession. I made this claim in March 1939, that is before the new Act came into force, while admitting the validity of my claim, the Income-tax Officer expressed his inability to refund the amount and said that I must make a proper application for review to the Income-tax Commissioner.

Accordingly, I made an application for review in April 1939. I therefore, submit that the claim having been made to the Income-tax Officer at Allahabad in March 1939, no question of limitation under S. 25 (5) arises; but even if the claim had not been made by me in March 1939, I am advised and urge accordingly that no limitation can possibly apply to an application for review under S. 33 which practically amounted to asking the Income-tax department to undo the wrong which it had done."

On 6th May 1940 the assessee again wrote to the Commissioner and referred to the latter's assumption that a claim for relief was made for the first time in April 1939 and that upon this assumption his claim was time-barred under the amending Act of 1939 — which came into force on 1st April 1939 —and the assessee said :

"I am advised that that proposition is not legally correct and the amended Act or to be more precise paras. 4 and 5 of S. 25, which have been added to the Income-tax Act for the first time in 1939, can only apply to assessments made after the passing of the amending Act of 1939 and cannot apply to assessments made previously even though claims for relief under S. 25 (3) may be made in regard to such assessments after the passing of the said amending Act. This aspect of the matter also should be clearly brought out in the statement of the case and a clear question formulated there on for the consideration of the Hon'ble Court."

On 31st July 1940 the Commissioner of Income-tax, Mr. W. R. Wall, made this reference to the High Court. Before considering the questions of

law which have been referred to us we may mention a concession which has been made before us by the Advocate-General—and which indeed was made by Mr. Ansari in his order of 29th August 1939. It is conceded that the assessee was overcharged, that he had a perfectly good claim on merits and that the relief now sought for could have been granted by the Income-tax Officer if he had been aware of the fact that the assessee had discontinued his profession as an advocate. The equities are thus with the assessee; but the Advocate-General contends that the Income-tax Officer was totally unaware of the discontinuance of practice and that it was the duty of the assessee to apply during the assessment year 1933-34. The Commissioner has referred to us a preliminary question of law and also three other questions of law which will arise if the preliminary question is answered in the affirmative. The preliminary question is as follows :

"Whether the order of the Commissioner dated 29th August 1939 under S. 33 of the Act is an order prejudicial to the assessee within the meaning of S. 66 (2) of the Act ?"

Section 33 of the Act provides :

"33 (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him or by himself when exercising the power of an Assistant Commissioner under sub-s. (4) of S. 5.

(2) On receipt of the record the Commissioner may make such enquiry or cause such enquiry to be made and subject to the provisions of this Act, may pass such order thereon as he thinks fit :

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard."

The section does not mention the right of an assessee to move the Commissioner to take action, but the assessee undoubtedly has the right of calling the attention of the Commissioner to a prejudicial order and of asking that action be taken. The proviso to this section means that the Commissioner shall not put the assessee in a worse position than he already is without giving him an opportunity of being heard. Section 66 (2) of the Act, provides as follows :

"Within 60 days of the date on which he is served with notice of an order under S. 31 or S. 32 or of an order under S. 33 enhancing an assessment or otherwise prejudicial to him or of a decision by a Board of Referees under S. 33A the assessee in respect of whom the order or decision was passed, may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order or decision, and the Commissioner shall, within 60 days of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

There are two provisos to this sub-section, the first of which is that a reference shall lie from an order under S. 33 only on a question of law arising out of that order itself, and not on a question of law arising out of a previous order under S. 31 or S. 32, revised by the order under S. 33. In the present case the second part of this proviso has no application inasmuch as there is no question of law before us arising out of a previous order under S. 31 or S. 32, revised by the order under S. 33. What we have to decide is whether the order of the Commissioner dated 29th August 1939 under S. 33 was or was not an order "otherwise prejudicial" to the assessee.

In 5 I. T. R. 267,[1] a Bench of the Nagpur High Court following the decision of a Bench of three Judges of the Madras High Court in *Venkatachalam Chettiar* v. *Commissioner of Income-tax, Madras*,[2] held that where the Commissioner of Income-tax, acting under S. 33 refuses to review the order of an Assistant Commissioner, the position of the assessee not being altered as a consequence, the assessee is not prejudiced within the meaning of S. 66 (2) and an application for reference is incompetent. The decision in *Venkatachalam Chettiar's case*[2] was, however, overruled by a Full Bench of five Judges in 7 I. T. R. 263,[3] and it is therefore no longer good law so far as Madras is concerned. In *Venkatachalam Chettiar's case*[2] the assessee applied to the Income-tax Officer for a refund of the income-tax under S. 48 of the Act, but his application was refused. The petitioner then filed an application asking the Commissioner to revise the order of Income-tax Officer under S. 33; but the Commissioner, having heard the application, declined to interfere. The petitioner then required the Commissioner to refer the matter to the High Court under S. 66 (2) of the Act; but the Commissioner dismissed this application on the ground that it was incompetent. His reason was that his order under S. 33 was not an order enhancing the assessment or otherwise prejudicial to the applicant. In respect to this view of the matter, Beasley C. J. observed :

"What S. 33 clearly contemplates is an order made by the Commissioner which alters the position of an assessee or an applicant to that person's prejudice. In this particular case, his position had been prejudiced already by the refusal of the Income-tax Officer to grant him the refund which he required. The Commissioner's order did no more than leave him in that position and, it is quite clear to us, was not an order which was prejudicial to the petitioner in the sense intended, namely, that his position at that time, that is the date of the Commissioner's order was altered by that order to one of prejudice to him."

In the five Judge case[3] Leach C. J. after citing the above observations, says at page 266 :

"With great respect I am unable to accept this interpretation. It means that the Commissioner's order must be more prejudicial than the order complained of before it can come within the purview of S. 66 (2). The section does not say so. All that it contemplates is a prejudicial order. It seems to me that if an order of the Income-tax Officer is prejudicial, an order which confirms it or rejects an application asking that it be revised is also prejudicial. It could not be said that a decree of an appellate Court dismissing an appeal from a Court of first instance is not prejudicial to the appellant. It is just as prejudicial as the original decree. There is no difference in this respect between a dismissal of an appeal and the dismissal of an application for

1. ('37) 24 A.I.R. 1937 Nag. 154 : 171 I.C. 797 : 5 I. T. R. 267 : I. L. R. (1938) Nag. 133, Central India Spinning, Weaving and Manufacturing Co., Ltd. (Empress Mills) v. Commissioner of Income-tax, C. P. and U. P.
2. ('35) 22 A. I. R. 1935 Mad. 379 : 156 I. C. 64 : 58 Mad. 367 : 68 M. L. J. 227 (S. B.).
3. ('39) 26 A. I. R. 1939 Mad. 709 : 184 I. C. 268 : I. L. R. (1939) Mad. 358 : (1939) 2 M. L. J. 68 : (1939) 7 I. T. R. 263 (F. B.), Voora Sreeramulu Chetty v. Commissioner of Income-tax, Madras.

revision when the law permits such an application to be made."

The learned Chief Justice then considers proviso 1 to S. 66 (2) and says :

"Mr. Patanjali Sastri has suggested that the proviso only relates to orders under Ss. 31 and 32, revised under S. 33. In other words, he asks the Court to read the second part of the proviso as governing the first part. I do not read in this way. I consider the effect of the proviso to be this: A reference shall lie only when a question of law arises out of the order passed under S. 33, but if the matter is one which relates to an order under S. 31 or S. 32 a question of law which arose out of the previous order alone cannot be referred."

We are in full agreement with this interpretation of the proviso. At p. 267 the learned Chief Justice refers to the Nagpur decision which we have already mentioned and says : "The Court accepted *Venkatachalam Chettiar's case*[2] without discussing it and therefore its judgment does not carry the matter further." The other four learned Judges concurred with the judgment of Leach C. J. This decision was referred to by a Full Bench of the Rangoon High Court in 8 I. T. R. 382.[4] The judgment was delivered by Roberts C. J., and was concurred in by the other two learned Judges. At p. 402 the learned Chief Justice states the facts as follows :

"The assessee had been the subject of an assessment which, upon the face of it, was a perfectly good one. It had been made year after year. After the death of a man named G. D. Paul the assessee, who had taken no notice of the income-tax authorities demands for payment, suddenly came forward and declared that the assessment had been made without his knowledge and that G. Paul had been impersonating him. But this was found as a fact against him by the Commissioner."

At page 403 the Chief Justice says :

"In my opinion, this was clearly not an order to the prejudice of the assessee. It in no way altered the position as it existed before the Commissioner chose to review the case; and, therefore, looking at the provisions of S. 66 (2) of the Act there is no ground for a reference to be made in the events that have happened."

Further on he refers to the case in 7 I. T. R. 263[3] and observes :

" No doubt the decision of the High Court of Madras to which we have been referred makes it clear that there may be an order which, in confirming a prejudicial order, is in itself prejudicial, but that is not the case here, for nothing has been done to alter an order which it is not proved was prejudicial in any sense of the word."

Thus in the Rangoon case the order was not prejudicial to the assessee; in the Madras case it was. The learned Advocate-General refers us to the case in 7 I. T. R. 506,[5] which appears to afford some support to the view taken by the income-tax authorities ; but the question of "prejudice" was dealt with in a few lines by the learned Judges of the Patna High Court and no authorities were referred to. In 8 I. T. R. 437,[6] Dalip Singh J. was inclined to agree with the view taken by the Madras High Court in 7 I. T. R. 263.[3] An argument was addressed to the learned Judges of the High Court at Lahore with a view to show that the above mentioned decision was wrong, and at p. 439 Dalip Singh J. observes :

" It is unnecessary to decide this point in view of the decision to which we have come on the other point, but I have remarked that the word 'prejudicial' in S. 33 need not have the same meaning as the word 'prejudicial' in S. 66 (2). In S. 33 there is no application necessarily before the Commissioner at all. If he does act on his own motion, there is no necessity for him to pass any order at all and therefore when S. 33 says that he cannot pass an order prejudicial to the assessee without hearing him, the word 'prejudicial' there is obviously used in the narrower sense of a prejudice occasioned to the assessee by the order of the Commissioner himself. In S. 66 (2) the reasoning does not apply because S. 66 (2) is dealing with the right of the assessee to make an application from such an order and, therefore, as at present advised, without expressing any final opinion on the point, I am inclined to hold that the decision of the Full Bench of the Madras High Court is correct, but it is unnecessary to decide this point for the proviso to S. 66 (2) expressly lays down that a reference from an order under S. 33 lies only on a question of law arising out of that order itself."

We have carefully examined the various authorities and we find ourselves in full accord with the view taken by the five learned Judges of the Madras High Court in 7 I. T. R. 263.[3] We agree with the interpretation which that Court placed on the words "otherwise prejudicial" and with the reasoning upon which their view is based. In the present case the assessee had admittedly been overcharged ; he had a perfectly good case on merits ; another Judge of this Court had obtained relief in similar circumstances ; and the assessee's application for review was disallowed. It therefore appears to us that the order of the Commissioner of Income-tax dated 29th August 1939 whether right or wrong was an order "otherwise prejudicial" to the assessee within the meaning of S. 66 (2) of the Act. The reference is therefore competent and the preliminary question must be answered in the affirmative. We now approach the three questions of law arising out of the Commissioner's order of 29th August 1939. The first question is :

" Whether on the materials before the Income-tax Officer at the time of the assessment for 1933-34, he was in law justified in assessing the assessee to income-tax without giving him relief under S. 25 (3) of the Act ?"

Section 25 (3) provides as follows :

" Where any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

The words "no tax shall be payable" impose a duty on the Income-tax Officer and this is conceded;

4. ('40) 27 A.I.R. 1940 Rang. 175 : 189 I. C. 318 : (1940) 8 I.T.R. 382 (F.B.), Amulakharai Chhotalal v. Commissioner of Income-tax, Burma.

5. ('39) 7 I. T. R. 506 (Pat.), Indarchand Kagriwal v. Commissioner of Income-tax, Behar & Orissa.

6. ('40) 8 I. T. R. 437 (Lah.), Nanhe Mal Janki Nath v. Commissioner of Income-tax.

but it is contended that the Income-tax Officer was in no way responsible for the non-performance of this duty for the reason that he had no knowledge of the fact that the assessee had discontinued his profession. In his order of 29th August 1939, Mr. Ansari has stated that the Income-tax Officer "was bound to exclude this income from the assessment of 1933-34 if he only could be aware of the discontinuance of the profession, but it appears that he had no idea of the discontinuance." The appointment of the assessee as a puisne Judge was notified, as we have already said, in the Gazette of 22nd July 1933, that is to say, four months before the order of assessment for the year 1933-34. It may be said with reason that the income-tax authorities cannot be expected to acquaint themselves with every appointment notified in the Gazette; but there are other circumstances which indicate that the Income-tax Officer was aware of the fact that the assessee had become a Judge of the High Court. Curiously enough, there is no copy on the record of the notice asking for a return, but there is an acknowledgment slip (No. 183) which shows that the notice to submit a return was addressed to "The Hon'ble Mr. Justice Iqbal Ahmad." The notice was served upon the assessee on 4th April 1933, at which date he was an Additional Judge of this Court. In the assessment form of 15th November 1933 the name of the assessee is shown as "The Hon'ble Mr. Justice Iqbal Ahmad." By that time the assessee had become a puisne Judge of the Court. Thus the Income-tax Officer had materials before him which should have put him on inquiry as to whether the assessee was entitled to relief under Sec. 25 (3) of the Act. This question must be answered in the negative. The next question referred to us is as follows :

"Whether the assessee's claim for relief under S. 25 (3) of the Act in respect of his assessment for 1933-34, made in the circumstances stated above, is barred by limitation ?"

In the Amending Act of 1939, which came into force on 1st April 1939, sub-s. (5) was added to S. 25. It provides as follows :

"No claim to the relief afforded under sub-s. (3) or sub-s. (4) shall be entertained, unless it is made before the expiry of one year from the date on which the business, profession or vocation was discontinued."

The right had accrued to the assessee before 1st April 1939. The application for relief under S. 25 (3) was preferred on 28th April 1939, but it is alleged on behalf of the assessee that he made a verbal claim at the office of the Income-tax officer in March 1939. In reply to a question referred to him by the Commissioner, the Income-tax officer said :

"Regarding your inquiry about Iqbal J.'s interview with me some 14 months back, I am unable to give from memory the details desired by you. Iqbal J. had seen me at the Income-tax office, Central Circle, about S. 25 (3) affair and I remember I had asked him to make a formal application if he liked. I cannot give any further details from memory. I might have made some note on the file."

The Commissioner in his statement of the case says :

"It may be taken as established that an interview took place between the assessee and the Income-tax Officer on the subject of the former's claim in March 1939, but a formal application for a refund under S. 25 (3) was not made till 28th April 1939, when the assessee's application under Sec. 33 was presented to the Commissioner."

Thus it is a matter of admission that the assessee did make a verbal claim in March 1939. It is contended on behalf of the Department that a claim for relief under S. 25 (3) of the Act should be in writing; but there is nothing in the Act to justify, this contention. The learned Advocate-General pleads that, having regard to the scheme of the Act as it appears from Chap. 4, which is headed "Deductions and Assessments" and which contains Ss. 18 to 39, it must be held to have been contemplated by the Legislature that any such application should be preferred during the assessment year. What the Legislature may have contemplated is a matter of speculation, but a claim for refund of tax wrongly assessed cannot be barred except by statute and there was no such bar before the amending Act. A bar of limitation cannot be read into the provisions of an Act in which no such bar is expressed. The amended sub-section itself goes to show that the Legislature was aware of the absence of any bar of limitation in the existing Act. The Commissioner in his statement of the case says :

"The question whether the claim was within time if it were assumed to have been made verbally in March 1939 does not arise out of the order under Sec. 33, as there was no mention of any such claim having been made either in the petition under S. 33 or in the application under S. 66 (2)."

This is true so far as it goes, but the question has been raised for the first time by the Commissioner in his statement of the case. His predecessor in office, when he declined to grant relief under S. 33, did not say that the application of the assessee was barred by time; he only said that it was not preferred within prescribed time, which is very different from saying that it was barred by a statutory provision. The question of limitation therefore can either not be advanced by the Department at all or, if it can be advanced, it can be met by facts which came to light at the time when the question of a reference to the High Court under S. 66 (2) was being considered by the Commissioner. The interview of the assessee with the Income-tax Officer in March 1939 was brought to the notice of the Commissioner when he thought that the application ought to have been presented within a year. Our reply to this question is in the negative. The last question referred to us is :

"Whether the Commissioner's discretion under S. 33 of the Act can legally be controlled by the Central Board of Revenue; and if so, whether the Central Board of Revenue acted judicially in refusing to authorise the Commissioner to exercise his power of revision in this case ?"

A Commissioner of Income-tax has no option but to obey departmental orders of the Central Board of Revenue; but it cannot possibly be said that his discretion can be "legally" controlled inasmuch as the discretion is vested in him by statute and there is no statutory control of such discretion. A Court or an official functioning as a Court must exercise its discretion judicially; but that is the only form of control which is known to the law. This being our view, the second part of the question does not arise. To sum up we answer the preliminary question in the affirmative and the first and second questions of law in the negative. We also answer the first part of the third question of law in the negative. As regards the second part of this question, it is unnecessary to return an answer. The Advocate-General is entitled to a fee of Rs. 200. The assessee is entitled to his costs. A copy of this order will be sent under the seal of the Court and the

signature of the Registrar to the Commissioner of Income-tax.

K.S./R.K. *Question answered.*

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* A. I. R. (29) 1942 Allahabad 233

FULL BENCH

IQBAL AHMAD C. J., GANGA NATH AND DAR JJ.

Chandra Shekhar and another — *Plaintiffs—Appellants*

v.

Manohar Lal and another — *Defendants — Respondents.*

Second Appeal No. 1382 of 1938, Decided on 22nd April 1942, from decision of Dist. Judge, Cawnpore, D/- 29th January 1938.

(a) Civil P. C. (1908), S. 100 — Finding that party purchased property from his private savings and was sole owner cannot be challenged in second appeal (Per *Iqbal Ahmad C. J., and Ganga Nath J.*).

The finding that a party purchased certain property from his own private savings and was, as such, the sole owner of the property cannot be challenged in second appeal. [P 234 C 1]

C. P. C. —

('40) Chitaley, Ss. 100 and 101, N. 52 Pt. 1.

('41) Mulla, Page 367 Pt. (g).

(b) Civil P. C. (1908), S. 35 — Court may in exceptional circumstances award costs even against stranger to litigation—Suit by benamidar — Defendant can raise question of liability of real plaintiff for costs and ask Court for decree for costs against him — Failure to do so precludes defendant from raising that question by separate suit (Per *Iqbal Ahmad C. J., and Ganga Nath J.*).

Under S. 35, the Court may, in exceptional cases, award costs even against a stranger to the litigation. The Court, of course, will not, and cannot, award costs against a person without giving him an opportunity of being heard. It follows that if a party to a litigation desires costs to be awarded against a stranger to that litigation, he must, at an appropriate stage of the litigation, raise the point before the Court, so that the Court may, if it thinks proper to do so, implead the stranger as a party to the litigation and give him an opportunity of being heard. It is open to a defendant in a suit by a benamidar to say that the real plaintiff is a person other than the person in whose name the suit has been filed, and to ask the Court to implead the real plaintiff and award him costs as against the real plaintiff but if the defendant in such a suit does not adopt such a course, he cannot, after the termination of litigation, raise the question of costs by a separate suit. The question of costs of particular suit is a matter incidental to that suit and cannot, therefore, be made the subject of a separate suit. [P 234 C 2]

C. P. C. —

('40) Chitaley, S. 35, N. 9 Pt. 6a.

('41) Mulla, Page 152, Note "Costs against person not a party to suit."

*** (c) Benami — Decree for costs against benamidar cannot be executed against beneficial owner — Question of liability of beneficial owner must be raised in suit in which decree was passed — It cannot be raised in execution proceeding nor by separate suit** (Per *Full Bench*).

The executing Court is to execute the decree as it stands and cannot be asked to enter into a discussion of, or to decide the question as to who is beneficially entitled under the decree or against whom the decree is to be executed. Consequently, a decree for costs against a benamidar is not executable against the beneficial owner. The question of the liability of the beneficial owner must be raised in the suit in which the decree was passed. It cannot be raised in the execution proceedings, much less by a separate suit : ('15) 2 A. I. R. 1915 All. 264 and ('25) 12 A. I. R. 1925 Mad. 701, *Rel. on; Case law discussed.* [P 235 C 1]

C. P. C. —

('40) Chitaley, S. 38, N. 8 Pt. 4.

('41) Mulla, Page 164 Pt. (v).

(d) Civil P. C. (1908), S. 35—Costs are in discretion of Court and are often awarded on personal considerations — Sometimes they may be of penal nature (Per *Dar J.*).

Costs are in the discretion of the Court and very often they are awarded on personal considerations. Sometimes they may be of penal nature. [P 237 C 1]

C. P. C. —

('40) Chitaley, S. 35, N. 5.

('41) Mulla, Page 148, Note "Costs to be in the discretion of the Court."

Babu Ram Avasthi — for Appellants.

Ram Nama Prasad — for Respondents.

IQBAL AHMAD C. J. — This is an appeal by Chandra Shekhar and Balak Ram, plaintiffs, arising out of a suit for a declaration that the house in dispute was liable to attachment and sale in execution of a decree for costs obtained by them in Suit No. 36 of 1928. Three persons were arrayed as defendants in the present litigation. Manohar Lal was defendant 1 and his two minor sons Ganesh Datta and Chandra Datta were defendants 2 and 3. Suit No. 36 of 1928 was brought by Ganesh Datta and Chandra Datta minors, against Chandra Shekhar and Balak Ram for recovery of a certain amount of money, Manohar Lal acted as next friend of Ganesh Datta and Chandra Datta in that suit. That suit was based on the allegation that Ganesh Datta and Chandra Datta had advanced by way of loan the amount claimed to Chandra Shekhar and Balak Ram. Chandra Shekhar and Balak Ram, however, pleaded that the amount in suit was not advanced to them by way of loan but was, as a matter of fact, deposited with them by Manohar Lal as his (Manohar Lal's) contribution to the funds of a particular partnership in which Manohar Lal had entered with them (Chandra Shekhar and Balak Ram).

The trial Court decreed Suit No. 36, but on appeal this Court accepted the defence put forward by Chandra Shekhar and Balak Ram and dismissed that suit with costs. Chandra Shekhar and Balak Ram applied for the execution of the decree for costs by attachment of the house in dispute alleging that Ganesh Datta and Chandra Datta, judgment-debtors, were owners of the house. Manohar Lal then objected under O. 21, R. 58, Civil P. C., claiming that the house belonged exclusively to him and was not liable to attachment and sale in execution of the decree for costs held by the plaintiffs. The objection of Manohar Lal was allowed and the house was released from attachment. The suit giving rise to the present appeal was then brought by Chandra Shekhar and Balak Ram. Manohar Lal contested the suit mainly on the allegation that the house was his self-acquired property and was not liable to sale in the decree for costs obtained by the

plaintiffs in Suit No. 36. Both the Courts agreed in holding that Manohar Lal purchased the house "from his own private savings" and was, as such, the sole owner of the house. This finding cannot be, and is not, challenged in second appeal.

It was, however, contended by the plaintiffs in the Courts below that as Ganesh Datta and Chandra Datta were mere benamidars for Manohar Lal with respect to the deposit that formed the subject of dispute in Suit No. 36, the real plaintiff of that suit must be deemed to be Manohar Lal even though that suit was filed in the names of Ganesh Datta and Chandra Datta. They, therefore, urged that Manohar Lal was liable to satisfy the decree for costs passed in their favour in Suit No. 36. This contention of the plaintiffs was overruled by both the Courts below and the suit was dismissed. The plaintiffs then filed the present second appeal and it came for hearing before my brothers Ganga Nath and Dar and it was contended before them that a decree for costs passed against a benamidar is executable against the real beneficial owner. As the question raised was of general importance, the case was referred by them to a Full Bench. On the facts stated above the only question that arises for consideration is whether a decree for costs against a benamidar is executable against the beneficial owner and on the answer to that question depends the decision of this appeal. The answer to the question is not free from difficulty and much can be said on both sides. But after giving the matter my best consideration I have arrived at the conclusion that the answer to the question must be in the negative.

In arriving at this conclusion I have not overlooked the long series of decisions which establish that a benamidar, even though he has no beneficial interest in the property standing in his name, is competent to sue in his own name and that the decision in such a suit operates as res judicata against the beneficial owner: *vide* 10 Cal. 697,[1] 3 All. 812,[2] 18 All. 69,[3] 21 All. 380[4] and 46 Cal. 566.[5] Speaking generally these decisions are based on the principle that the benamidar must be deemed to have instituted the suit with the full authority and consent of the beneficial owner, and, as such, must be presumed to be suing on behalf of the beneficial owner. Similarly, a decree obtained against a benamidar has been held binding on the beneficial owner even though he (the beneficial owner) was not a party to the suit : *vide* 30 All. 30.[6]

A slight extension of the principle underlying the decisions just quoted is illustrated by the decision in A.I.R. 1933 All. 641.[7] In that case a certain zamindari share was recorded benami in the name of the mother of the beneficial owner and the mother was appointed lambardar. Another cosharer brought a suit for profits against the mother and obtained a decree. The share recorded in the name of the mother was sold in execution of the decree and purchased by the cosharer-decree-holder. The beneficial owner (the son) then brought a suit for possession of the share on the ground that as he was no party to the decree his interest in the property sold did not pass by the auction sale to the auction purchaser. The suit was dismissed on the ground that the mother, who was the benamidar, must be deemed to have represented the beneficial owner in the litigation and the decree obtained against her was binding on the beneficial owner (the son). But these decisions, in my opinion, have no bearing on the question that is the subject of consideration in the present appeal. All that these decisions lay down is that a decision as to the right or title to a property that is litigated in a suit, to which the benamidar is a party but the beneficial ownor is not, is binding on the beneficial owner. But the principle underlying these decisions cannot, in my judgment without the risk of introducing great confusion in the execution department, be extended to the question of costs awarded by a decree against a benamidar when the beneficial owner is no party to the decree.

The question of costs is regulated and governed by S. 35, Civil P. C., and by that section the Court is given "full power to determine by whom or out of what property and to what extent such costs are to be paid." As I read that section it appears to me that the Court may, in exceptional cases, award costs even against a stranger to the litigation. The Court of course will not, and cannot, award costs against a person without giving him an opportunity of being heard. It follows that if a party to a litigation desires costs to be awarded against a stranger to that litigation, he must, at an appropriate stage of the litigation, raise the point before the Court, so that the Court may, if it thinks proper to do so, implead the stranger as a party to the litigation and give him an opportunity of being heard. Instances of suits by a benamidar or by a mere puppet in the hands of a speculator are not wanting. It is open to a defendant in such a suit to say that the real plaintiff is a person other than the person in whose name the suit has been filed, and to ask the Court to implead the real plaintiff and award him costs as against the real plaintiff but, if the defendant in such a suit does not adopt such a course, he cannot, in my opinion, after the termination of litigation, raise the question of costs by a separate suit. The question of costs of particular suit is a matter incidental to that suit and cannot, therefore, be made the subject of a separate suit. To hold otherwise would be to introduce great confusion in the execution department.

A suit by a benamidar is no doubt deemed to have been instituted with the consent and approval of the beneficial owner, and as such, the benamidar represents in fact the real owner in the suit. But this fact, in the event of the dismissal of the suit and costs being awarded to the defendant, cannot entitle the defendant to execute the decree for costs both against the benamidar and the beneficial owner. It may be that he has a right to recover costs either from the beneficial owner or from the benamidar, but he cannot recover the same from both. It follows that if the right to file a separate suit against the beneficial owner for the costs awarded by the decree be conceded to the defendant, it will have to be held that the benamidar, against whom the decree awards costs, will also be entitled to plead in execution that he being a mere benamidar is not liable for the costs which the defendant must recover from the beneficial owner. This would be destructive of the well established principle that a Court executing the decree cannot

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1. ('84) 10 Cal. 697, Gopi Nath v. Bhugwat Pershad.
2. ('81) 3 All. 812 : 1881 A.W.N. 79, Khub Chand v. Narain Singh.
3. ('95) 18 All. 69: 1895 A.W.N. 160, Nand Kishore Lal v. Ahmad Ata.
4. ('99) 21 All. 380, Yad Ram v. Umrao Singh.
5. ('18) 5 A.I.R. 1918 P.C. 140 : 49 I.C. 1 : 46 Cal. 566 : 46 I.A. 1 (P.C.), Ch. Gur Narayan v. Sheolal Singh.
6. ('07) 30 All. 30 : 4 A. L. J. 689 : 1907 A. W. N. 272, Kaniz Fatima v. Waliullah.
7. ('33) 20 A. I. R. 1933 All. 641 : 146 I. C. 873, Lachman Singh v. Collector of Moradabad.

go behind the decree. As the decree, on the face of it, awards costs against the benamidar, it is not open either to the decree-holder or to the benamidar in such a case to ask the execution Court to make the beneficial owner liable for the costs. If the question of the liability of the beneficial owner cannot be raised in the execution department much less can it be enforced by means of a separate suit. This Court in 37 All. 414[8] and the Madras High Court in 48 Mad. 553,[9] held that where a decree has been transferred to a particular person under an instrument in writing, no other person, claiming that he was the real owner under the transfer and that the transferee named therein was a mere benamidar for him, can apply for execution of the decree, under the terms of O. 21, R. 16, Civil P. C. The ratio decidendi of these cases is that the execution Court is to execute the decree as it stands and cannot be asked to enter into a discussion of, or to decide, the question as to who is beneficially entitled under the decree or against whom the decree is to be executed. It follows that in the case before us the execution Court could execute the decree only against Ganesh Datta and Chandra Datta. It would be anomalous, therefore, to decree the present suit and thus allow the plaintiffs to ask the execution Court to execute the decree against Manohar Lal — a step which the execution Court could not, as stated above, take.

The view that I take is not in conflict with the decisions in A.I.R. 1928 Cal. 835[10] and 1940 A.L.J. 823.[11] These decisions are authorities for the proposition that after the death of a benamidar decree-holder the beneficial owner is entitled to be substituted in his place. This is so because on the death of the decree-holder his legal representative has the right to be brought upon the record and, as the benamidar is a mere trustee for the beneficial owner, the beneficial owner, on the death of the benamidar, is entitled to be sustituted in his place. For the reasons given above, I would affirm the decisions of the Courts below and dismiss this appeal with costs.

GANGA NATH J. — I concur.

DAR J. — This is an appeal against a judgment and decree, dated 29th January 1938, of the District Judge of Cawnpore by which he affirmed a judgment and decree, dated 8th December 1936, of the Civil Judge of Cawnpore in a suit for declaration that a certain house in the city of Cawnpore was liable to attachment and sale in execution of a decree. Two Hindu minors, Ganesh Dutta and Chandra Dutta by their next friend, Manohar Lal, who was their father, raised an action in the Court of the Subordinate Judge of Cawnpore, Suit No. 36 of 1928, against Chandra Shekhar and Balak Ram for recovery of a large sum of money. The claim of Ganesh Dutta and Chandra Dutta shortly stated was that the sum claimed was their father's money which was lent to or deposited with Chandra Shekhar and Balak Ram in the names of Ganesh Dutta and Chandra Dutta, minors, which in the events that had happened they were entitled to recover as money lent or money deposited. On 22nd December 1928, the Subordinate Judge of Cawnpore passed a decree in favour of Ganesh Dutta and Chandra Dutta, but on appeal to this Court by a judgment and decree, dated 24th October 1932, the claim of Ganesh Dutta and Chandra Dutta was dismissed and they were ordered to pay a sum of Rs. 2158-13-0 as costs to Chandra Shekhar and Balak Ram.

Chandra Shekhar and Balak Ram put the decree for costs in execution and attached a house in the city of Cawnpore. Manohar Lal, the next friend of the minors Ganesh Dutta and Chandra Dutta, raised an objection to this attachment on the ground that the house was his personal property and the decree for costs being against Ganesh Dutta and Chandra Dutta, the said house was not liable for sale in execution of the said decree. Chandra Shekhar and Balak Ram, the decree-holders, on the other hand, contended that Ganesh Dutta and Chandra Dutta were joint owners of the house as it was a joint family property of Ganesh Dutta and Chandra Dutta and Manohar Lal and even if it be assumed that it was a personal property of Manohar Lal the house was liable to be sold in execution of the decree because in the said decree of Ganesh Dutta and Chandra Dutta the real party was Manohar Lal, the two minor boys being his benamidars. The executing Court allowed Manohar Lal's objection and released the house from attachment. Chandra Shekhar and Balak Ram thereupon made an appeal to this Court that dismissed the appeal of Chandra Shekhar and Balak Ram on the ground that as Manohar Lal was not a party to the decree, his objection to the attachment of the house came under O. 21, R. 58 and not under S. 47, Civil P. C., and no appeal lay to this Court. Incidentally this Court also observed :

"The Court executing the decree cannot go behind the decree which, on the face of it, is against the minor plaintiffs. Manohar Lal is not made liable by the terms of the decree for the costs awarded to the successful defendants. It is clear that the Court executing the decree will materially alter the terms of the decree if it finds that the party really liable for costs is Manohar Lal. We think that the lower Court was right in holding that the decree-holders cannot execute their decree for costs against Manohar Lal, who is not shown in the decree as a party." (*See* 1935 A. L. J. 383[12]).

On 7th September 1934, Chandra Shekhar and Balak Ram raised an action in the Court of the Civil Judge of Cawnpore against Manohar Lal, Ganesh Dutta and Chandra Dutta for a declaration that the house in Cawnpore mentioned above was liable to attachment and sale in execution of the above decree for costs and for a further declaration that the real plaintiff in Suit No. 36 of 1928 was Manohar Lal and Ganesh Dutta and Chandra Dutta were mere benamidars for him and they had no real interest of their own. Chandra Shekhar and Balak Ram again alleged that the house in dispute was the joint property of Manohar Lal and his two sons, Ganesh Dutta and Chandra Dutta, and even if it was taken to be the separate property of Manohar Lal, the house was still liable to sale because Manohar Lal was the real plaintiff in Suit No. 36 of 1928 in which the decree for costs was passed and Ganesh Dutta and Chandra Dutta were mere benamidars for Manohar Lal. The trial Court found that the house was a personal property of Manohar

8. ('15) 2 A. I. R. 1915 All. 264 : 29 I C 593 : 37 All. 414 : 13 A. L. J. 557, Kamta Prasad v. Indomati.
9. ('25) 12 A. I. R. 1925 Mad. 701 : 88 I. C. 409 : 48 Mad. 553 : 48 M. L. J. 419, Palaniappa Chetty v. Subramania Chettiar.
10. ('28) 15 A.I.R. 1928 Cal. 835 : 114 I. C. 495 : 55 C. L. J. 82, Nil Kanta v. Ram Chand.
11. ('41) 28 A. I. R. 1941 All. 81 : 192 I. C. 737 : I. L. R. (1941) All. 136 : 1940 A. L. J. 823, Raj Narain v. Ahmadi Jan.
12. ('35) 22 A.I.R. 1935 All. 359 : 158 I. C. 1113 : 1935 A. L. J. 383, Chandra Shekhar v. Manohar Lal.

Lal acquired by his personal funds and that being so the said house could not be sold in execution of the decree for costs which was passed not against Manohar Lal, but against his two sons, Ganesh Dutta and Chandra Dutta. The trial Court further found that if Chandra Shekhar and Balak Ram wanted to make Manohar Lal responsible for their costs they ought to have taken steps about it in Suit No. 36 of 1928 before or at the time when the decree for costs was passed and it was not open to Chandra Shekhar and Balak Ram after the decree for costs had been passed against Ganesh Dutta and Chandra Dutta to seek a declaration that Manohar Lal was responsible for costs which was decreed against Ganesh Dutta and Chandra Dutta. On appeal this judgment was affirmed by the District Judge of Cawnpore and against that judgment the plaintiffs have made this second appeal which has been referred for decision to this Bench.

The only question for my consideration in this case is whether the decree for costs passed against Ganesh Dutta and Chandra Dutta in favour of Chandra Shekhar and Balak Ram can be executed against Manohar Lal on the ground that Ganesh Dutta and Chandra Dutta were the benamidars for Manohar Lal and they were the nominal parties and Manohar Lal was the real party. It may now be taken to be settled by authority that there is nothing illegal in a benami transaction and that a benamidar can sue and be sued and a decree in favour of the benamidar or against the benamidar enures in favour of the real owner and binds the real owner as the case may be. In 46 Cal. 566,[5] Mr. Ameer Ali in delivering the judgment of the Judicial Committee made the following observation:

"On the question whether a person who has no beneficial interest in the property which stands in his name or is acquired in his name can maintain an action in respect thereof there seems to be considerable diversity of judicial opinion in India. The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the benemi system, is and has been a common practice in the country. There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people. The rule applicable to benami transactions was stated with considerable distinctness in a judgment of this Board delivered by Sir George Farwell in 37 All. 557.[13] Referring to a benami dealing their Lordships say :

'It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law that where a *feoffment* is made without consideration the use results to the *feoffor*.'

So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned, he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of res judicata. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him. In case of a contest between an alleged benamidar and an alleged real owner, other considerations arise with which their Lordships are not concerned in the present case."

There is also authority for the view that in the absence of any evidence to the contrary it is to be presumed that the benamidar institutes the suit or defends it with the full knowledge of the beneficial owner and also for the view that the benamidar is only another name for the real owner and as such the real owner himself must be deemed to be a party for the purposes of S. 11, Civil P. C. But there is a conflict of judicial authority on the question whether the real owner or benamidar or both can execute a decree and on the question whether the real owner can take steps to substitute himself under S. 47, Civil P. C., or by an independent suit and further on the question whether the doctrine of benami transactions should be confined to suits or should be extended to execution proceedings. In 48 Mad. 553,[9] which is a Full Bench decision in one of the judgments at pp. 558 and 559, it was stated :

"It is also clear that the Civil Procedure Code did really intend to prevent benamidars coming in and making applications to the Court on the general basis of the law relating to benami transactions. . . . It would lead to very serious consequences if we should allow the law of benami to have any operation with regard to suits and proceedings and records of Court, and if only on that ground, it would be desirable to disallow any such contentions."

The 'benamidar' in the above quotation is used to signify the real owner and opinions may differ as to whether this is the true meaning of the word. It may be so in Madras, but in some places 'benamidar' means the nominal person and not the real person. However, the meaning of the passage is perfectly plain and it expresses the view that the Civil Procedure Code contemplated that where proceedings have been taken in the names of nominal parties, real parties should not be allowed to disturb the nominal array of parties. In A.I.R. 1928 Cal. 835[10] the Calcutta High Court has expressed the view that the true owner can execute a decree obtained in the name of his benamidar. In I.L.R. (1939) Mad. 1004,[14] a Bench of Madras High Court after citing the passages quoted above by me from the earlier judgment of the same Court in 48 Mad. 553[9] observed as follows :

"The language here employed is very wide, suggesting as it does that it would be proper to ignore a plea of benami if it tends to affect suits, proceedings and records of Court. The facts of the case itself did not, so far as we could see, call for such a sweeping observation and we are unable, with the utmost respect, to treat it as any better than an obiter dictum. The learned Judge himself in this connexion refers in support of the proposition only to S. 66, Civil P. C., which in terms limits the prohibition to an attack on the title of the person claiming title under a purchase certified by the Court, and expressly saves the right of a third per-

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13. ('15) 2 A. I. R. 1915 P.C. 96 : 30 I.C. 299 : 37 All. 557 : 42 I. A. 202 (P. C.), Mt. Bilas Kunwar v. Desraj Ranjit Singh.

14. ('39) 26 A.I.R. 1939 Mad. 210 : 183 I.C. 699 : I.L.R. (1939) Mad. 1004 : (1939) 1 M. L. J. 379, Minakshi Iyer v. Noor Mohammad.

son to proceed against the property ostensibly sold to the certified purchaser if in fact and in truth it is liable to satisfy a claim of such third person against the real owner. We cannot see any warrant in the provisions of the Code for enlarging the prohibition so as to cover suits and proceedings or the records of Court in general. To do so would result in many cases in the promotion and not in the suppression of fraud. Provisions of this character restrictive as they are of the rights of parties and the jurisdiction of the Courts should, we think, be strictly construed, and ought not to be extended beyond the plain language of the rule . . . . . It may be sound policy to discourage benami transactions in general tending, as they very often do, to the effective concealment of fraud to the embarrassment of Courts. But unless statutorily bound, the Court must continue to do its duty of unravelling the truth however cleverly hidden by false or fictitious trappings, and administer justice according to the true rights of parties such as they may be found to be on enquiry. It may again be a desirable end to thwart the attempt frequently made by unscrupulous debtors to throw obstacles in the way of successful litigant realising the fruits of his decree, and prevent the Court from being side tracked into a long and tedious enquiry having the effect of delaying or defeating a bona fide decree-holder. Even if such were the obvious purpose of the obstruction, the Court must still do its duty by holding the enquiry and get at the truth, subject, no doubt, to such rules of procedure as the Legislature has laid down."

The preponderance of authority seems to be in favour of the view that if a decree has been assigned to a benamidar, then the benamidar alone will be able to execute the decree and the real owner will not be permitted to take proceedings under O. 21, R. 16, Civil P. C., and if a question of set off arises under O. 21, R. 18, Civil P. C., it will have to be worked on the basis of nominal parties and not with reference to the right of real owners. For the purpose of enforcing rights and liabilities of real owners in benami transactions, it is possible to draw a distinction between decrees determining the rights of parties and decrees for costs only. By the Indian statute costs are in the discretion of the Court and very often they are awarded on personal considerations which apply to nominal parties which are before the Court. Some time they may be of penal nature. It is further possible to draw a distinction between costs awarded to a benamidar and costs awarded against a benamidar. In cases relating to costs in favour of benamidar money which was spent in litigation by the real party and which has resulted in a decree for costs may possibly be regarded as money held in trust by the benamidar for the real owner or the real plaintiff and the decree for costs may be regarded as a fruit of the money spent by the real owner or the real plaintiff and there may be some injustice in allowing the benamidar to take away and appropriate this money in cases where it might not be possible to recover this money from benamidar if he had once realized it. But these considerations do not arise in case of a decree for costs against a benamidar which is sought to be executed against the property of the real party to the litigation. In such a case, the benamidar is not holding any property in trust for the real party which the decree-holder seeks to recover nor there is any question of there being a binding decree against the real owner. In a case where the decree is for payment of costs against *A* and the decree-holder seeks to recover costs from *B* on the ground that *B* is liable to pay the costs because *B* promoted the litigation and was the real party and *A* was only a nominal party, very different questions arise for consideration than the simple question of recognizing benami transactions in matters relating to execution. The question which arises in such a case is not that the decree passed against benamidar is binding on the real owner, but the question which arises is whether costs can be recovered from a person who was not a party to the litigation but who promoted and financed the litigation. As a general rule, the liability to pay costs for unsuccessfully carrying on litigation nominally in the name of another person by the person who thus carries on the litigation, can only be determined and imposed in the litigation itself and cannot be determined in execution of decree passed in that litigation against a nominal party or by an independent action. I am not aware of any procedure in this country by which costs awarded against nominal parties can be recovered from real parties in execution of decree and in my opinion if it is intended to make any other person than the nominal party responsible for costs this should be done before or at the time of the passing of the decree for costs and not in the execution of that decree.

In the case before me, Manohar Lal was acting as the guardian of Ganesh Dutta and Chandra Dutta in the suit in which decree for costs was passed against Ganesh Dutta and Chandra Dutta. The fact that Manohar Lal was financing the litigation and that the litigation was carried on by Manohar Lal in the name of Ganesh Dutta and Chandra Dutta was fully brought out in Suit No. 36 of 1928 and was known to Chandra Shekhar and Balak Ram. They took no steps at the time or before the decree for costs was passed to secure their costs against Manohar Lal and they were content with a decree against nominal parties. Later on, Chandra Shekhar and Balak Ram tried to execute the decree by attaching the house of Manohar Lal and on an objection taken by Manohar Lal the house was released and it was held that Manohar Lal not being a party to the suit, the decree for costs could not be executed against him. The plaintiffs have now brought a suit for a declaration that Manohar Lal is liable under the said decree. In my opinion, such an action cannot lie on the ground that Chandra Shekhar and Balak Ram's remedy was to make Manohar Lal liable in the suit itself in which the decree for costs was passed and also on the ground that rightly or wrongly an application of Chandra Shekhar and Balak Ram to execute the decree against Manohar Lal was dismissed by the executing Court and the order has become final. In my opinion, if Chandra Shekhar and Balak Ram had any right to execute the decree against Manohar Lal this could only be done by proceedings under S. 47, Civil P. C., which they had already taken unsuccessfully and not by a separate suit. For the reasons given above I would dismiss this appeal with costs.

BY THE COURT. — The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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SPECIAL BENCH

COLLISTER, BAJPAI AND BRAUND JJ.

Gaya Prasad Tewari — Applicant

v.

Commissioner of Income-tax, Central and United Provinces —

Opposite Party.

Civil Revn. Appln. No. 734 of 1938, Decided on 24th February 1942.

(a) Income-tax Act (1922, as amended by Act 4 of 1937), S. 16 (3) (a) (iii)—Assessee purchasing in 1922 two houses with his own money in name of his wife—Transfer not for consideration or in connexion with agreement to live apart—By deed executed in 1929 wife settling houses on trust whereof she appointed certain persons including assessee as trustees — Trustees to manage trust affairs and to appoint one of them as manager — Settlor appointing herself as manager (dharma karta) during her life on remuneration — Assessee to act as her agent for collecting rent, filing suits and protecting trust property — For aforesaid services wife to be paid Rs. 50 monthly and husband Rs. 100 monthly—Allowance of Rs. 50 to wife held not salary arising out of employment and hence assessable in hands of assessee under Section 16 (3) (a) (iii).

The assessee purchased two houses in 1922 from his own money in the name of his wife; the transfer was not for consideration or in connexion with an agreement to live apart. By an instrument of trust dated 30th September 1929 executed by the wife with the consent of the assessee she settled these two houses upon trusts whereof she appointed six named persons, including her husband, the assessee, as trustees. The trustees were to stand possessed of the trust properties and to manage its affairs according to the trust instrument and to nominate from amongst themselves a "Head Manager or Mukh Dharam Karta" to manage its affairs and collect income. The settlor herself during her life was to be a "Dharam Karta" (Manager) and was to manage the affairs of the trust, while her husband, the assessee was to be her agent for the purpose of collecting rents, filing suits and protecting the trust property so long as she remained the Mukh Dharam Karta. For this the assessee was to receive Rs. 100 a month and his wife was to receive, as Mukh Dharam Karta, Rs. 50 a month out of the income of the trust :

Held that the monthly allowance of Rs. 50 notwithstanding its description as "remuneration for services in the trust deed could not in the circumstances be treated as salary simpliciter arising out of employment, and so far as S. 16 (3) (a) (iii) was concerned it was clearly distinguishable from a salary paid to an employee independently engaged by the trustees for the purposes of the trust, for there was no real employment of the wife in the ordinary sense of the term. Although the wife was named as the Mukh Dharam Karta her services were nominal in view of the fact that they were to be performed for her by her husband who was also to be remunerated for his services, and hence the services to be rendered by the wife were nothing more than a cloak for the reservation to her of an interest in the property. Therefore, in the circumstances of the case, the allowance of Rs. 50 a month was income which arose indirectly from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connexion with an agreement to live apart and therefore was computable as part of the total income of the husband under S. 16 (3) (a) (iii): (1924) 2 K. B. 494 and (1891) 2 Ch. 613, *Disting.*

[P 239 C 1, 2 ; P 241 C 1]

(b) Income-tax Act (1922, as amended by Act 4 of 1937), S. 16 (3)—S. 16 (3) applies to income arising from transfer effected before amending Act unless income is chargeable for year ending before 1st April 1937.

Section 16 (3) is not concerned with the date of the transfer; it is concerned with the income arising from the property and chargeable to income-tax for any year commencing on or after 1st April 1937. Section 16 (3) is wide enough to apply to income arising from transfers effected before the passing of the amending Act unless the income is chargeable for a year ending before 1st April 1937 : ('41) 28 A. I. R. 1941 Pat. 59 (F. B.), *Rel. on.*

[P 239 C 2]

G. S. Pathak — for Applicant.

N. P. Asthana — for Opposite Party.

COLLISTER J. — This is a reference under S. 66 (2), Income-tax Act. The assessee is Gaya Prasad Tewari. The accounting year was from Asarh Sudi 3rd S. 1992 to Asarh Sudi 11th S. 1993 and the assessment year was 1937-38. One of the items included by the Income-tax Officer in the income of the assessee was a sum of Rs. 600 shown as "allowance to wife;" and it is this item which is the subject of the reference. On 27th February 1922 the assessee purchased the two houses in the name of his wife Mt. Chhemkali. Thereafter, this lady organized and conducted a school in a room of one of the houses, while the rest of the property was apparently let out on rent. On 30th September 1929 she executed a trust deed in favour of the Shanti Balika Vidyalaya, and under the terms of the instrument it was provided that she should have Rs. 50 a month as *mukh dharam karta* or head manager and her husband should have Rs. 100 a month for working as her agent. These sums of money were to be paid from the income of the trust property. The Commissioner of income-tax has referred the following question to this Court :

"Whether in the circumstances of the case the allowance of Rs. 600 received by the assessee's wife out of the income arising from the properties transferred to her by the assessee is liable to be assessed in his hands in accordance with the provisions of S. 16 (3) (iii), Income-tax Act?"

The Commissioner is of opinion that the question should be answered in the affirmative. What we have to decide is whether the Rs. 50 per mensem which was payable to the assessee's wife under the terms of the deed of trust was her salary arising out of employment, as contended on behalf of the assessee, or whether it was taxable as part of the assessee's income under S. 16 (3) (iii) as claimed by the department. Section 16 (3) provides as follows:

"(3) In computing the total income of any individual for the purpose of assessment there shall be included —

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly (i) .... (ii) .... (iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connexion with an agreement to live apart."

It is a matter of admission before us that the assessee purchased the property from his own money in the name of his wife; and the transfer was not for consideration or in connexion with an agreement to live apart. From the assessee's statement dated 1st November 1937, and from the terms of the trust-deed itself, it is clear that the lastnamed instrument was executed with the consent of the assessee, and it is not suggested in the referring order that the assessee retains any title in the property. By the provisions of the trust-deed the lady appointed the assessee and four other persons as trustees; and she appointed herself as mukh dharam karta or head manager during her life time. After her death the assessee was to hold this office, and due provision was made for his successors. It was provided that the head manager should conduct the affairs of the trust, should collect income arising from the trust property and should institute and defend all such suits and complaints as might arise in connexion with the trust. The instrument then went on to provide that all the affairs of the Shanti Balika Vidyalaya were to be managed by the trustees, whose duty it was to prepare a budget at the beginning of each year. The head manager was to be the president of the committee of trustees and she or he was to maintain a regular account which was to be put up before the trust committee every third month. The head manager was further responsible for carrying out all necessary repairs ; and the savings of the trust were to be deposited in a reliable bank or elsewhere by the head manager. There was also a provision that the assessee was to act as agent for the executant during her life time. It was his duty to collect rents of the trust property and to institute and defend suits and complaints relating to the trust property; and he had "full power to take any action for the protection of the trust." In consideration for these services he was to receive Rs. 100 a month; and the executant herself, as mukh dharam karta, was to receive Rs. 50 a month as remuneration for her services. This allowance was also to be paid to her successors after her death ; and the payment was to be made from the income of the trust property.

Under the terms of the instrument the assessee was to be in close association with the executant as her agent and we have little doubt that in point of fact he would perform all the functions of the head manager during the life time of his wife. In the trust-deed the monthly allowance of Rupees 50 is described as "remuneration for services;" but notwithstanding this description it cannot in the circumstances be treated as salary simpliciter arising out of employment. It is a benefit which in consideration for the lady's services as mukh dharam karta is reserved to her out of the income of the trust property and under the express terms of the trust deed itself; it is clearly distinguishable—so far as S. 16 (3) (iii) is concerned—from a salary paid to an employee who is independently engaged by the trustees for the purposes of the trust, for, there is no real employment here in the ordinary sense of the term. Property was purchased by the assessee in the name of his wife, a trust deed was subsequently executed by his wife with his consent and it was provided that the lady was to appropriate Rs. 50 a month from the income of the trust property by virtue of her office as mukh dharam karta. Having regard to all the facts, we are of opinion that in the circumstances of this case the allowance of Rs. 50 a month was income which arose indirectly "from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart." It is, therefore, computable as part of the total income of the husband under S. 16 (3) (iii) of the Act; it is not salary arising out of employment, as claimed on behalf of the assessee. It is next contended on behalf of the assessee that S. 16 (3) of the Act is not retrospective. This sub-section was added by the Income-tax (Amendment) Act of 1937, which came into force on 4th March 1937. The transfer was in 1922, but the income with which we are concerned was charged in the assessment year 1937-38. Section 5 of the amending Act provides :

"The amendment made in the said Act by S. 2 shall not have effect in respect of any income chargeable to income-tax for any year ending before 1st April 1937."

This means that it shall have effect in respect to income chargeable to income-tax for any year ending after 1st April 1937. Learned counsel for the assessee concedes that the year referred to in this section is the year of assesement; and, in our opinion, this section of the amending Act makes it clear that the provisions of S. 16 (3) (iii) are applicable to the sum of Rs. 600, which became chargeable to income-tax in the year 1937-38. Learned counsel for the assessee pleads that the section is not applicable in the present case for the reason that the transfer was effected in 1922, i. e. long before 1st April 1937; and, in support of this contention, he relies upon the analogy of sub-s. (1) (c) of S. 16, in which the words "whether effected before or after the commencement of the Income-tax (Amendment) Act, 1939" occur. It is true that no such clause finds place in sub-sec. (3) (iii), but the Legislature enacted a separate section in the amending Act which leaves no room for doubt as regards its intention. This Act is not concerned with the date of the transfer; it is concerned with the income arising from the property and chargeable to income-tax for any year commencing on or after 1st April 1937. Section 16 (3) is wide enough to apply to income arising from transfers effected before the passing of the amending Act unless the income is chargeable for a year ending before 1st April 1937. This view was taken by a Full Bench of the Patna High Court in 20 Pat. 202.[1] The question which the Commissioner has referred to us cannot be answered by a simple affirmative, for the language in which it is couched assumes that the wife's allowance is "out of the income arising from the properties transferred to her by the assessee;" and these words beg the very question which is being propounded. In our opinion the sense of our reply should be that the item of Rs. 600 received by the assessee's wife is liable to be assessed in the hands of the assessee under the provisions of S. 16 (3) (iii), Income-tax Act.

BRAUND J. — This is a reference under S. 66, Income-tax Act, (11 of 1922). The assessee is one Gaya Prasad Tewari, who, and whose wife, Mt. Chhemkali, are associated with a school called the Shanti Balika Vidyalaya in the following circumstances. Two houses at Cawnpore appear to have been transferred by purchase from a third party to the wife by an instrument of transfer dated 27th February 1922. It has been found as a fact that, although the transfer of these houses was to the wife, the purchase price was paid by the assessee. Between 1922 and 1929 the wife appears to have

1. ('41) 28 A.I.R. 1941 Pat. 59 : 192 I. C. 204 : 20 Pat. 202 : 21 P. L. T. 1096 (F.B.), H. P. Banarji v. Commissioner of Income-tax, B. & O.

started and carried on a school in one room of the two houses in question, while the remaining parts of the premises were let and yielded a rental income. By an instrument of trust dated 30th September 1929 executed by the wife, she settled these two houses upon trusts whereof she appointed six named persons, including her husband, as trustees. She recited that she was carrying on the school in one room of the premises and expressed a desire to perpetuate the management of the school by constituting a trust of it. The trustees were to stand possessed of the trust properties and to manage its affairs according to the trust instrument which included the following provisions. They were to nominate from amongst themselves a 'Head Manager or Mukh Dharam Karta' to manage its affairs and collect the income. There then followed provisions under which the settlor herself during her life was to be a 'Dharam Karta (Manager)' and was to manage the affairs of the trust, while her husband, the assessee, was to be her agent for the purpose of collecting rents, filing suits and protecting the trust property. For these services the assessee was to get out of the income of the trust property Rs. 100 a month, while by a subsequent clause, the wife was to get Rs. 50 a month. It is this last mentioned sum that is in issue under this reference. The actual terms of these provisions are contained in the following extracts from the trust deed.

"(1) That the trustees shall nominate from amongst them a Head Manager or Mukh Dharam Karta to manage the affairs of the trust and collect the income arising out therefrom, provided that so long as I, the Executant, shall remain alive, shall be a Dharam Karta (manager) and shall be managing affairs of the trust to her best ability and on behalf of myself, the Executant Dharam Karta, my, the Executant's, husband Pandit Gaya Prasad Tewari shall be my agent and shall collect the rent of the trust property and on behalf of myself, the Executant Dharam Karta, shall file suits for recovery of arrears of rent and lodge and defend all sorts of suits and complaints in connection with trust property and shall have full power to take any action for the protection of the trust and in consideration of the services so rendered by him, he shall get Rs. 100 (one hundred) per month, and, after me my, (the executant's) husband shall be the Mukh Dharam Karta (Head-manager). . . . . ."

That does not appear to be a very artistic translation of the original and I venture to think that it is a pity that in matters of this kind translations are not better made. But it is sufficient to convey the sense of the disposition. By para. (3) it is provided that the Mukh Dharam Karta, that is the wife ". . . . . shall manage the affairs of the trust, collect income arising out of it, file all sorts of suits in connection with trust property and defend on behalf of the trust all such kinds of suits and complaints as would be filed and lodged against the trustees. That the whole affair of Shanti Balika Vidyalaya shall be managed by the trustees and in the beginning of every year the trustees shall, for expenditure of the said school, prepare a budget which shall be passed by the Committee and the expenditure shall be incurred accordingly." Paragraph (4) provides for meetings of the trustees to be held once in every three weeks and for their proceedings to be recorded in the minute book. By para. (5) it is provided:—"That the Mukh Dharam Karta in view of the office held by him, shall be the President of the Trust Committee and he shall maintain a regular account of the income and assets of the trust property and this account shall be put up before the Trust Committee every third month and shall be passed by the trustees." By para. (8) the Mukh Dharam Karta is made responsible for making arrangements for necessary repairs to the trust property, and in defraying the expenses, out of its income. By para. (11) the Mukh Dharam Karta and her husband disclaimed all beneficial interest in the trust property. By para. (15), which is a material paragraph so far as this reference is concerned, the trust deed provides: — "(15) That the Mukh Dharam Karta shall get Rs. 50 per mensem as remuneration for the services that he or she shall render as a manager and this amount shall be paid out of the trust's income."

Those appear to me to be the material provisions of the trust deed and, to summarize them, they amount to the appointment of the assessee's wife during her life-time as the Mukh Dharam Karta with ample powers of management, which powers were in effect to be exercised by the assessee on his wife's behalf, so long as she remained the Mukh Dharam Karta. For this the assessee was to receive Rs. 100 a month, and his wife was to receive, as Mukh Dharma karta, Rs. 50 a month out of the income of the trust. In addition to this, the assessee was allowed quarters free of rent. In these circumstances, an assessment was made on the assessee in the tax year 1937-38 and in respect of the income receivable in the year beginning 4th June 1935 and ending 30th June 1936 made up, so far as is relevant to the present reference, of Rs. 1200 representing his allowance of Rs. 100 a month, Rs. 120 representing the value of the rent free quarters, and Rs. 600 representing the monthly allowance of Rs. 50 a month to his wife. It is in reference to the last mentioned item that the present question has arisen. It should be mentioned that there is no evidence that the trust possessed any income other than the income derived from the rents of those parts of the premises which were available for letting. The material provision of the Income-tax Act (11 of 1922) is S. 16, as that section has been amended by the Income-tax Act (Amendment Act, 1937). As so amended, the relevant sub-section (sub-s. (3)) reads thus :

"(3) In computing the total income of any individual for the purpose of assessment, there shall be included (a) so much of the income of a wife or minor child of such individual as arises directly or indirectly . . . . . (iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ;"

The question that arises in this case, therefore, is whether, in the events which have happened, the monthly payment to the assessee's wife of Rs. 50 a month out of the income of trust can be said to arise directly or indirectly from the two houses transferred by the assessee to his wife in 1922. For this purpose I am prepared to assume that the purchase of the property by the assessee in the name of his wife in 1922 was the equivalent of a transfer to her of that property within the meaning of the subsection with which I am dealing. It has, moreover, been found as a fact by the Commissioner that, not only was it the husband's money that paid for the purchase, but that also there is no evidence that it was in consideration of any agreement between the husband and the wife to live apart. The Income-tax Officer in the first instance, as I have already said, treated the income of Rs. 600 received by the wife as income assessable in the hands of the assessee and this assessment was maintained in appeal

by the Assistant Commissioner. It then came to the High Court at the instance of the assessee.

There is a slight temptation to jump to the view that the reward for the services of the assessee's wife under the trust deed is attributable primarily to her services rather than to the actual property out of which the income was derived. But on reflection and in the particular circumstances of this case, I am inclined to agree with the Assistant Commissioner that that is not so. It all depends, as I think, upon the true construction of the trust deed itself. If, on a true construction of the deed, the services of the assessee's wife amounted to an independent employment and could be held to have had no relation to any former interest in the property, I, for myself, should have hesitated to hold that an allowance or salary in connexion with that service arose either directly or indirectly from the assets in question. At least, I should have desired to reserve further my opinion as to that. If, on the other hand, on a true construction of the deed, it should appear that the allowance under it reserved to the assessee's wife was merely a means of reserving to her an interest in the income of the property, then I should feel little hesitation in arriving at the conclusion that it arose, indirectly at least, from the property itself. Reverting to the trust deed before us, I am inclined to think that the only proper conclusion is that the payment of the income of Rs. 50 a month to the wife amounts only to a reservation to her of part of the income of the property. She is not herself a trustee and the case is therefore distinguishable from that in (1924) 2 K. B. 494[2] in which Rowlatt J. in circumstances which otherwise were very similar to the present circumstances, held that a remuneration of £100 a year payable to a trustee was not remuneration but was an "annual payment" payable out of trust property. To that extent the present case is less unfavourable to the assessee than was that case.

In (1891) 2 Ch. 613[3] at p. 624, Lindley L. J. held that a payment reserved to a trustee of £200 a year, while carrying on a testator's business, was a legacy and not a salary or remuneration and hence was amenable to legacy duty. The foundation of these decisions appears to me to be that, inasmuch as a trustee is under no obligation to assume that position and does so voluntarily, it must be taken that what he derives under the will is in the nature of a beneficial interest rather than in the nature of remuneration for services which he is not bound to render. They are, however, both distinguishable from the present case, because, in the view I take upon the construction of this particular trust deed the services to be rendered by the wife are nothing more than a cloak for the reservation to her of an interest in the property. It is true that she is named as the Mukh Dharam Karta, but her services are nominal in view of the fact that there are express provisions that they shall be performed for her by her husband who is also to be remunerated for his services. Were it possible by a device of this kind to exclude income from the charge of income-tax, it would, as it seems to me, be possible in almost any case for a man of property to settle it in such a way as by constituting himself a paid manager of it he could evade paying tax on a substantial part of its income. That, however, is not the only point taken on behalf of the assessee. He takes the further point that sub-s. (3) of S. 16 of the Act does not apply at all. As I have already said, this subsection was introduced by an amendment by the Amending Act, 1937. By S. 5 of that Act it was provided :

"5. The amendment made in the said Act"—that is in the Income-tax Act of 1922—"by S. 2 shall not have effect in respect of any income chargeable to income-tax for any year ending before 1st April 1937."

The learned advocate appearing for the assessee does not, as I understand him, argue that the income itself now assessed arose for any year ending before 1st April 1937, but that the operation of the amendment is excluded because the transfer itself to the wife by the assessee took place before 1st April 1937. He puts it first on the general ground that, inasmuch as a taxing Act can never be construed to have a retrospective effect unless there are express words to that effect, it cannot be supposed in this case that the Legislature has assumed to charge to income-tax income which, at the time the transfer was made, and for many years thereafter, was immune from tax. He says that this is giving to the Act a retrospective effect and that, if the parties had known it, they would not, or might not have carried out the transaction at all. Now, that, in my view, discloses a fundamental misconception. The Amending Act will not, as I see it, by taking this income have any retrospective effect at all. The Act does not tax the transaction, that is to say, the transfer of 1922, at all. It taxes the income of the property in the hands of the wife by aggregating it with the husband's income. And it has been particularly careful by S. 5 to make it very plain that income is not to be taxed with retrospective effect. In short, so far as income is concerned, there is nothing retrospective about it. It is true that the transfer which entitled the wife to receive this income took place long ago, but that, to my mind, is wholly immaterial. I am inclined to think that the argument is based upon the material misconception that there is some sort of common law right that, if at any time the ownership of property bearing income does not attract income-tax, it is for ever entitled to be immune from tax. That, of course, is wholly untrue.

The other, and I think more substantial, ground upon which the assessee puts it is that, whereas in the subsequent amendment in 1939 of S. 16 sub-s. (1) it has been expressly declared by sub-s. (c) that the amendment is not to operate where the settlement or disposition referred to has been effected before or after the commencement of the Amending Act, the amendment of sub-s. (iii) omits this provision. It is said that this points, by the omission of those words in the Amending Act of 1937, to a deliberate intention not to affect a transfer by a husband to a wife which took place before 1937. This argument is highly ingenious but it is one which I cannot accept. The reason why the amendment of 1939 was careful to exclude a settlement or disposition effected before the commencement of the Amending Act is, I think, obvious. The amendment was to the effect that, in computing the total income of an assessee, all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disposer were to be deemed to be income of the settlor or disposer. Now, in the Amending Act of 1939 which introduces this amendment, there is no saving of income arising after the

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2. (1924) 2 K. B. 494 : 93 L. J. K. B. 974 : 69 S.J. 12 : 40 T. L. R. 784, Baxendale v. Murphy.

3. (1891) 2 Ch. 613 : 60 L. J. Ch. 537 : 64 L. T. 515 : 39 W. R. 565, In re Thorley.

amendment. Had the legislature, therefore, not introduced the words "before or after the commencement of" the Amending Act, there would really have been a danger of the amendment becoming retrospective, because on the face of the amendment the income of any transaction, whenever it took place, might have been assessable. It was necessary, therefore, for the Act to make it clear. So far, however, as sub-s. (3) is concerned, the position is quite different. The Amending Act of 1937 in itself by S. 5 makes it abundantly clear that only future income is to be affected at all. It was not in the least necessary, therefore, to limit in any way the transaction from which that future income should arise. That again involves the principle that a man has no common law right so to arrange his affairs that the income of his property is for ever to be immune from the charge of income-tax. Nor is there anything either harsh or unreasonable in the legislature imposing for the future a tax on income, however its receipt may be manipulated, which under existing legislation is free from tax.

The same view has been taken in a Full Bench case in the Patna High Court in 20 Pat. 202[1] although in that case the second of the two points taken before us by the assessee was not, I think, discussed. I desire before concluding this judgment to draw attention to the form in which the question has been stated by the learned Commissioner. It is:

"Whether in the circumstances of the case the allowance of Rs. 600 received by the assessee's wife out of the income arising from the properties transferred to her by the assessee, is liable to be assessed in his hands, in accordance with the provisions of S. 16 (3) (iii), Income-tax Act."

If it be predicted, as by the question it is, that the income arises from the properties transferred, then there can only be one answer. That, however, is obviously not what the learned Commissioner meant. And I see that, by his letter of 29th September 1938, the assessee himself strongly protested against it. The answer I would give would be that: "In the circumstances of the case referred to us the allowance of Rs. 600 received by the assessee's wife out of the properties settled by the trust deed dated 30th September 1929 and under cl. (15) thereof is liable to be assessed in accordance with the provisions of S. 16 (3) (iii), Income-tax Act."

BY THE COURT. — The answer to the question referred to us is as follows: In the circumstances of the case the allowance of Rs. 600 received by the assessee's wife out of the properties settled by the trust deed dated 30th September 1929 and under cl. (15) thereof is liable to be assessed in the hands of the assessee in accordance with the provisions of S. 16 (3) (iii), Income-tax Act. The assessee must pay the costs of this reference, and we fix the fee of the learned Advocate-General at Rs. 200. A copy of our judgment will be sent under the seal of the Court and the signature of the Registrar to the Commissioner of Income-tax.

G.N./R.K. *Answer accordingly.*

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VERMA AND YORKE JJ.

Seth Gordhan Das

v.

Seth Anand Prasad.

First Appeal No. 497 of 1934, Decided on 18th December 1941, from decision of Sub-Judge, Saharanpur, D/- 10th August 1934.

(a) Banker and customer — Banking and money lending—Distinction — Bank or banker defined — Native banks called kothis — Functioning of, explained—Joint Hindu family held not banker.

There is a broad distinction between a banking business and a money-lending business. The essential function to enable a person, firm or institution to be regarded as banker or a bank is that of receiving current deposits against which cheques are to be drawn. No person or body, corporate or otherwise, can be a banker who does not (1) take deposit accounts, (2) take current accounts, (3) issue and pay cheques and (4) collect cheques crossed and uncrossed for his customers : (1848) 2 H. L. C. 28 and (1912) 2 Ch. 183, *Rel. on.* [P 244 C 1, 2]

Some modifications of this strict view may be necessary in dealing with the case of "Native Banks," which were generally called kothis. These kothis used to keep accounts which were accepted as final by all who had to deal with them. They gave no receipts and no pass books and did not make use of cheques, but they operated more or less as bankers receiving deposits and making payments against those deposits on demand. The drawing of a hundi is something which is done by many persons other than bankers and hence is no proof of the existence of a banking business. Nor does the entry of any moneys received on loan as deposits in the accounts of firms of commission agents go to indicate any banking business. (Joint Hindu family held not bankers.) [P 244 C 2; P 245 C 1, 2; P 248 C 1]

(b) Evidence Act (1872), S. 33—Statement of person not witness in case is inadmissible without oral evidence to support it.

The statements by person who is not a witness in the case are not in any way admissible in the absence of oral evidence to support them. [P 245 C 2]

(c) Civil P. C. (1908), O. 11, Rr. 12 and 13 — Procedure under O. 11, Rr. 12 and 13 not followed—No adverse inference can be drawn against party from non-production of his account books.

A party is not bound to produce his account books in support of his own case if he does not think those account books to be useful or relevant evidence to prove his case. No adverse inference can be drawn against a party for non-production of his account books unless the party which wants that party to produce has served upon him the necessary notice and followed the procedure prescribed by law under O. 11, Rr. 12 and 13 : ('15) 2 A. I. R. 1915 P. C. 96, *Rel. on.* [P 247 C 1]

C. P. C. —

('40) Chitaley, O. 11 Rr. 12 and 13 N. 25 Pts. 1 and 2.

('41) Mulla, Page 671 Pt. (i).

(d) Hindu law—Joint family — Family business — Only in case of ancestral business debt contracted for purposes of business binds family without proof of enquiry on part of creditor as to purpose of debt — Plaintiff alleging defendant joint Hindu family to be carrying on banking business and suing to recover amounts alleged to have been deposited by him with manager of business and in respect of which pro-notes were executed by manager in plaintiff's favour — Words "udhar lekar" in pro-notes held clearly suggested loan rather than deposit—Plaintiff failing to establish that there was family banking business or business of

borrowing and lending — Manager found to be doing some "len den" besides managing zamindary property—Deposits held were loans taken by manager—Plaintiff not having attempted to show legal necessity held was bound to fail.

The principle that the manager of a joint Hindu family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby is only applicable in cases of ancestral business : ('35) 22 A. I. R. 1935 All. 221 (F. B.), *Rel. on* ; 34 Bom. 72 and ('15) 2 A. I. R. 1915 Oudh 123, *Ref.* [P 247 C 2]

In respect of certain amounts alleged to have been deposited by the plaintiff with the karta of a joint Hindu family the karta had executed promissory notes in favour of the plaintiff. The plaintiff's case was that the amounts were not loans but deposits with the banking business of the joint family of the defendants. The plaintiff failed to establish that the business of the defendants was a banking business or an ancestral business of borrowing and lending. All that was established was that the manager of the family was in the habit of doing some money lending (len-den) as also some business in wheat and the like besides managing the zamindary property of the family. In the suit for recovery of the alleged deposit by the plaintiff :

Held that the words "udhar lekar" used in the pro-notes by the manager clearly suggested a loan rather than a deposit. The sums alleged by the plaintiff to have been taken by the karta as deposits were in fact taken as loans and the plaintiff not having attempted to establish legal necessity was bound to fail. [P 244 C 1 ; P 248 C 1]

Held further that the business of "len den" did not by any means invariably involve the assumption that the money-lender was himself in the habit of taking loans. [P 247 C 2]

Hindu law —

('40) Mulla, Page 258 Pts. (a) and (b).

('38) Gour, Page 472 N. 1226.

P. L. Banerji, N. C. Shastri and D. Sanyal — for Appellant.

Sir Tej Bahadur Sapru, S. B. L. Gour and J. Gupta — for Respondents.

YORKE J.—This is a first appeal by the plaintiff in a suit for the recovery of two sums of Rs. 3500 and Rs. 5000 alleged by the plaintiff to have been deposited by him with the banking firm of the defendants' family on 8th July 1930 and 16th July 1931. The plaintiff alleged that on each occasion he was given what he called a "chitthi" or letter signed by the then manager of the family business Durga Prasad stating the interest on the first deposit as -/10/6 per mensem and that on the second deposit as -/11/- per mensem. According to the plaintiff's case there had been a banking business ("Karobar banking") in the family of the defendants from the time of their grandfather Seth Ram Chander Das, who died about the year 1924. It was alleged that after the death of Seth Ram Chander Das this business was managed by his son Durga Prasad, who died on 7th August 1931 leaving a widow Mt. Bhupi Kunwar, defendant 4. Plaintiff further alleged that this business was continued by the defendants Anand Prasad, Har Prasad and Kanti Prasad, of whom Kanti Prasad is a minor and Har Prasad deaf and dumb, sons of Jyoti Prasad, Durga Prasad's brother who had died in 1923, predeceasing his father Seth Ram Chander Das. The suit was filed on 5th July 1933 and it was definitely and clearly, in a series of different paragraphs of the plaint, alleged that the claim was based on deposit and not on loan. The object of this allegation in the plaint is entirely free from doubt. If there was in the family of Seth Ram Chandra Das, Durga Prasad and the present defendants a banking business then no question would arise of legal necessity or of any of the points which ordinarily arise in cases of loan, whereas prima facie, as the suit contained a reference to two chitthis, which by appearance are promissory notes, the suit should have been an ordinary money suit based on loans taken by Durga Prasad. To avoid the necessity of proving legal necessity the suit was carefully framed as a suit in which no plea of absence of legal necessity would be open to the defendants.

On behalf of the defendants a number of pleas were taken. It was contended that there never was any banking business of the family. It was said that the family of Seth Ram Chander Das, his sons and grandsons was a joint family which possessed joint family property in the shape of zamindari. As regards these two amounts evidenced by the pro-notes it was said that these were not deposits but personal borrowings by Durga Prasad, who, it was said, had been a spendthrift and had found himself in a position of freedom from restraint upon the death of his father Ram Chander Das and had proceeded to incur numerous debts. It was pleaded that these being personal borrowings of Durga Prasad, even if taken by him as manager of the family estate, were not binding upon the defendants. The learned Subordinate Judge framed three issues :

"(1) Was any ancestral joint family banking business carried on by Durga Prasad in 1930 and 1931 (the years in which these two transactions took place) ?

(2) Was the money in suit deposited by the plaintiff with the said banking firm ?

(3) Is the debt in question binding upon the defendants and/or they are personally liable ?"

He dealt with the first two issues together and he held that the plaintiff had completely failed to establish that Durga Prasad was carrying on any joint family banking business in 1930 and 1931 and he also held that the money in suit was not deposited with Durga Prasad in connection with any joint family banking business. On the third issue he held that the debt in question was not binding upon the defendants and that they were not personally liable. Before dealing with the arguments in the case we think it necessary to emphasize the fact that the plaintiff's case, deliberately so stated by him, was that the family of Seth Ram Chander Das, his sons and grandsons had a joint family business which was a banking business in which members of the public used to make deposits of money. The phrase "karobar banking" is used in paras. 2, 3 and 4 of the plaint and in para. 3 of the plaint it is said that :

"The banking business continued for the benefit of the members of the family and all the members were benefited thereby. Other persons also considered this business as reliable and firm, and people used to deposit their money with the defendants on interest."

In para. 4 it is said that the plaintiff too reposed much confidence and had reliance on the banking business of the defendants and consequently he also deposited money with the joint family of the defendants. He should of course have said "in the defendants bank," but there is no room for doubt about the nature of the claim which was being made. The

first question in the case is whether these two sums of money were actually advanced to Durga Prasad. On that question we feel no doubt, in view of the two chitthis or promissory notes (Exs. 17 and 18), dated Asarh Sudi 13, Sambat 1987, and Asarh doem Sudi Ekam, Sambat 1988. The wording is much the same in each. It runs :

"To Messrs. Hira Lal Gordhan Das.

From : Ram Chandra Das Durga Prasad,

Saharanpur.

Our compliments to you. We having borrowed (Ex. 18 'taken') Rs. 3500 from you have credited the same to you and we shall pay interest thereon at the rate of -/10/6 (Ex. 18. -/11/-) and shall pay the money to you on demand.

Letter written on . . . ."

The first letter is signed by Roshan Lal, munim, and Durga Prasad, and the second by Durga Prasad only. Evidence has been given in support of these two promissory-notes and it can hardly be doubted that these two sums were paid over to Durga Prasad. We may note that in the first of these two chitthis the words used for "having borrowed" are "udhar lekar," which clearly suggests a loan rather than a deposit. On behalf of the plaintiff a large volume of documentary evidence was produced which was intended to show that a banking business was carried on and not merely that Seth Ram Chander Das and after him Seth Durga Prasad did a certain amount of what is commonly called "len den," that is money-lending. Learned counsel for the plaintiff-appellant has taken us through a whole series of documents which, he argued induce an inference that a banking business was carried on. We may note first that there is a broad distinction between a banking business and a money-lending business (though it is questionable whether the evidence would even be sufficient to establish that Seth Ram Chander Das and after him Seth Durga Prasad actually carried on a money-lending business and did not rather do a certain amount of money-lending along with management of their zamindari and transactions in connexion with for example grain). In this connexion we have been referred to Yannan's Banking Law and Practice in India, 2nd Edn. 1933, which is said to be a standard work on Banking in this country. The author remarks at p. 30 :

"There being no statutory definition to guide, some of the leading writers on Banking Law have, from time to time, attempted to define the terms. Dr. Herbert L. Hart, author of the well-known treatise 'Law of Banking' says (p. 1) : 'A banker is one who, in the ordinary course of his business, honours cheques drawn upon him by persons from and for whom he receives money on current accounts.' This definition is based upon the dicta given in a number of decisions beginning with (1848) 2 H. L. C. 28.[1] According to this definition the essential function to enable a person, firm or institution to be regarded as a banker or a bank is that of receiving current deposits against which cheques are to be drawn."

The learned author goes on to refer to some cases and particularly to (1912) 2 Ch. 183,[2] and to a definition given by Sir John Paget, whom he describes as another great authority. He quotes as follows from Sir John :

"It is a fair deduction," says Sir John Paget, reviewing (1912) 2 Ch. 183[2] and other legal decisions "that no person or body, corporate or otherwise, can be a banker who does not (1) take deposit accounts, (2) take current accounts, (3) issue and pay cheques and (4) collect cheques crossed and uncrossed for his customers."

We are prepared to concede (subject to the remarks contained in a decision of this Court to which we shall refer at a later stage) that some modifications of this strict view may be necessary in dealing with the case of what we may call "Native Banks" of the kind which were generally called kothis. These kothis, we understand, used to keep accounts which were accepted as final by all who had to deal with them. They gave no receipts and no pass books and did not make use of cheques, but they operated more or less as bankers receiving deposits and making payments against those deposits on demand. In point of fact, the very existence of the two pro-notes signed by Durga Prasad in the present case itself throws a doubt on the allegation that the defendants' family were bankers in any sense whatever. With these preliminary remarks we may come first, as learned counsel has chosen to deal with the evidence in that order, to the documentary evidence. Learned counsel refers first to two decrees in favour of Seth Ram Chander Das, one a mortgage decree and the other a money decree. Neither of these is any indication of the existence of a 'banking' business. He took us next to a number of plaints and decrees in suits instituted by Durga Prasad. In one such case the defendant had executed a mortgage in favour of the sons and grandsons of Seth Ram Chander Das. It is true that there were a number of such plaints and decrees but the existence of such plaints and decrees which make no reference to any banking business is no indication whatever that the family of the defendants ever had anything in the nature of a 'banking' business.

Learned counsel came next to plaints instituted after Durga Prasad's death on the basis of bonds executed in his favour. He laid stress on the fact that the occupation of the plaintiff was described as money lending, but again it can only be said that money-lending is an entirely different thing from banking and even if Seth Ram Chander Das did some money-lending and after him his son Durga Prasad continued to do some money-lending and after their death Durga Prasad's nephews, the sons of Jyoti Prasad, continued to do some money-lending, that would not enable the plaintiff to get a decree against the defendants unless he could prove that legal necessity existed for the loans, which might of course be proved by showing that the loans were taken in the ordinary course of business. That however was not the case of the plaintiff who laid himself out from the very start to avoid any risk of being put to proof of legal necessity. Learned counsel for the appellant went on to refer to a number of documents showing moneys lent by Ram Chander Das and Durg Prasad and properties acquired by them, apparently with the idea of showing that Durga Prasad continued after the death of Ram Chander Das to manage the family property and what he called the family business as a sound manager. Without having a full knowledge of the whole of the transactions by this family, it would be impossible to derive any sound inference from these transactions and in fact a doubt is thrown on the wisdom of some of them by events of later date. For instance Durga Prasad purchased certain property which the defendants had subsequently to sell in order to meet the debts incurred for the purchase of those properties.

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1. (1848) 2 H.L.C. 28: 81 R.R. 14, Foley v. Hill.
2. (1912) 2 Ch. 183: 81 L.J.Ch. 769: 106 L.T. 968: 28 T.L.R. 451, In re Birkbeck Permanent Benefit Building Society.

Learned counsel next referred to certain statements made by Seth Ram Chander Das and by Durga Prasad, a statement by Ram Chander Das on 8th June 1910 in which he admitted money-lending and the existence of account books, and a statement by Durga Prasad on 12th June 1929 in which he said that he had debts outstanding of Rs. 40,000 or Rs. 50,000 and that he kept account books. It was suggested that these debts must represent the moneys of depositors, but there is nothing on the record to support this suggestion. Again, on 24th August 1929, in a statement Durga Prasad gave his occupation as zamindari and spoke of his 'shop' and of receiving money from a certain person and giving a hundi, but that again is no proof whatever of the existence of a banking business. The drawing of a Hundi is something which is done by many persons other than bankers. Learned counsel went on to refer to certain sale deeds executed by Anand Prasad in order to pay family debts. One of these is the sale deed which was executed to pay off money described as borrowed by Seth Durga Prasad for lawful necessity and for purchase of some property out of the joint funds but in his own name. This in no way proves a banking business. The other is more interesting and is, if anything, definitely damaging to the plaintiff's case. It is a sale of property on 14th April 1932 by Anand Prasad for Rs. 8000. The executant says that "In his lifetime Seth Durga Prasad borrowed money for payment of a prior debt payable by Seth Ram Chander Das, Durga Prasad and for maintenance of the family and for safeguarding the family property. Seth Durga Prasad died childless. I and my brothers, the surviving members of the joint Hindu family, are the owners of the property left by Seth Ram Chander Das and Durga Prasad."

Further on the executant Anand Prasad says :

"The creditors are also prepared to bring suits. If suits are brought, I shall be burdened with costs and the family property would be ruined. It would also bring a bad name."

The items in respect of which this sale was effected were three "chitthis," all of them signed by Seth Durga Prasad and described as payable by Seth Ram Chander Das and Seth Durga Prasad in favour, two of them, of firm Seth Maman Chand Radha Kishen, and the third in favour of Seth Jai Narain. It is clear from this that the word "chitthi" was treated by Anand Prasad himself as equivalent to a pronote and the creditors of these chitthis as creditors in respect of loans. In fact, at another point in the document he says: "The interest of the debts is increasing and the creditors are making pressing demands for their amounts." Learned counsel sought also to base an argument on a plaint of one Chhater Sen supported by an application for the suit to be struck off. In this plaint (Ex. 24) dated 18th August 1932, Chhater Sen plaintiff alleged in para. (1) that Seth Durga Prasad and the defendants Anand Prasad, etc., carried on "banking" jointly in the name of Ram Chander Das and Durga Prasad and in para. (2) that in connexion with the "banking" business, money used to be deposited with the defendants and they lent it to others on interest or invested it in zamindari property. Exhibit 25 is an application by the plaintiff which runs as follows :

"In the above case it is submitted that Anandi Prasad alias Chhottan Lal, defendant 2, has to avoid dispute this day executed and completed a letter in favour of the plaintiff in respect of the amount claimed. It is therefore prayed that the suit may be struck off."

It seems to us to be quite clear that even if this application of Chhater Sen can be said to prove the execution of a promissory note in favour of Chhater Sen for the amount claimed in the plaint which contains these allegations, the execution of such a pronote does not amount to an admission of the truth of the statements contained in the plaint. At the most it shows that Anand Prasad and his brothers and Durga Prasad's widow were not prepared to fight Durga Prasad's creditors. All the statements here are the statements of Chhater Sen, who is not a witness in the case, and prima facie we doubt whether in the absence of oral evidence to support them they are in any way admissible. Some question was put to Anand Prasad but such admission as he made is no admission in respect of these documents.

The last group of documents upon which reliance has been placed for the appellant consists of extracts from the account books of third persons showing that these persons had borrowed money from Ram Chander Das, Jyoti Prasad and had kept ledger accounts in which they entered the transactions between them and Ram Chander Das Jyoti Prasad. Looking at this evidence in detail the first set of accounts (Ex. 21) is proved by Nehal Chand, P. W. 11, who knows nothing personally about his own family's dealings with Ram Chander Das. The accounts he produces relate to transactions of 1905 in respect of which only the ledger is produced while the diary is not forthcoming. Incidentally the account itself is incomprehensible and does not balance. It certainly is no proof whatever that Ram Chander Das had any banking business. The witness made some other statements but they will be dealt with a long with the oral evidence. Another set of accounts is proved by Piare Lal, but this gentleman's statement makes it clear that he was inimical to Durga Prasad, who was his own cousin. All the accounts show is receipt from Ram Chander Das by Piare Lal's firm, which did an 'arhat' business and which incidentally has failed, so that Piare Lal, apart from other defects, is shown on his own admission to be a man of no standing, who was declared insolvent only three years, previous to the present suit.

The last group of accounts, a lengthy group, is proved by one Hari Chand whose firm was a commission agency which has ceased to exist. His own firm had not got any banking business but he says that they entered sums received on loan as deposits. It follows that the entry of any moneys in the accounts of firms of this kind does not go to indicate any banking business. The witness is indebted to the defendants and appears to be almost a pauper. Of these three witnesses two were intended also to prove that certain persons made deposits with the so-called "banking firm" Ram Chander Das Durga Prasad. Nehal Chand while alleging that he advised Mt. Rampiari to deposit three separate sums of Rs. 4000, 2000 and 1300 with Durga Prasad three or four years ago, had to admit that he was not present when these deposits were made, and further that pronotes were executed in respect of these deposits. It is a curious fact that the documentary evidence in respect of loans by Mt. Rampiari to Durga Prasad, namely, the sale deed Ex. 1 in favour of Seth Madan Lal dated 13th February 1932 mentions three chitthis or pro-notes but shows that the total amount was only Rs. 5500.

Reliance has further been placed on behalf of the plaintiff on the oral evidence of seven witnesses apart from the plaintiff himself. Those witnesses have been criticised in detail by the learned Subor-

dinate Judge and we think that he has rightly refused to place any reliance upon them. Girdhari Lal (P. W. 5) who does an 'arhat' business in Saharanpur and Shamli, professes to have had only two transactions with Durga Prasad in his life. Once he did business in regard to certain khattis in Shamli and once he deposited Rs. 1000 not his own money, with Durga Prasad, as he says. He does not know the name of any depositor except himself. Jai Chand Rai (P. W. 2) gives oral evidence of a deposit of Rs. 2000 said to have been repaid after six months and even this amount was lent upon a promissory note and was therefore presumably a loan. He never saw anybody else deposit any money with Durga Prasad. Shiv Narain (P. W. 6) purports to prove a deposit by his own son of Rs. 2000 his separate money with Durga Prasad, which money he says was repaid to him, that is to the father, but he has to admit that there is no entry in his accounts and that he did not see the deposit made and therefore he has no personal knowledge of the deposit. His evidence is clearly valueless. Sri Ram (P. W. 7) claims to have made a deposit himself and to have instituted a suit for its recovery and to have got a decree, but his suit was dismissed in appeal, evidently on the finding that there was no banking business. Shankar Lal (P. W. 8) purports to depose to three deposits made by Mt. Jumna Kunwar, but he had to admit that Mt. Jumna Kunwar had brought a suit for recovery of these so-called deposits and that on that occasion he himself as a witness had deposed that Durga Prasad took the money as a loan to pay Government revenue. Moti Lal (P. W. 12) is stated by the learned Subordinate Judge to be a most respectable witness. But this witness was not prepared to say that Durga Prasad carried on a banking business in the sense of a business as conducted by a bank which receives money on current or deposit accounts and pays money on cheques etc. and so on. In answer to a question whether Durga Prasad carried on any banking business he replied "Money lending is a banking business." He had deposed that people also used to deposit money with Durga Prasad, but he admitted that he could not say if the deposits were made with Durga Prasad as loans, that he had no personal dealings with Durga Prasad and that he could not give any instance of any deposit of money with him. He added the information that Durga Prasad did some cigarette and petrol business. This is scarcely the sort of business which one would have expected a banker to be carrying on. Jugal Kishore (P. W. 10) is another witness who gives away the plaintiff's case entirely. He says that he used to act as a broker for having money deposited in banks but that Seth Ram Chander Das did not give any brokerage to anybody whereas other firms used to give him brokerage. Nonetheless he used to get money deposited with Ram Chander Das. Later on he said that he did not remember the names of the depositors, and he next made the illuminating statement that : "debts and deposits are the same thing. Deposits are made even with those persons who do not carry on any banking business. If deposits are made with a particular firm without its making any demands then such a firm is called a banking firm."

The evidence of such a witness is clearly worthless to prove that in fact there was any banking business. Lastly, we may refer to the statement of the plaintiff Gordhan Das himself. He did not produce or offer to produce his account books but relied solely upon the two promissory notes executed in his favour. Gordhan Das himself in cross-examination had to admit that he had deposited money with four different persons, and he said that "None of the said persons with whom I deposited money carry on banking business." Further on he said : "I cannot give the name of any person who might have deposited money with Ram Chander Das before me" and again : "I do not exactly remember if there are any entries of the name of the firm Ram Chander Das Jyoti Prasad and Ram Chander Das Durga Prasad in our account book."

We think that neither the documentary evidence nor the oral evidence is of the smallest service to establish that Seth Ram Chander Das or Seth Durga Prasad or the present defendants have ever carried on any banking business. It follows that the amounts in suit cannot have been deposited with Durga Prasad as alleged by the plaintiff. There is nothing whatever in this case to indicate that with either Seth Ram Chander Das or any members of the family there have ever been made deposits against which the depositors could withdraw money either by cheque or by any other means whenever they liked to withdraw it. On the contrary, what is proved is that Durga Prasad took two loans of Rs. 5000 and Rs. 3500 and it was for the plaintiff to establish that those loans were taken for legal necessity and created debts by which the whole joint family including the present defendants were bound. Learned counsel for the respondents has referred us in this connection to a decision of this Court to which we think it desirable to refer. In 29 All. 773,[3] a Bench of this Court had to consider Arts. 59 and 60 of Sch. 2, Limitation Act. In discussing this matter they said that it was not easy to say to what class of cases the Legislature meant Art. 60 to apply, but they found it unnecessary to come to a decision on the "point holding, as we do, that it is not intended to apply to a transaction which is regarded by the law as a loan." They went on to remark : "Now the authorities cited by the appellants clearly lay down that ordinarily dealings between a native banker and his customers are in the nature of loans made by the latter to the former." They accordingly refused to apply Art. 60 which provides for money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable, a period of three years which begins to run from the date when the demand is made.

Learned counsel for the appellant has attempted to support his case that there was a banking business by insistence on the plea that the defendants were in possession of account books which they had failed to produce. The irresistible inference, he says, is that these account books would have shown that Ram Chander Das and Durga Prasad after him and the defendants had a banking business which would have been apparent had these account books been produced. Much reliance has been placed upon the two statements made by Ram Chander Das and by Durga Prasad referred to earlier. No doubt Ram Chander Das did admit that he was in the habit of keeping accounts. The admission of Durga Prasad was also one of maintenance of accounts, but it is to be noted that on that occasion Durga Prasad did not produce his accounts although it would appear that they had been summoned from him. It seems however that in that suit Durga Prasad had only been called to prove that he met a certain Kewal Ram at Aligarh on a certain date and he was asked

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3. ('07) 29 All. 773 : 1907 A.W.N. 263 : 4 A. L. J. 628, Dharam Das v. Ganga Devi.

to support his statement by a reference to his accounts which should have shown that he had spent money on going to Aligarh on that occasion. He refused to produce his accounts and said that the key was with his munib who had died. In effect he said in that case that he was not in possession of his account books. In the present case Anandi Prasad defendant has denied receipt of account books from Durga Prasad and the only direct cross-examination on this point was aimed at eliciting an admission that he had produced account books before the Income-tax Officer. It is clear that Anandi Prasad was not bound to produce his account books in support of his own case if he did not think those account books to be useful or relevant evidence to prove his case, assuming of course that those account books existed. In actual fact the written statement had been filed on 14th August 1933 and a statement was made by the defendants' counsel on 29th August that Anandi Prasad was not in possession of any bahi khatas, that is bahi khatas relating to the years 1930 and 1931 and we suppose earlier.

The position taken up by the plaintiff was that the statement made by Anandi Prasad's counsel on 29th August 1933 was untrue, and on 24th October 1933 he made an unusual application in which he began by saying that the defendants had denied the existence of their account books. He went on to say that in fact account books had been kept and would show the money due to the plaintiff and other persons credited in those account books, and he said that that was why the defendants did not want to produce them. He went on to ask that the defendants should be ordered to obtain and produce a copy of the statements and orders relating to assessment of income-tax passed against Durga Prasad and the defendants from the year 1925 up to the year 1931, the cost of which the plaintiff was ready to pay. The plaintiff of course could not himself obtain these copies from the Income-tax department. For the appellant, it is contended that this was a sufficient notice of demand to the defendants to produce their account books. On the other hand, it has been contended on behalf of the respondents that no presumption can be drawn against a party for non-production of a document unless the party which wants that party to produce has served upon him the necessary notice and followed the procedure prescribed by law. That procedure is laid down in O. 11 Rr. 12 and 13, Civil P. C., and it is not disputable in the present case that the plaintiff had entirely omitted to do anything of the kind. In this connection we may refer to the decision of their Lordships of the Privy Council in 37 All. 557[4] at p. 566 where their Lordships said with reference to certain accounts not produced :

"These books do not necessarily form any part of the plaintiff's case ; it is of course possible that some entries might have appeared therein relating to the bungalow (the property in suit). But it is open to a litigant to refrain from producing any documents that he considers irrelevant ; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents . . . It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way. If he fails to do so no inference in his favour can be drawn as to the contents thereof."

In the present case, if it was the plaintiff's contention that the defendants were in possession of account books which they were refusing to produce he should have taken steps in accordance with the law. Not having done so he is not entitled to ask the Court to draw any inference from the non-production of those documents. Learned counsel for the plaintiff-appellant has sought to fall back on an alternative case that this was an ancestral family business of money-lending and it is suggested, relying upon 34 Bom. 72,[5] that in these circumstances even if these were loans, yet being loans taken by the karta of the family and part of a series of transactions by the family they must be treated as taken in the course of the family business of borrowing and lending money. In that case it was held by Chandavarkar J. that :

"Under Hindu law a joint family which carries on a trade handed down from its ancestors becomes a trading family ; trade being one of its kulacharas (duty or practice) it attracts to itself all the necessary incidents of trade. The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose is subject to at least one important exception. Where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby because that power is necessary for the very existence of the family."

Reference was also made to a case of the Judicial Commissioner's Court of Oudh in which 34 Bom. 72[5] was followed. This is 18 O. C. 84[6] in which it was held that:

"Where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to enquire into the finances of the business, so long as that business forms the purpose of the debts, in order to bind the whole family thereby, because the power to contract debts is incidental to the carrying on of the business, from which the family derives its means of subsistence and support."

In order however to make the principles set out in these two decisions applicable it has to be found first that there was a family business or rather, we would say, an ancestral family business of trading or money lending involving both borrowing and lending. Incidentally the business of "len den" by no means invariably involves the assumption that the money-lender is himself in the habit of taking loans. It will be sufficient for us to say that in our judgment this principle is only applicable in cases where there is an ancestral business, vide for example, the decision of this Court in 57 All. 605.[7]

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4. ('15) 2 A.I.R. 1915 P.C. 96 : 30 I.C. 299 : 37 All. 557 : 42 I.A. 202 (P.C.), Mt. Bilas Kunwar v. Desraj Ranjit Singh.

5. ('10) 34 Bom. 72 : 2 I. C. 173 : 11 Bom.L.R. 255, Raghunathji Tarachand v. Bank of Bombay.

6. ('15) 2 A. I. R. 1915 Oudh 123 : 27 I. C. 567 : 18 O. C. 84, Baba Din v. Bansraj.

7. ('35) 22 A. I. R. 1935 All. 221 : 155 I. C. 136 : 57 All. 605 : 1935 A. L. J. 177 (F. B.), Ram Nath v. Chiranji Lal.

a The evidence on the record does not justify a finding that there was in the defendants' family an ancestral business of borrowing and lending. In any case it is important to remember that the plaintiff's case was not that it was unnecessary to prove legal necessity, etc., because there was an ancestral money-lending business but on the ground that there was a family "banking" business. In the present case the evidence goes little further than to prove that like his father Ram Chander Das the son Durga Prasad also did some "len den." To sum up, the plaintiff based his case on an allegation of a family banking business. That allegation he has entirely failed to establish. He fell back on an ancestral "family" business of money-lending and that also the evidence does not establish. What the evidence does establish is that as manager of this joint family Seth Ram Chander Das was in the b habit of doing some money-lending as also some business in wheat and the like besides managing his zamindari property. The same course was followed by his son Durga Prasad who seems to have added to these activities some dealings in cigarettes and petrol. In our opinion, it is quite clear that the sums alleged by the plaintiff to have been taken by Durga Prasad as deposits were in fact taken as loans and the plaintiff has not attempted to establish legal necessity and in fact for reasons best known to himself, very probably the reason stated in the written statement of the defendants, he deliberately avoided the responsibility of having to establish the existence of legal necessity. In our judgment the plaintiff's suit was rightly dismissed by the learned Subordinate Judge. There is no force in this appeal which accordingly fails and is dismissed with costs.

c G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Allahabad 248

ALLSOP AND VERMA JJ.

Dharampal Singh — Plaintiff — Appellant

v.

Mool Chand and another — Defendants — Respondents.

First Appeal No. 54 of 1936, Decided on 25th March 1942, from decision of Addl. Civil Judge, Bijnor, D/- 30th October 1935.

(a) Civil P. C. (1908), O. 32, R. 4-A (Allahabad) —Execution sale—Failure to observe R. 4-A is d **mere irregularity and does not vitiate whole proceeding — Minor can treat sale as nullity only on ground of guardian's gross negligence —What amounts to negligence stated.**

The appointment by the Court of a person other than the guardian appointed by competent authority under the Guardians and Wards Act is a mere irregularity and does not vitiate the whole proceedings, when the person appointed by the Court is not absolutely disqualified from representing the minor but is one whom the Court in its discretion could appoint to represent the minor but might not have appointed, if it had been aware of all the relevant facts such as that a guardian for the minor had already been appointed by a competent authority under the Guardians and Wards Act : 29 All. 290, *Rel. on*; ('20) 7 A.I.R. 1920 Mad. 745, *Not foll.*; 28 All. 137 and 31 All. 572 (P.C.), *Expl.* [P 249 C 1, 2]

Consequently, an execution sale cannot be avoided merely on the ground that a person other than the guardian appointed under the Guardians and Wards Act was appointed by the Court to represent the minor in execution proceedings. The minor can treat the sale as nullity only if it could be shown that he was in fact not represented by a person who acted properly in his behalf or in other words unless it could be shown that the person appointed to represent him was guilty of gross negligence in the execution proceedings in looking after the interests of the minor. The fact that the guardian did not make any objections or take any steps to prevent the sale of the property in itself is no reason for regarding him as having been negligent. It must be shown that there was anything which he could reasonably be expected to do in the interest of the minor to preserve his property. [P 249 C 2 ; P 250 C 1]

C. P. C. —

('40) Chitaley, O. 32 R. 4, N. 6 Pt. 2.

('41) Mulla, Page 1024 Pt. (v).

(b) Civil P. C. (1908), Ss. 50 and 53—Decree f **against father—Subsequent partition — Decree can be executed after father's death against son's property obtained by partition.**

It is incorrect to say that Ss. 50 and 53 refer only to the property which came to the sons by reason of the death of the father, since there are no words to that effect in either of the two sections. Once the father is dead, the only question is what property is in the hands of the son and whether that property is liable for the payment of the father's debt under the Hindu law. The property of a son obtained by a partition after a decree had been passed against the father can be sold in execution of that decree after the father's death : ('37) 24 A. I. R. 1937 Mad. 610 (F. B.); ('35) 22 A. I. R. 1935 Pat. 275 (F. B.) and ('34) 21 A.I.R. 1934 All. 590 (F. B.), *Rel. on*; ('37) 24 A. I. R. 1937 Nag. 45; ('28) 15 A.I.R. 1928 Mad. g 657 (F. B.) and ('37) 24 A. I. R. 1937 Mad. 424, *Disting.* [P 250 C 2 ; P 251 C 1]

C. P. C. —

('40) Chitaley, S. 53, N. 4.

('41) Mulla, Pages 223-224, Note "Partition."

B. Malik, Krishna Mohan and Jawahar Lal — for Appellant.

Vishwa Mitra — for Respondents.

ALLSOP J. — This appeal arises out of a suit for the recovery of certain property sold on 20th June 1932, in execution of a decree for money. The decree was obtained on 13th December 1921 against Liaqat Singh, the father of the plaintiff Dharampal Singh. The decree was for Rs. 778. Liaqat Singh died in the year 1926 and his two sons, the plaintiff, Dharampal Singh, and Ompal Singh, were substituted in proceedings in execution for him as minors under the h guardianship of their mother, Mt. Bhagwan Dei. After the substitution the proceedings continued. The property was sold for a sum of Rs. 64 and the auction purchasers were put into possession on 11th November 1932. After the decree had been obtained a suit for partition was instituted on 17th December 1921 by the plaintiff Dharampal Singh, and his two uncles, Mannu and Lakhan, the brothers of Liaqat Singh against Liaqat Singh himself, his wife Mt. Bhagwan Dei and his mother Mt. Har Dei. A decree was passed in this suit on 18th April 1922. Dharampal Singh's brother Ompal Singh, was born after the decree for partition was passed.

Dharampal Singh instituted the suit which has given rise to this appeal originally on the allegation that he was of full age, but subsequently it was found that he was still a minor and that the suit proceeded through Dharampal Singh's next friend Mst. Har Dei, his grandmother. It is necessary to mention that Mt. Har Dei had been appointed the guardian

of Dharampal Singh by the District Judge under the provisions of the Guardians and Wards Act. The appointment was made on 4th December 1923. The main point raised in the suit was that Dharampal Singh was not properly represented in the execution proceedings because he was impleaded under the guardianship of Mt. Bhagwan Dei instead of being impleaded under the guardianship of Mt. Har Dei under the provisions of O. 32, R. 4A of Sch. 1, Civil P. C. The plaintiff's suit having been dismissed by the Court below it is argued before us in this appeal in the first instance, that he was not properly represented in the execution proceedings and consequently that a sale made in the course of those proceedings was void in so far as he was concerned. Learned counsel for the appellant has relied strongly upon the case of 43 Mad. 808,[1] but on the other hand we have a clear authority of our own Court in 29 All. 290[2] in support of the proposition that it is a mere irregularity for a Court to appoint a person other than the guardian appointed by competent authority to represent a minor in the course of a suit or other proceedings. The learned Judges who decided the case in 43 Mad. 808[1] based their decision upon the case in 28 All. 137[3] which they considered to have been affirmed by their Lordships of the Privy Council in 31 All. 572[4] with the greatest respect we must say that it seems to us that the case in 28 All. 137[3] was not at all in point. That was a case where it was found as a fact that the person who was representing the minor had acted not only with gross negligence but also that he had been guilty of deliberate fraud against the minor. The decision did not turn upon the question that he was the guardian appointed by competent authority within the meaning of the rule which corresponded with the present R. 4A of O. 32.

In the Privy Council case to which reference was made by the learned Judges it was held that of the two guardians one was not qualified and that the interest of the other was adverse. The guardian who was not qualified was a married woman and there was a definite provision in the Code of Civil Procedure of that time that no married woman could act as the guardian of a minor in the course of proceedings in a Court of law. Their Lordships did not discuss this question. They merely mentioned, what was the fact, that the married woman who was appointed to represent the minor was absolutely disqualified from doing so. The case before us is entirely different. Mt. Bhagwan Dei was not absolutely disqualified from representing her minor son in the course of the proceedings in execution. It is true that the learned Judge presiding in the Court executing the decree should have appointed Mt. Har Dei to act on behalf of the minor unless, for reasons which he should have recorded in writing he thought that Mt. Bhagwan Dei was the proper person to represent the minor, but if the Judge had so chosen he could have appointed Mt. Bhagwan Dei in preference to Mt. Har Dei. We may mention that there is no evidence before us that the learned Judge of the executing Court did not consider this question and did not appoint Mt. Bhagwan Dei after giving reasons in writing for her appointment in preference to the appointment of Mt. Har Dei but as it is not asserted in the written statement that the appointment of Mt. Har Dei by the District Judge as guardian of Dharampal Singh under the Guardians and Wards Act was brought to the notice of the learned Judge executing the decree, we may assume for the purposes of this case that the learned Judge did not proceed in accordance with the provisions of R. 4A of O. 32.

We have mentioned the authority of this Court in 29 All. 290[2] in order to support the conclusion that the failure to observe that rule was a mere irregularity and did not vitiate the whole proceedings. It is one thing to say that a minor is not represented at all if represented by a person who is absolutely disqualified from representing him and quite another to say that he is not represented at all if represented by a person whom the Court in its discretion could appoint to represent him but might not have appointed, if it had been aware of all the relevant facts. We consider that we should follow the decision of this Court in 29 All. 290[2] especially as it seems to us that it would throw an impossible burden upon the parties to proceedings in which a minor was involved if those proceedings were to be regarded in certain circumstances as void if the person appointed to represent the minor was not the person appointed by competent authority to be the guardian of the minor under the Guardians and Wards Act. The person proceeding against the minor might, as is alleged in this case, have no knowledge at all about the appointment of the guardian by competent authority and, if that was so, it would be most unfair to hold that the proceedings were void if the minor was represented by a person who was able and thoroughly willing to represent him and who did not bring to the notice of the Court the fact that there was another person appointed by competent authority to be the guardian of the minor. In the case before us, we see no reason to doubt that there was no intention on the part of the decree-holders executing the decree to act in any way which was unfair to the minors. Bhagwan Dei was their mother and was their natural guardian. It is quite possible that the decree-holders had no knowledge of the appointment of Mt. Har Dei on 4th December 1923. There is no reason why they should have had knowledge of this fact. It appears that Mt. Bhagwan Dei herself acted as next friend of the minors in certain proceedings for the mutation of names in the revenue Court. The notice of the proceedings in execution was served upon Mt. Bhagwan Dei by affixation on a building in which the process-server had reason to think that she was at that time. In this affidavit he stated that a relation of Mt. Bhagwan Dei's had appeared but had refused to take the notice and that Mt. Bhagwan Dei herself could not come out of the house because she was a pardanashin. It is probable that Mt. Bhagwan Dei and Mt. Har Dei and other members of the family were all living in the same house and that they all had full knowledge of the proceedings in execution of the decree. We are satisfied that the mere fact that Mt. Bhagwan Dei was appointed guardian instead of Mt. Har Dei would not be sufficient to avoid the proceedings against the plaintiff-appellant and that the sale could be treated by him as a nullity only if it could be shown that he was in fact not represented by a person who acted properly in his behalf or in other words unless it could be shown that

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1. ('20) 7 A. I. R. 1920 Mad. 745 : 59 I. C. 842 : 43 Mad. 808 : 39 M. L. J. 239, Nagappa v. Rajabhai Hussain.
2. ('07) 29 All. 290 : 4 A. L. J. 155 : 1907 A.W.N. 70, Dammar Singh v. Pirbhu Singh.
3. ('06) 28 All. 137 : 2 A. L. J. 615 : 1905 A.W.N. 229, Hanuman Prasad v. Muhammad Ishaq.
4. ('09) 31 All. 572 : 3 I. C. 864 : 36 I. A. 168 : 6 A. L. J. 822 (P.C.), Rashid-un-nisa v. Muhammad Ismail Khan.

Mt. Bhagwan Dei was guilty of gross negligence in these proceedings.

Certainly, it seems that she did not appear to make any objections or take any steps to prevent the sale of the property but that in itself is no reason for regarding her as having been negligent. We have to see whether there was anything which she could reasonably be expected to do in the interest of the minor to preserve his property. Learned counsel for the appellant has raised two points in his argument that Mt. Bhagwan Dei did not properly represent Dharampal Singh in the execution proceedings. The first point is that the property was sold for a grossly inadequate price. He has referred to evidence produced by him to show that the revenue of the property in suit was about Rs. 175 a year and that the profits amounted to about Rs. 640 a year. We may accept this evidence for the purposes of this case, although it does seem that the profits are rather large in relation to the revenue which usually represents about 40 per cent. of the profits of the property. If we take the profits from the property to amount to Rs. 640 a year and calculate the value of the property at 25 years' purchase, we may say that the property is worth about Rs. 16,000 but on the other hand, as the learned Judge of the Court below has mentioned, it was very heavily encumbered.

There were two mortgages one dated 1st February 1921 to secure a debt of Rs. 10,000 and the other dated 16th August 1921, to secure a debt of Rs. 3000. In the first mortgage there was a stipulation for payment of interest at the rate of Rs. 7-8-0 per cent. per annum and in the second mortgage for payment of interest at the rate of 15 per cent. per annum. By the year 1931, it would appear that interest was due for a period of ten years on each of the mortgages. It has not been alleged that any interest had been paid. The amount due on the first mortgage would thus have been Rs. 17,500 and on the second mortgage, Rs. 7500 or in all a charge of Rs. 25,000. It is true that there were other properties included in the deeds of mortgage besides the property in suit, but on the face of it there is no reason for thinking that the price obtained for the property was necessarily much too small. There is nothing to indicate that there was any irregularity in the sale or that the property was not auctioned in the ordinary way according to the rules. Learned counsel has argued that the first mortgage was afterwards redeemed as the result of a suit for quite a small sum of money because a sum of Rs. 5600 which was left with the mortgagee for payment to certain creditors had not been paid and that part of the consideration was found not to be for legal necessity or for the payment of antecedent debts, the mortgage having been executed by Liaqat Singh and the suit having proceeded against others. It may be that the charge was not quite so heavy as it appeared to be, but the charge undoubtedly existed and we do not see how Mt. Bhagwan Dei in the course of the execution proceedings could have done anything about this matter. It was open to the guardian appointed by competent authority, that is, Mt. Har Dei, to take some steps, if it was legally possible, to get a declaration or to redeem the mortgage on the payment of the smaller sum which might possibly have been due. It seems to us that there was no course open to Mt. Bhagwan Dei to increase the price which was obtained for the property. That disposes of the first argument which has been addressed to us by learned counsel for the appellant. The second point he has urged is that the property sold was not liable to sale in the course of proceedings in execution of the decree. This property had come to the plaintiff-appellant by reason of a partition and learned counsel argues that it was not property which was liable to sale under the provisions of Ss. 50 and 53, Civil P. C., in execution of a decree passed against the father of the plaintiff-appellant. It is not necessary for us, in this case, to express any definite opinion upon the question which has been raised. It is sufficient for us to point out that it is at least very doubtful whether the guardian of the plaintiff-appellant could have succeeded if she had made an objection that the property was not liable to sale in execution of the decree. Learned counsel has drawn our attention to a number of cases. The first is the case of I.L.R. (1938) Nag. 10.[5] This case however is not strictly in point. It was a case in which the decree-holder had sought to sell the property of the sons in execution of a decree against the father while the father was still alive and it is obvious that the provisions of Ss. 50 and 53, Civil P. C., did not apply.

The next case to which learned counsel has referred us is the case in 14 Pat. 732[6] but the learned Judges who decided that case would have decided against the contention that the property in the case before us was not liable to sale. They all agreed that the property of a son obtained by a partition after a decree had been passed against the father could be sold in execution of that decree. Learned counsel has also referred us to certain cases of the Madras High Court, namely, 51 Mad. 361[7] and I.L.R. (1937) Mad. 1004.[8] The first case does not affect the question before us because in it the sons were impleaded in the suit which was instituted against the father. In the second case the decree against the father had been obtained after the partition and the father was still alive. On the other hand, we have been referred by learned counsel for the respondents to the case in A. I. R. 1937 Mad. 610[9] which supports the contention that the property of the appellant could have been sold in the execution proceedings on the decree against the father. On the plain wording of Ss. 50 and 53, Civil P. C., we should ourselves be inclined to hold that the property of the son was liable to sale in the course of the execution proceedings. Once the son was impleaded as the representative-in-interest of his father, the only question was whether the property in his hands was liable under the Hindu law for the payment of the debt due from the father.

The argument put forward by learned counsel for the appellant is that Ss. 50 and 53 refer only to the property which came to the sons by reason of the death of the father, but there are no words to that effect in either of the two sections. Once the father is dead, the only question is what property is in

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5. ('37) 24 A.I.R. 1937 Nag. 45 : 170 I.C. 724 : I.L.R. (1938) Nag. 10, Firm Govindram Dwarkadas v. Nathulal.

6. ('35) 22 A.I.R. 1935 Pat. 275 : 157 I.C. 53 : 14 Pat. 732 : 16 P.L.T. 393 (F.B.), Atul Krishna v. Lala Nandanji.

7. ('28) 15 A.I.R. 1928 Mad. 657 : 110 I. C. 141 : 51 Mad. 361 : 54 M.L.J. 726 (F.B.), K. R. Subramania Ayyar v. Sabapathy Aiyar.

8. ('37) 24 A.I.R. 1937 Mad. 424 : 169 I.C. 400 : I.L.R. (1937) Mad. 1004 : (1937) 1 M.L.J. 249, Kuppan Chettiar v. Masa Goundan.

9. ('37) 24 A. I. R. 1937 Mad. 610 : 171 I. C. 101 : I. L. R (1937) Mad. 880 : (1937) 2 M. L. J. 251 (F. B.), Venkatanarayana Rao v. Venkata Somaraju.

the hands of the son and whether that property is liable for the payment of the father's debt under the Hindu law. The terms of the sections are sufficiently wide to cover the case which we are considering. As we have said, however, it is not necessary for us to decide the question definitely. It is sufficient for us to say that it might well have appeared to a guardian representing the interest of the minor that it was not worthwhile to make an objection to the sale of the property upon the ground that it was not liable for sale in the course of the execution proceedings. Such objection might well have failed and considerable costs might have been incurred. Even if the objection had prevailed ultimately, it would only have meant that a separate suit would have been instituted against the minor and the same question would have arisen whether the property was liable for the payment of the debt due from the father under the Hindu law. Learned counsel has suggested that this particular property might not have been liable, but we think that there can be no question that it was liable in view of the decision of the Full Bench of this Court in 57 All. 176.[10] We are satisfied that there is nothing to establish that Mt. Bhagwan Dei was guilty of any negligence in looking after the interests of the minor or that there was anything that she could reasonably be expected to have done to protect his interest which she did not do. We are satisfied that there is nothing to establish that any substantial injury was caused to the plaintiff-appellant by any omission on the part of Mt. Bhagwan Dei. In these circumstances we hold that the learned Judge of the Court below was right in his conclusion that the sale execution of the decree was binding upon the plaintiff-appellant. The result is that the appeal must fail and we hereby dismiss it with costs.

G.N./R.K. *Appeal dismissed.*

10. ('34) 21 A. I. R. 1934 All. 590 : 150 I. C. 411 : 57 All. 176 : 1934 A.L.J. 483 (F.B.), Chhotey Lal v. Ganpat Rai.

A. I. R. (29) 1942 Allahabad 251 (1)

GANGA NATH J.

Babunandan Lal and another — Judgment-debtors—Applicants

v.

Parshottam Sahu — Decree-holder — Opposite Party.

Civil Revn. Appln. No. of 1941, Decided on 10th October 1941, against order of Addl. Civil Judge, Benares, D/- 3rd May 1941.

U. P. Debt Redemption Act (13 of 1940), S. 4 (3), Proviso (3) — Applicability — S. 4 (3), Proviso (3) does not apply to execution application disposed of before Act came into force.

Section 4 (3), Proviso (3) indicates that the execution application, referred to therein, must be pending at the time or made after the Act came into force. It does not apply to an execution application made and disposed of before the Act came into force. [P 251 C 2]

A. Sanyal — for Applicants.

Satya Narain Prasad — for Opposite Party.

ORDER.—This is an application in revision from the order of the learned Additional Civil Judge, Benares, rejecting the applicants' application for amendment of the decree under the Debt Redemption Act. The applicants' application was rejected on the ground that the opposite party, decree-holder, had made a declaration required under sub-s. (3) of S. 4 of the Act in his application for execution which he had made after the Act came into force. It was contended on behalf of the applicants that since the decree-holder had previously made an application for execution against the land of the applicants, it was not open to them to make the declaration in the subsequent execution application. The previous application was made and rejected before the Act came into force. Proviso (3) to sub-s. (3) to S. 4 is as follows :

" Provided also that no declaration shall be made under sub-s. (3) where the creditor has already applied for execution against the land, agricultural produce or person of such agriculturist."

The words of this proviso clearly show that the execution application, referred to therein, must be pending at the time or made after the Act came into force. It does not apply to an execution application made and disposed of before the Act came into force. The decree-holder was, therefore, entitled to make the declaration referred to in sub-s. (3). As he has made the required declaration, the applicants are not entitled to amendment of the decree against him under Ss. 8 and 9, U. P. Debt Redemption Act. The application is rejected. The stay order is discharged.

G.N./R.K. *Application rejected.*

A. I. R. (29) 1942 Allahabad 251 (2)

COLLISTER AND BAJPAI JJ.

L. Ganesh Prasad—Assessee—Applicant

v.

Commissioner of Income-tax — Opposite Party.

Misc. Case No. 307 of 1940, Decided on 24th February 1942.

(a) Income-tax Act (1922), S. 66 (2)—Petition under S. 66 (2) not presented within prescribed period—Neither Commissioner nor High Court can condone delay — Limitation Act, S. 5 does not apply.

There is no provision authorizing the Commissioner to have recourse to S. 5, Limitation Act, in connexion with an application presented before him under S. 66 (2), Income-tax Act. Section 66 (2), Income-tax Act, contains no saving clause and gives neither the Commissioner nor the High Court any power to condone delay if the assessee does not present his application within the time prescribed. [P 252 C 1]

Limitation Act —
('42) Chitaley, S. 5 N. 4, Pt. 8.

(b) Income-tax (1922), S. 66 (2)—Application under S. 66 (2) is not complete till accompanied by fee.

An application under S. 66 (2) is not complete till it is accompanied by a fee of Rs. 100. [P 252 C 1]

L. M. Roy — for Applicant.

N. P. Asthana — for Opposite Party.

BAJPAI J. — This is an application under S. 66 (3A), Income-tax Act. The applicant prays that we should require the Commissioner to state a case and refer two questions of law for our decision. The learned Commissioner had refused to state a case under S. 66 (2) of the Act because he thought that the application was barred by time. The facts are that the Assistant Commissioner's order was passed

on 3rd January 1939, and it is common ground that the application under S. 66 (2) of the Act would have been in time upto 13th March 1939. An application asking for a reference under S. 66 (2) was filed on 16th February 1939 (that is within time), but it was not accompanied by a fee of Rs. 100 as required. The petitioner was also informed by the Commissioner of Income-tax that Rs. 100 ought to be remitted immediately. Nothing seems to have been done by or on behalf of the petitioner till 13th March 1939, the very last date of limitation, when an insured letter from Benares was sent to the Commissioner. This insured letter contained a currency note for Rs. 100, but it was received in the Commissioner's office on 15th March 1939, two days after limitation had run out. The learned Commissioner says :

"Section 66 (2) contains no saving clause and gives neither the Commissioner nor the High Court any power to condone delay if the assessee does not present his application within the time prescribed."

This view is right. There is S. 66 (7A) of the Act which says :

"Section 5, Limitation Act, 1908, shall apply to an application to the High Court by an assessee under sub-s. (3) or sub-s. (3A)."

There is, however, no provision authorizing the Commissioner to have recourse to S. 5, Limitation Act, 1908, in connexion with an application presented before him. Learned counsel for the assessee says that the application was within time, but he forgets that an application is not complete till it is accompanied by a fee of Rs. 100, and from what we have said above it is clear that the fee of Rs. 100 was received two days after the expiry of the period of limitation. We are, therefore, satisfied that the Commissioner's decision on the point of limitation was correct and we dismiss this application with costs. We fix the fee of the learned Advocate General at Rs. 50. After deducting the costs of the Department the balance may be refunded to the assessee out of the deposit of Rs. 100.

G.N./R.K. *Application dismissed.*

A. I. R. (29) 1942 Allahabad 252

GANGA NATH J.

Bishambhar Nath and another — Judgment-debtors — Applicants

v.

Radhey Shiam Seth and others — Decree-holders — Opposite Party.

Civil Revn. Appln. No. of 1942, Decided on 11th March 1942, from order of Munsif, Shahjahanpur, D/- 29th October 1941.

U. P. Debt Redemption Act (13 of 1940), Ss. 4 and 8 — Object — Ss. 4 and 8 apply to all classes of decrees.

Sections 4 and 8 are for the mutual benefit of the parties. There is nothing in Ss. 4 and 8 to restrict their application to a certain class of decrees. They apply to all classes of decrees. It is therefore incorrect to say that S. 4 (3) does not apply to a decree which is not executable against the land, agricultural produce or person of an agriculturist.

[P 252 C 2]

C. B. Agarwala — for Applicants.

ORDER. — This is an application in revision against the order of the learned Munsif of Shahjahanpur, refusing to amend the opposite party's mortgage decree under S. 8, U. P. Debt Redemption Act (Act 13 of 1940). The applicant made an application under S. 8 for amendment of the decree. The decree-holder gave a declaration required under S. 4, sub-s. (3). It was on account of this declaration that the learned Munsif rejected the application for amendment of the decree. It has been contended that S. 4, sub-s. (3) does not apply to a mortgage decree in which the mortgaged property is other than land in a mahal. Reliance was placed on S. 21 of the Act which provides as follows :

"Notwithstanding anything contained in R. 6 or R. 8A of O. 34 of Sch. 1, Civil P. C., 1908, where in a suit based on a loan secured by a first mortgage a decree for sale has been executed and the net proceeds of the sale of the mortgaged property are found insufficient to pay the amount due to the plaintiff or to the defendant, as the case may be, no decree shall be passed for the balance due to such plaintiff or defendant, as the case may be, and if any decree for such balance has been passed before the commencement of this Act, it shall be deemed to have been satisfied."

On the basis of this section it has been argued that in case of a mortgage where the mortgaged property is other than land in a mahal, the mortgage decree will have to be executed against the mortgaged property and therefore a declaration made under S. 4, sub-s. (3) will be ineffective as in no case, in view of the provisions of S. 21, the decree-holder will be entitled to proceed against any land in a mahal, agricultural produce or person of the mortgagor. Section 4, sub-s. (3) is as follows :

"No decree recoverable from an agriculturist shall be amended under the provisions of this Act if the creditor declares that such decree shall not be executed against the land, agricultural produce or person of such agriculturist."

It applies to every decree recoverable from an agriculturist. Similarly, S. 8 also applies to every decree. After an amendment of a decree under S. 8, a decree-holder can execute his decree against land in a mahal or agricultural produce or person of the agriculturist. In case where a declaration provided for in S. 4, sub-s. (3) is made and a decree is not amended under S. 8, U. P. Debt Redemption Act, it will not be open to a decree-holder to proceed against these properties even if his decree was executable against them. The sections are for the mutual benefit of the parties. If a judgment-debtor gets the benefit of reduction of interest under S. 8 by amendment of the decree the decree-holder also gets the benefit of being entitled to execute his decree against the land agricultural produce or person of an agriculturist. There is nothing in Ss. 4 and 8 to restrict their application to a certain class of decrees. They apply to all classes of decrees. If the contention of the applicant that S. 4, sub-s. (3) does not apply to a decree which is not executable against the land, agricultural produce or person of an agriculturist be accepted, then it might as well be contended by the decree-holder that S. 8 also does not apply to such decrees. The application has been rightly rejected. There is no force in the application and it is ordered that it be rejected.

G.N./R.K. *Application rejected.*

A. I. R. (29) 1942 Allahabad 253 (1)

ALLSOP AND VERMA JJ.

Ram Lal Sahu — Applicant

v.

Dina Nath — Opposite Party.

Misc. Appln. No. 664 of 1941, Decided on 6th February 1942.

Appeal—Appeal dismissed as withdrawn—It cannot be restored even if appellant acted under mistake of law.

An appeal which was dismissed at the instance of the appellant himself as withdrawn cannot be restored even if the appellant had acted under a mistake of law : ('30) 17 A. I. R. 1930 All. 100, *Disting.* [P 253 C 1, 2]

C. P. C. —

('40) Chitaley, O. 23 R. 1 N. 3; O. 41 R. 9 N. 4 and O. 41 R. 19 N. 1.

Lakshmi Saran — for Applicant.

ALLSOP J. — This is an application for the restoration of an execution appeal which was dismissed by a Bench of this Court of which one of us was a member. The appeal was dismissed because learned counsel for the appellant stated that his client had instructed him to withdraw the appeal. It appears that the applicant was a subsequent and Dinanath the opposite party a prior mortgagee of certain property. The applicant instituted a suit and obtained a decree for the sale of the property which he himself purchased. Thereafter, Dinanath instituted a suit on his own mortgage impleading the applicant as a subsequent mortgagee and he obtained a decree for the sale of the property. The applicant's defence in that case was that the property in his possession in consequence of the sale of his mortgage was not the same as the property mortgaged to Dinanath. The point was apparently decided against the applicant and a decree was passed. When proceedings were taken in execution of the decree the applicant again raised the point that the property mentioned in the decree was not the property in his possession. The decision was against him and it was against that decision that he appealed to this Court. He withdrew the appeal, according to him, because he was advised that his proper remedy was to file a regular suit in order to obtain a declaration that the decree did not involve the property which was in his possession. He filed such a suit but it was dismissed by the trial Court and though an appeal to the first Court was allowed this Court restored the order of the trial Court. It was when this Court dismissed the regular suit that the applicant filed the present application for restoration of his appeal against the order of the Court executing the decree.

It seems to us that it is quite impossible now to restore an appeal which was dismissed on the application of the appellant himself that he wished to withdraw it. It may be that the appellant was acting under a misapprehension but that cannot affect the result. If we were to restore appeals which had been withdrawn in this manner we would create a state of affairs where nobody would ever be certain that the litigation in which he was involved was concluded. Learned counsel has referred us to the case in A. I. R. 1930 All. 100,[1] but the facts of that case were quite different. A suit had been dismissed and some of the plaintiffs had appealed. Another plaintiff had made an application to the trial Court to set aside the order dismissing the suit and to restore it to its original number. The trial Court accepted the contention of this plaintiff and passed an order accordingly. That order was subsisting when the appeal against the decree dismissing the suit came before this Court. It was naturally brought to the notice of the Court that the decree had already been set aside by the action of the trial Court and consequently the appeal was dismissed. At a later stage the order of the trial Court restoring the suit was set aside by this Court and this Court then agreed to restore the appeal against the order dismissing the suit. It seems to us that the circumstances were quite different from those of the case before us. We do not think that we can possibly restore an appeal that was dismissed at the instance of the appellant himself even if the appellant was acting under a mistake of law. We consequently dismiss this application.

G.N./R.K. *Application dismissed.*

1. ('30) 17 A. I. R. 1930 All. 100 : 122 I. C. 402, Mohammed Shafi v. Chedu.

A. I. R. (29) 1942 Allahabad 253 (2)

MOHAMMAD ISMAIL AND MULLA JJ.

Emperor

v.

Iqbal Krishna Kapoor and another Respondents.

Criminal Appeals Nos. 173 and 174 of 1942, Decided on 8th April 1942, from order of Sess. Judge, Cawnpore, D/- 12th December 1941.

(a) Defence of India Act (1939), Rules under, R. 26 (1) (e) — Words "notify his movements" in R. 26 (1) (e)—Meaning—Government cannot call upon suspected person to report his presence periodically.

The words 'notify his movements' in R. 26 (1) (e) cannot be extended to mean "shall report his presence." Rule 26 does not empower the Government to call upon the suspected person to report his presence periodically. Failure to report presence does not contravene R. 26 (1) (e). [P 254 C 1]

(b) Defence of India Act (1939), Rules under, R. 26 (1) (a) to (h)—R. 26 (1) (h) does not confer independent power—Order must be made within limits of R. 26 (1) (a) to (g)—No valid order can be made under R. 26 (1) (h) which is not covered by R. 26 (1) (a) to (g).

Rule 26 (1) (h) does not confer any independent power. The order must be made within the limits of sub-rules (a) to (g) of R. 26 (1) and those orders may be regulated by virtue of R. 26 (1) (h). If an order does not come within the scope of sub-rr. (a) to (g) of S. 26 (1) it cannot be supported by R. 26 (1) (h) alone. No valid order can be made under R. 26 (1) (h) which in terms is not covered by any of the preceding sub-rules. [P 254 2]

Government Advocate — for the Crown.

K. N. Katju and D. Sanyal — for Respondents.

MOHAMMAD ISMAIL J. — These two connected appeals were disposed of by one judgment by the learned Sessions Judge of Cawnpore as they involved an identical point of law. There is no controversy about the facts. The respondents Messrs. Iqbal Krishna Kapoor and Krishna Chandra Beri of Cawnpore were arrested and committed to jail custody under sub-rules (1) and (2), respectively of R. 129 of the Defence of India Rules. By an order dated 1st August 1941 the respondents were released

on the following conditions: (1) Shall reside and remain within the limits of police station Kotwali, district Cawnpore, and shall not leave those limits without the written permission of the Superintendent of Police, Cawnpore; (2) shall report his presence in person at police station, Kotwali, once a week until further orders; (3) shall refrain from any activities in any way connected with the Congress Satyagrah campaign. Although the order is dated 1st August the actual release of Mr. Beri was effected on 26th August 1941, and of Mr. Kapoor on 7th September. It is conceded that the respondents complied with conditions 1 and 3. They, however, did not report their presence at the police station as provided by condition 2. The Senior Superintendent of Police, Cawnpore made two separate complaints against the respondents on the allegation that they committed an offence punishable under R. 26 (6) of the Defence of India Rules inasmuch as they failed to report their presence at the police station. The trial Court found them guilty and convicted them. The learned Sessions Judge on appeal took a contrary view and held that the respondents had committed no offence. He accordingly acquitted them. The Provincial Government has now appealed to this Court against the two orders of acquittal.

The question for consideration is a simple one and its decision depends on the interpretation of R. 26 (1) (e) and (h). Rule 26 deals with restriction of movements of suspected persons and empowers the Government to pass restriction and detention orders. Sub-rule (e) of the aforesaid rule has conferred authority on the Government to make an order requiring the suspected person to "notify his movements," in such manner at such times and to such authority or person as may be specified in the order. It is argued by learned Government Advocate that condition 2 of the order is covered by sub-r. (e). In our opinion this contention is untenable. To notify his movement, cannot be extended to mean "shall report his presence." The respondents were directed to reside and remain within the limits of police station Kotwali. It follows therefore that they could move about freely within the specified limits without restriction of any kind. They could, if they so desired, visit different parts within the sanctioned area and were placed under no obligation to obtain previous permission of any officer for that purpose. If however they wanted to leave those limits they were bound to obtain a written permission of the Superintendent of Police of Cawnpore District. Rule 26 does not empower the Government to call upon the suspected person to report his presence periodically. If the intention was to place such a restriction upon him a clear provision to that effect would have been made in the rule. By a reference to Section 10, Criminal Tribes Act (Act 6 of 1924), we find the following provisions:

"*10.* (1) The Provincial Government may .... issue . . . either or both of the following directions: (a) report himself at fixed interval; (b) notify his place of residence and any change or intended change of residence, and any absence or intended absence from his residence."

The above rules are very comprehensive. Under these rules it would be the duty of the party concerned to report himself at stated intervals if he were directed to do so. In R. 26 no such power has been conferred upon the Government and it would not be possible to interpret sub-r. (e) so as to cover direction (2). This will be imposing an additional burden upon the respondents which in our judgment is not contemplated by the rule. It is not suggested that the respondents intended to move out of the limits of Kotwali station. They admittedly remained within those limits during the period mentioned in the complaint. They had therefore nothing to notify at the police station. The dictionary meaning of the expression "move" is to change place or posture; to stir; to pass or go in any manner or direction from one place or part of space to another. The order does not indicate that the respondents were under an obligation to inform the authorities of the places visited by them during the week. Their report at the police station could not, therefore, be with the object of notifying their movements. The respondents in our judgment, have not contravened sub-r. (e) by failing to report their presence at the police station. It is not necessary to pursue the matter further as we are in agreement with the learned Sessions Judge with respect to his interpretation of sub-rule (e).

The learned Government Advocate has argued that in any event restriction 2 is covered by sub-r. (h) which permits orders to be made on a person regulating his conduct in any such particular as may be specified in the order. This sub-rule in our opinion does not confer any independent power. The order must be made within the limits of sub-rules (a) to (g) and those orders may be regulated by virtue of sub-r. (h). If an order does not come within the scope of sub-rules (a) to (g) it cannot be supported by sub-rule (h) alone. It cannot be seriously contended that any valid order may be made under sub-rule (h) which in terms is not covered by any of the preceding sub-rules. We have carefully perused the judgment of the learned Sessions Judge and have given our serious consideration to the argument of learned counsel for the Crown. We have not overlooked the fact that the Defence of India Rules have been promulgated with a view to conferring exceptional powers upon the executive authorities. In interpreting the rules, however, we would not be justified in extending those powers. In other words the rules must be interpreted strictly and the orders made thereunder must be confined within the limits of the rules from which they derive their authority. For the reasons given above we are not prepared to interfere with the orders of the Court below. The appeals are accordingly dismissed. The respondents are on bail. They need not surrender. Their bail bonds are discharged.

G.N./R.K. *Appeals dismissed.*

A. I. R. (29) 1942 Allahabad 254

ALLSOP AND VERMA JJ.

Kunwar Gajpati Rikh — Defendant — Appellant

v.

Mrs. May Ida Rikh and another — Plaintiffs — Respondents.

First Appeal No. 536 of 1935, Decided on 18th March 1942, from decision of Addl. Sub-Judge, Bijnore, D/- 30th August 1935.

Hindu law — Partition—*S* having three sons *V*, *J* and *T* from Hindu wife—After wife's death *S* becoming Christian, marrying Christian woman and getting son *M* — Partition deed relating to ancestral property based on family arrangement by which *M* acknowledging to have no share in property and *S* and his three sons acknowledging *M's* right to maintenance — *S* and his three sons dividing property and agreeing to pay Rs. 600 monthly to *M* and his widow and chil-

dren after his death—*S*, *V*, *J* and *T* to contribute Rs. 150 monthly—Maintenance made charge on properties in hands of *S*, *V*, *J* and *T*—Suit for arrears of maintenance by *M's* widow and son against *T's* property in hands of his son—S. 14, T. P. Act, held not applicable—Defendant held could not repudiate charge and claim property—Minors who were represented by their fathers at partition held could not subsequently question partition on ground that their fathers might have made better bargain.

The parties to the partition deed were *S* and his four sons *V*, *J*, *T* and *M*. *S* was originally a Hindu and his three elder sons *V*, *J* and *T* were born to him by a Hindu wife to whom he was first married. He afterwards became a Christian and, his Hindu wife having died, he married a Christian woman by whom he had his fourth son, *M*. It was stated in the deed by the parties that the property to be partitioned was ancestral property which had originally been part of the property of a joint Hindu family and that *S* and his three elder sons were alone entitled to a share in it. But the deed of partition as between *S* and his elder sons of one part and *M* of the other part was based on a family arrangement by which *M* acknowledged that he had no right to a share in the property and the others acknowledged that he had a right to be maintained. The parties agreed that a sum of Rs. 600 a month should be paid by way of maintenance to *M* and his widow and children after him. The property was divided into five lots. One lot was set apart for the maintenance of the dignity of the estate, and the other four lots were assigned to *S* and his three elder sons each of whom agreed to pay one-fourth of the allowance of Rs. 600 a month to *M* and to his widow and children. *S* and each of the sons was to pay Rs. 150 a month and a charge was created on various properties assigned to them at the partition. In the suit by *M's* widow and son for arrears of maintenance against *T's* property in the hands of his son :

Held that (1) S. 14, T. P. Act, could not in any way apply to the facts of the case; [P 256 C 1]

(2) the deed of partition was itself the basis of the defendant's exclusive title to the properties which were subject to the maintenance charge. He could not claim the whole village which came to him by the deed and at the same time repudiate the charge which the deed created. It might be open to him to question the validity of the whole agreement and to say that there had been no valid partition of the property, but that contention was not advanced ; [P 256 C 1]

(3) the minor members of the family represented at the time by their fathers, could not afterwards question the provisions of the deed of partition upon the ground that their fathers might have made a better bargain or that they had received less at the time of partition than they should have received. [P 256 C 2]

S. N. Sen and G. S. Pathak — for Appellant.
Shabd Saran — for Respondents.

ALLSOP J. — The plaintiffs in the suit which has given rise to this appeal were Mrs. May Ida Rikh and Kunwar Kenneth Cyrrl Rikh, the widow and son respectively of Kunwar Madho Rikh deceased. They asserted in their plaint that the defendant, Kunwar Gajpati Rikh, was liable under an agreement dated 9th June 1922, to pay an allowance of Rs. 150 a month to Madho Rikh and after Madho Rikh's death to his widow and son, the plaintiffs. Madho Rikh died in the year 1931 and the plaintiffs asserted that no maintenance had been paid since that time. They claimed a sum of Rs. 4793-4-0 on this account. They asserted also that the allowance had not been paid for some time before the death of Kunwar Madho Rikh, but, as they were not certain of the exact amounts which had been paid and not paid, they asked for a decree for settlement of accounts. The learned Judge of the Court below found that a sum of Rs. 4275 was due on account of maintenance for the period after Madho Rikh's death and a sum of Rs. 1000 for the period prior to his death. He gave the plaintiffs a decree against the defendant for a sum of Rs. 5275 as principal and Rs. 428-7-0 as interest with pendent and future interest at 6 per cent. per annum. He further directed that the defendant was not personally liable for the payment of the decretal amount and that his liability should be confined to the extent of the zamindari property situate in the village of Hansupura in his hands, on which there was a charge for the maintenance allowance. The defendant has appealed.

The claim of the plaintiffs-respondents was based on a partition deed dated 9th June 1922. The parties to this deed were Raja Shiam Rikh and his four sons, Vishwa Nath Rikh, Jaswant Rikh, Tirloki Nath Rikh and Madho Rikh. From the recitals in the deed, it would appear that Shiam Rikh was originally a Hindu and that his three elder sons, Vishwa Nath Rikh, Jaswant Rikh and Tirloki Nath Rikh were born to him by a Hindu wife to whom he was first married. He afterwards became a Christian and his Hindu wife having died, he married a Christian woman by whom he had his fourth son, Madho Rikh. It would also appear that it was admitted at the time by the parties that the property to be partitioned was ancestral property which had originally been part of the property of a joint Hindu family and that Shiam Rikh and his three elder sons were alone entitled to a share in it. The parties agreed, however, that a sum of Rs. 600 a month should be paid by way of maintenance to Madho Rikh and his widow and children after him. The property was divided into five lots. One lot was set apart for the maintenance of the dignity of the estate because Shiam Rikh had been given the hereditary title of Raja and the members of the family apparently desired that he and the persons who succeeded him as Raja should be able to keep up the position which the title conferred upon them. The other four lots were assigned to Shiam Rikh and his three elder sons. Each of these agreed to pay one-fourth of the allowance of Rs. 600 a month to Madho Rikh and to his widow and children. The father and each of the sons was to pay Rs. 150 a month and a charge was created on various properties assigned to them at the partition. The village assigned to Tirloki Nath Rikh which was charged with the payment of the maintenance allowance was the village of Hansupura which has been mentioned in the decree of the Court below. Tirloki Nath Rikh died in the year 1927 and the defendant-appellant, Gajpati Rikh, is his son.

The decree of the learned Judge of the Court below has been assailed on several grounds. The first of these is that the arrangement which the parties to the deed of partition reached offended against the rule of perpetuity set forth in S. 14, T. P. Act. The learned Judge of the Court below held that the provisions of this section did not apply because the creation of a charge was not a transfer of property within the meaning of S. 14. Learned counsel for the appellant has argued that

the finding of the learned Judge upon this point is incorrect. He has referred to the Full Bench decision of this Court in 1941 A. L. J. 518.[1] We do not think it is necessary in this case to go into the question whether the contention is right or wrong. It seems to us that the provisions of S. 14. T. P. Act, cannot, in any way, apply to the facts of this case. If the creation of the charge was a transfer of property, that transfer took place at the time when the partition deed was executed. A charge was created immediately in favour of Madho Rikh and was to be inherited by his widow and children. Even if the transaction is regarded as a transfer for life to Madho Rikh followed by a transfer to his wife and children the latter would obviously be alive at his death or within a few months thereafter.

Another argument addressed to us against the decision of the learned Judge of the Court below is that the agreement was void under S. 23, Contract Act, because it offended against the principles of Hindu law, but that argument is really nothing more than a statement that the agreement is void under those principles. This brings us to the main argument which has been addressed to us, namely, that Tirloki Nath Rikh was not entitled to alienate any part of the property (which came jointly to him and his son, the appellant), without legal necessity of some kind. It seems to us that this argument can be answered upon several grounds. In the first place, the deed of partition is itself the basis of the defendant's exclusive title to this village of Hansupura. In our judgment, he cannot claim the whole village which came to him by this deed and at the same time repudiate the charge which the deed created. It might be open to him to question the validity of the whole agreement and to say that there had been no valid partition of the property, but that is a contention which he has not advanced in the course of this suit or, as far as we are aware, at any other time.

In the second place, we consider that the deed of partition as between Shiam Rikh and his elder sons of one part and Madho Rikh of the other part was based on a family arrangement by which Madho Rikh acknowledged that he had no right to a share in the property and the others acknowledged that he had a right to be maintained. It has been strenuously argued that Madho Rikh, on the facts stated in the document, had no claim at all to maintenance or to any share in the joint family property and that there could not possibly have been any dispute about his rights. In our judgment, this argument is based upon the assumption that the recitals in the deed are correct, but we are not satisfied that they are necessarily so. It seems that those recitals themselves were embodied in the deed on the basis of the agreement between the parties and it may be that Madho Rikh made admissions not justified by the facts in consideration for receiving an allowance from the other members of the family. It is possible that the whole of the property was not ancestral property, for instance, and that there might have been a claim by Madho Rikh to some of the properties on the ground that they had been acquired by his father personally. This is, of course, a mere assumption, but, on the other hand, it is also a mere assumption that the recitals in the deed represent the true facts. The parties did not produce any extraneous evidence upon the point. It seems to us that there may well have been some dispute or at least a strong apprehension of a possible dispute between the father and his sons or between the brothers after the father's death and that the members of the family came together and decided upon the course which it was best to pursue in the interests of the family. If the arrangement had destroyed some contingent interest which might have arisen in favour of the minor, Gajpati Rikh, he might perhaps have questioned its validity but in this case he did nothing of the kind. It resulted only in a partition by which Tirloki Nath Rikh and Gajpati Rikh got an exclusive right in certain property subject to a charge for maintenance. The interests of the father and son were the same and it must be held that the former sufficiently represented the latter. We think that partitions of this kind would never result in any confidence by members of the family in their rights if the minor members of the family, represented at the time by their fathers could afterwards question the provisions of the deed of partition upon the ground that their fathers might have made a better bargain or that they had received less at the time of partition than they should have received. The argument addressed to us is based upon the assumption that the defendant-appellant and his father received the village of Hansupura as part of their share at the time of the partition and that there was a subsequent transfer by the father when he created this charge in favour of Madho Rikh. This is not correct. A true statement of the facts is that the appellant and his father received the village of Hansupura subject to the charge and we do not think that it is possible to allow the defendant-appellant now after all these years to say that he should have received the village without any charge upon it just as it would be impossible to allow him to say that all the villages given to his father and himself did not constitute their fair share of the property which was being partitioned.

We are satisfied that the defendant-appellant cannot be allowed now to question the arrangements made at the time of the partition. We may add that he seems to have come of age about the year 1925 and that he did not at any time repudiate the partition. It appears in fact from a deed of sale which the plaintiffs produced that he accepted his liability to pay maintenance to Madho Rikh and that he transferred certain property to him in lieu of the arrears of maintenance which were at that time due. The document is Ex. 4. It has lastly been argued on behalf of the defendant-appellant that the rate of maintenance should at least be reduced because the property in the hands of the defendant-appellant is considerably less than it was at the time when the partition took place. In the course of the trial in the Court below, the defendant-appellant put in an application supported by an affidavit in which he stated that he had sold a number of villages partly to pay off a debt of Rs. 55,101-11-4 which was due from his father under the terms of the deed of partition and partly to pay off other debts incurred for legal necessity. We may point out that the affidavit was no evidence in the case. If the defendant-appellant wished to prove the facts that he had asserted, he should have gone into the witness-box, taken an oath and subjected himself to cross-examination at the hands of the other side. He has produced certain sale deeds, but these do not show that the property was transferred in order to pay off debts. The consideration was for the most part paid in cash and there is no evidence at all that it was necessary for the defendant-appellant to dispose of these villages so that it may be inferred that his

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1. ('41) 28 A. I. R. 1941 All. 345 : 196 I. C. 425 : I. L. R. (1941) All. 691 : 1941 A. L. J. 518 (F. B.), U. P. Government v. Manmohan Das.

present condition is due to causes which were not within his control. In so far as the debt of rupees 55,101-11-4 is concerned, that existed at the time when the agreement was made for the payment of the allowance and if this debt has been paid off by the transfer of part of the property which came to the share of the defendant-appellant, his position is really no worse than it was at the time when the agreement was made. We are satisfied that there is no sufficient reason for reducing the amount which has been found by the learned Judge of the Court below to be due to the plaintiffs-respondents. The result is that this appeal must fail and we dismiss it with costs.

G.N./R.K. *Appeal dismissed.*

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VERMA AND YORKE JJ.

Hakim Ali — Judgment-debtor — Applicant

v.

Shanker Lal — Decree-holder — Opposite Party.

Misc. Case No. 933 of 1940, Decided on 24th November 1941.

(a) Agra Tenancy Act (3 of 1926), Ss. 248, 242 and 264 — Rent suit of description under Serial No. 4, Group A of Act decreed by Assistant Collector of first class — In view of nature of property sought to be attached and sold decree transferred under Act to Collector for execution — Collector holding sale and confirming it—Application by judgment-debtor to set aside sale heard by Assistant Collector invested with powers of Collector under S. 238 of Act — Application to set aside sale held must be taken as under O. 21, R. 90, Civil P. C., in view of S. 264 and Sch. 2 of Act—Appeal from dismissal of application held lay to District Judge and not to Commissioner in view of S. 248 read with S. 242.

A rent suit of the description mentioned at Serial No. 4, Group A, Agra Tenancy Act, valued at over Rs. 200 was decreed by the Assistant Collector of the first class but, on account of the nature of the property sought to be attached and sold, the decree was sent under the provisions of the Agra Tenancy Act to the Collector for execution. After the sale was held and confirmed, the judgment-debtor applied to set aside the sale on the ground of material irregularity in publishing or conducting the sale. The application was heard by an Assistant Collector of the first class invested with the powers of a Collector under S. 238 of the Act and dismissed:

Held that the application to set aside the sale must be taken to have been made under O. 21, R. 90, Civil P. C., as was evident from the provisions of S. 264 and Sch. 2, Agra Tenancy Act. [P 257 C 2]

Held further that appeal from the order dismissing the application under O. 21, R. 90 lay to the District Judge and not to the Commissioner in view of the provisions of S. 248 read with S. 242. [P 258 C 1, 2]

(b) U. P. Revenue Manual, Chap. 40—Chapter 40 does not apply to revenue Court's decree.

Chapter 40 of the Revenue Manual deals only with the sale of ancestral land in execution of civil Court decrees. The whole of Chap. 40 does not apply to decrees passed by revenue Courts. [P 258 C 2]

(c) Civil P. C. (1908), Ss. 68 to 72—Applicability—Ss. 68 to 72 do not apply to decree passed by revenue Court.

Sections 68 to 72 apply to decrees passed by civil Courts the execution of which is transferred to the Collector in accordance with the provisions of S. 68 and do not apply to cases in which the decree has been passed by a revenue Court. [P 258 C 2]

C. P. C. —

('40) Chitaley, S. 68, N. 3.

('41) Mulla, Page 276 N. "Scope and operation of the section."

(d) Civil P. C. (1908), S. 47 and O. 21, R. 92 and O. 43, R. 1 (j) — Orders under S. 47 and O. 21, R. 92—Appeals—Distinction.

An order passed under O. 21, R. 92 upon an application under O. 21, R. 90 is appealable as an order under the provisions of O. 43, R. 1 (j) whereas orders which come within the purview of S. 47 amount to decrees by virtue of the definition of "decree" contained in S. 2 (2) of the Code, and are appealable as such. [P 258 C 2]

C. P. C. —

('40) Chitaley, S. 47, N. 84 Pt. 1 and O. 21 R. 92, N. 13 Pt. 1.

('41) Mulla, Page 198, N. "Appeal" and Page 901 N. "Appeal."

S. A. Rafique — for Applicant.

VERMA J.—This is a reference by the learned Additional Commissioner of Meerut under S. 289, U. P. Tenancy Act (17 of 1939). The question that has been referred to this Court for decision is whether an appeal, presented by certain judgment-debtors against an order passed upon an application to set aside a sale held in execution of a decree for arrears of rent, lay to the District Judge or to one of the superior revenue Courts. The material facts, so far as we can gather them from the papers before us, appear to be these. A suit for the recovery of arrears of rent was instituted in the Court of an Assistant Collector of the first class. The suit was evidently of the description mentioned at Serial No. 4, Group A, Agra Tenancy Act (3 of 1926). It was valued at over Rs. 200. The Assistant Collector of the first class decreed the suit on 10th September 1931. In execution of this decree, certain property of the nature contemplated by Serial No. 13 of List 2 of Sch. 2, Agra Tenancy Act of 1926 was attached and was sold on 20th May 1937. The nature of the property sought to be attached and sold being as mentioned above, the decree although it had been passed by an Assistant Collector of the first class, had to be sent to the Collector for execution under the provisions contained in Serial No. 13, List 2, Sch. 2, Tenancy Act of 1926. This procedure was followed and the decree was executed by the Collector. The sale was confirmed by the Collector on 25th June 1937. Several months later, namely, on 3rd February 1938, an application was filed by the judgment-debtors praying that the sale be set aside on the ground that there had been material irregularity or fraud in publishing or conducting it. This application must be taken to have been made under O. 21, R. 90, Civil P. C., as is evident from the provisions contained in S. 264, and Sch. 2, Tenancy Act of 1926. Omitting cls. (a) and (b) of S. 264, with which we are not concerned in this case, it is apparent that the whole of the Civil Procedure Code, except the provisions mentioned in List 1 of Sch. 2, was made applicable to

all suits and other proceedings under that Act, subject to the modifications contained in List 2 of Sch. 2. Order 21 of the Code was not mentioned in List 1 of Sch. 2. The result is that the whole of that order was applicable to proceedings under the Act, subject to the modifications stated against Serial Nos. 12 and 13 of List 2. The Court that had jurisdiction to hear the judgment-debtors' application mentioned above was the Court of the Collector.

Section 238, Tenancy Act of 1926 however authorized the Local Government to confer on an Assistant Collector of the first class all or any of the powers of a Collector under that Act. The application was accordingly heard by an Assistant Collector of the first class invested with the powers of a Collector under the provisions of the section just mentioned. He dismissed the application on 29th October 1938. The judgment-debtors thereupon presented a memorandum of appeal against the order of 29th October 1938 to the Court of the District Judge. The appeal came up for hearing before an Additional District Judge. A preliminary objection was taken on behalf of the decree-holders respondents to the effect that the appeal did not lie to the District Judge. This preliminary objection found favour with the Additional District Judge and by his judgment dated 10th May 1939 he directed that the memorandum of appeal be returned to the appellants 'for presentation to proper Court.' The memorandum of appeal was thereupon filed by the judgment-debtors-appellants in the Court of the Collector. By his order dated 23rd June 1939, the Collector held that he had no jurisdiction to entertain the appeal for the obvious reason that the order against which the appeal had been filed had been passed by a Court exercising a jurisdiction which was concurrent with the jurisdiction of the Collector himself, and not by a Court which in the particular matter was in any way subordinate to the Court of the Collector. The judgment-debtors thereupon took their memorandum of appeal to the Court of the Commissioner. The matter came up before the learned Additional Commissioner and he has made this reference to this Court by his order dated 21st October 1940. He has expressed the opinion that the learned Additional District Judge was not right in holding that the appeal did not lie to the civil Court. Having perused the papers and having heard learned counsel appearing for the judgment-debtors—no appearance having been made on behalf of the decree-holders or the auction purchasers — we have come to the conclusion that the learned Additional Commissioner is perfectly right in the view which he has expressed and that the learned Additional District Judge was wrong in holding that no appeal lay to the District Judge.

It seems to us that the learned Additional District Judge entirely misunderstood the law. The first error into which the learned Judge fell was in thinking that the judgment-debtors' application for the setting aside of the sale fell under para. 997 of the Revenue Manual read with O. 21, R. 90, Civil P. C. Paragraph 997 occurs in Chapter 40 of the Manual, and the heading of that chapter shows that it deals only with the sale of ancestral land in execution of civil Court decrees. The decree which was under execution in the present case was not a civil Court decree, transferred for execution to the Collector in accordance with the provisions contained in S. 68, Civil P. C., to the execution of which the provisions of Sch. 3 of that Code applied. That being so, the whole of Chap. 40 of the Revenue Manual was inapplicable. The learned Additional District Judge then referred to para. 1011 of the Revenue Manual and expressed the opinion that there was some conflict between that paragraph of the Manual and S. 248, Tenancy Act of 1926. Paragraph 1011 of the Manual is also in Chap. 40 and has nothing to do with a case in which the decree sought to be executed had been passed by a revenue Court. The learned Additional District Judge's references to Ss. 68 and 70 (1) (c), Civil P. C., were similarly erroneous. The learned Additional Commissioner is perfectly right in pointing out that Ss. 68 to 72, Civil P. C., apply to decrees passed by civil Courts the execution of which is transferred to the Collector in accordance with the provisions of S. 68 of that Code, and do not apply to cases in which the decree has been passed by a revenue Court. The learned Additional District Judge seems, further, to have been labouring under some confusion when he referred to S. 47, Civil P.C. The order against which the judgment-debtors desire to appeal is an order passed under R. 92 of O. 21 of the Code upon an application under R. 90 of that order. Such an order is appealable as an order under the provisions of O. 43, R. 1 (j) of the Code, whereas orders which come within the purview of S. 47 of the Code amount to decrees by virtue of the definition of "decree" contained in S. 2 (2) of the Code, and are appealable as such. The contention of the counsel for the judgment-debtors appellants that the order in question was appealable to the District Judge in view of the provisions of S. 248 read with S. 242, Tenancy Act of 1926, was perfectly correct. The material portion of sub-s. (3) of S. 248 runs thus :

"An appeal shall lie from the following orders .... of a Collector, namely, orders mentioned .... in O. 43, R. 1, Civil P. C., 1908. Such appeal shall lie to the Court, if any, having jurisdiction under S. 242 of this Act to hear an appeal from the decree in the suit, or in the case of applications for execution, the Court having jurisdiction to hear an appeal from the decree which is being executed."

As has already been stated, the amount or value of the subject-matter of the suit in the present case exceeded Rs. 200 it is obvious, therefore, that the appeal from the order of 29th October 1938 lay to the Court of the District Judge. We entirely agree with all that the learned Additional Commissioner has said on the subject in his order of reference. That is our answer to the reference.

G.N./R.K. *Answer accordingly.*

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IQBAL AHMAD C. J. AND COLLISTER J.

Commissioner of Income-tax, Central and United Provinces — Applicant

v.

B. Behari Lal Bhargava — Respondent.

Privy Council Appeal No. 4 of 1941, Decided on 10th April 1942, for leave to appeal to His Majesty in Council.

Income-tax Act (1922), S. 66A (2) — Right of appeal under S. 66A (2) is confined only to cases certified as fit for appeal by High Court — High Court would be justified in refusing certificate in case which does not come within S. 109 (c), Civil P. C.—Case to be fit for appeal within S. 109 (c), Civil P. C., must raise substantial question of law of general importance — U. P. Improvement Trust awarding certain amount to person in land acquisition proceedings — Question whether amount awarded was

by way of interest or damages is mixed question of law and fact — It is not substantial question of law — Nor is it of general importance.

The right of appeal under S. 66A (2) is confined only to cases which the High Court certifies to be fit for such an appeal. The High Court would be justified in refusing a certificate in a case which in its view does not raise any question of such importance as would warrant a certificate under section 109 (c), Civil P. C. In order to bring a case within the purview of S. 109 (c), Civil P. C., the proposed appeal to His Majesty in Council must raise a substantial question of law of general importance. In determining whether or not the question of law raised is one of general importance the Court will take into consideration among other facts, the question whether or not the question raised is likely to arise in numerous cases : ('27) 14 A.I.R. 1927 P.C. 242, *Rel. on.* [P 259 C 2]

The question whether the amount awarded to a person by the U. P. Improvement Trust in the land acquisition proceedings was awarded by way of interest or damages is strictly speaking not a pure question of law but is a mixed question of fact and law and certainly is not a substantial question of law. Nor is it a question of general importance. Hence it does not come within the purview of S. 109 (c), Civil P. C. [P 259 C 2]

C. P. C. —
('40) Chitaley, S. 109, N. 10, Pts. 9 & 52.
('41) Mulla, Page 390, Pt. (m).

N. P. Asthana — for Applicant.
G. S. Pathak and Gajadhar Prasad Bhargava — for Respondent.

IQBAL AHMAD C. J. — This is an application for leave to appeal to His Majesty in Council against the decision of a Bench of this Court in a reference under S. 66 (3), Income-tax Act. The facts that led to the reference are shortly as follows. Certain house property of Behari Lal Bhargava, the opposit party, was acquired by the Improvement Trust and a certain amount was awarded as compensation to the opposite party by the Acquisition Officer of the Trust. The opposite party being dissatisfied with the award of the Acquisition Officer took the matter before the Improvement Trust Tribunal and the Tribunal increased the amount of the award and further awarded to the opposite party a sum of Rs. 12,708 by way of interest on the increased amount. It appears that after the award by the Acquisition Officer, the Trust had taken possession of the house and accordingly the Tribunal held that the opposite party was entitled to a sum of Rs. 12,708, by way of interest for the loss of the possession of the house. The Income-tax Department assessed the opposite party on this sum of Rs. 12,708. The opposite party objected to this assessment and eventually the matter was referred to this Court under S. 66(3), Income-tax Act. A Bench of this Court held that the sum of Rs. 12,708 was awarded to the opposite party by way of damages and was not liable to assessment. In particular, the Bench held that the said amount could not be regarded as an "income" accruing to the opposite party and therefore was not liable to assessment of income-tax. In this view of the matter, the Bench held that the amount of Rs. 12,708 should not be assessed to income-tax. In the concluding portion of its judgment the Bench made the following observations :

"It is not without considerable doubt and hesitation that we have arrived at this decision, for there is much to be said on the other side ; but upon the whole matter we think that this is the correct view to take and we also bear in mind that where the interpretation of a fiscal enactment is open to doubt, it should be construed favourably to the subject."

The present application for leave to appeal to His Majesty in Council is under S. 66A (2), Income-tax Act, which runs as follows :

"An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council."

This sub-section was considered by their Lordships of the Privy Council in 54 I. A. 421,[1] and it was held that the right of appeal to the Privy Council from a decision of the High Court upon a case stated under S. 66, Income-tax Act, 1922, given by sub-s. (2) of S. 66A is only in cases which the High Court certifies to be a fit one for such an appeal. Their Lordships further observed that the High Court would be justified in refusing a certificate in a case which in its view does not raise any question of such importance as would warrant a certificate under S. 109 (c), Civil P. C., 1908. It is well settled that in order to bring a case within the purview of S. 109 (c), Civil P. C., the proposed appeal to His Majesty in Council must raise a substantial question of law of general importance. In determining the question whether or not the question of law raised is one of general importance, the Court will take into consideration, among other facts, the question whether or not the question raised is likely to arise in numerous cases. In the present case, we are not satisfied either that the question raised by the proposed appeal is a substantial question of law, or that the question is one of general importance. The answer to the question raised before the Bench depended on the answer to the question whether or not the additional amount awarded by the tribunal to the opposite party by way of interest was "income" within the meaning of the Act. The Bench held that the amount awarded to the opposite party was really by way of damages and as such it could not be characterised as "income" within the meaning of the Act. The short question that is sought to be raised before His Majesty in Council therefore is whether or not the amount of Rs. 12,708 was awarded to the opposite party by way of interest or by way of damages. This question strictly speaking is not a pure question of law, but is a mixed question of fact and law, and certainly not, a substantial question of law.

Apart from this, the question is not likely to arise in a number of cases. Instances of acquisition of house property and the taking of its possession by the Improvement Trust before the amount of compensation has been finally determined must be few and far between and as such the question whether the amount awarded to a particular person as compensation for acquisition is by way of interest or by way of damages is not likely to arise in a large number of cases. We cannot, therefore, hold that the question sought to be raised is a question of general importance. For the reasons given above we dismiss this application with costs.

G.N./R.K. *Application dismissed.*

1. ('27) 14 A.I.R. 1927 P. C. 242 : 106 I. C. 156 : 9 Lah. 284 : 54 I. A. 421 (P. C.), Delhi Cloth and General Mills Co., Ltd. v. Income-tax Commissioner, Delhi.

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ALLSOP AND VERMA JJ.

Mt. Bhaggo Bibi — Plaintiff-Appellant

v.

Sri Ishwar Radha Ramanji and Behariji and others — Defendants — Respondents.

First Appeal No. 463 of 1935, Decided on 5th February 1942, from decision of Civil Judge, Allahabad, D/- 8th August 1935.

Civil P. C. (1908), Ss. 145, 47 and 11 — Question whether person was liable under S. 145 arising in Court executing decree — Executing Court alone has jurisdiction to decide that question—Once question is decided, it binds parties unless questioned in appeal—Person held liable becomes party under S. 47 and order for sale of his property amounts to decree and operates as res judicata between parties.

If a question arises in the Court executing the decree whether a person is liable under the provisions of S. 145 it is the executing Court alone which has jurisdiction to decide that question and once the question is decided, the decision is binding between the parties unless it is questioned in appeal. Once it is held that the person is liable under S. 145 he becomes a party under the provisions of S. 47 and any order for the sale of his property amounts to a decree which would bind the parties and would operate as res judicata. [P 260 C 2]

C. P. C. —

('40) Chitaley, S. 47, N. 9; S. 145, N. 11 Pt. 9.

Shah Muhammad Faizullah — for Appellant.

Mukhtar Ahmad — for Respondents.

ALLSOP J. — Mt. Bhaggo Bibi, the plaintiff-appellant, went after the death of her husband to live with a man called Jokhu Lal. She was the owner of certain houses which Jokhu Lal mortgaged to Baldeo Narain and others. The mortgagees instituted a suit for the sale of the mortgaged property and obtained a decree. Thereafter, the Allahabad Improvement Trust acquired some of the houses and deposited a sum of over Rs. 9000 as compensation to the owner. The holders of the decree for sale of the mortgaged property attached the money in execution of their decree. Mt. Bhaggo Bibi, the plaintiff-appellant, then objected upon the ground that the houses were hers and not Jokhu Lal's. Her objection was dismissed and she instituted a suit for a declaration that the property was hers. She obtained a decree from the trial Court and an appeal was filed by the opposite parties in this Court. In the course of the appeal, the question arose whether Mt. Bhaggo Bibi should be allowed to withdraw the money which had been deposited by the Improvement Trust and ultimately she was allowed to withdraw it on the condition that she furnished security for the return of the money if the appeal succeeded in whole or in part. She executed a security bond in favour of the Registrar of this Court. Ultimately, the appeal against Mt. Bhaggo Bibi was partly allowed and the result was that she was liable for the return of part of the money withdrawn by her from the deposit made by the Improvement Trust. The holders of the decree for sale then went to the Court which was executing their decree and made an application that the money due to them should be recovered from Mt. Bhaggo Bibi on the basis of the security bond executed by her in favour of the Registrar of this Court. We understand that she was impleaded as a party under the provisions of S. 145, Civil P. C. We do not know whether she made any objection or not, but we may assume that she did for the purposes of this appeal and if that is so, the question was decided against her by the Court executing the mortgage decree. Her property was put to sale in execution of that decree. She then instituted the suit which has given rise to this appeal in order to obtain a declaration that her property was not liable for sale in execution of the mortgage decree. The learned Judge of the Court below has held that the property was hers and that it was not liable for sale under the mortgage decree as such. He has also expressed his opinion that it was probably not liable for sale in execution of the mortgage decree on the basis of the security bond executed by the appellant in favour of the registrar of this Court, but he has held that the Court executing the decree decided the point against the appellant that she did not appeal against that order, that the order is binding upon her and that consequently she has no right to obtain a decree in a different suit that her property could not be sold by the Court executing the mortgage decree. With this conclusion we agree.

Learned counsel for the appellant has argued that the Court executing the mortgage decree had no jurisdiction to sell the property and that any order passed by him for the sale of the property was an order passed without jurisdiction. It seems to us that there is no force in this argument. The appellant has not placed any of the necessary documents before us in our printed book. We do not know what application was made to the Court executing the mortgage decree or what objection, if any, was taken by Mt. Bhaggo Bibi or what order was passed, but apparently it was held that Mt. Bhaggo Bibi was liable under the provisions of S. 145, Civil P. C. Whether this order was right or wrong, it was binding upon those who were parties to the proceedings in which it was passed. If a question arose in the Court executing the decree whether Mt. Bhaggo Bibi was liable under the provisions of S. 145, Civil P. C., it was the executing Court alone which had jurisdiction to decide that question and once the question was decided, the decision was binding between the parties unless it was questioned in appeal. Once it was held that Mt. Bhaggo Bibi was liable under S. 145, she became a party under the provisions of S. 47, Civil P. C., and any order for the sale of her property amounted to a decree which would bind the parties and would operate as res judicata in the suit which is the subject of appeal before us. As we have already said, we are satisfied that the decision of the learned Judge of the Court below was correct and we, therefore, dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Allahabad 260 (2)

VERMA J.

Ram Lal Sahu and others — Applicants

v.

Dina Nath — Opposite Party.

Application in F. A. F. O. No. 28 of 1941, Decided on 30th January 1942.

Allahabad High Court Rules, Chap. 3, R. 7— R. 7 leaves no discretion — No application for leave to appeal under R. 7 other than one made immediately after judgment is delivered can be entertained.

Rule 7 leaves no discretion to the Judge. On the language of R. 7, no question of the sufficiency or insufficiency of the cause which prevented counsel from making an application, or even of the existence or non-existence of a cause, can arise. No application under R. 7 for leave to appeal other than one made immediately after the judgment is delivered can be entertained. [P 261 C 1]

N. P. Asthana — for Applicants.

Shiva Prasad Sinha — for Opposite Party.

ORDER. — This is an application praying that permission to file an appeal under the Letters Patent against my judgment in F. A. F. O. No. 28 of 1941 delivered on 2nd December 1941 be granted. It is stated in the affidavit filed in support of the application that although a mention was made by counsel for the respondent "as to permission being granted for Letters Patent appeal," no leave was asked for immediately after the judgment had been delivered, as required by the rules of the Court as "there was a misapprehension in the mind of the counsel that permission for filing the Letters Patent appeal was not necessary in the first appeal from order." The application was filed on 20th January 1942. Notice of this application was served on the counsel for the other side and he has appeared to-day to oppose this application. Rule 7 of Chap. 3 of the rules of the Court runs thus :

"An application for leave to appeal under Cl. 10, Letters Patent against an appellate judgment of a Single Judge of this Court shall be made in writing or orally to the Judge deciding the appeal immediately after the judgment is delivered. No other application for such leave to appeal shall be entertained . . . ."

The language of the rule is perfectly clear and leaves no discretion to the Judge. The learned Advocate-General has argued that the cause mentioned in the affidavit, namely, that learned counsel were labouring under a misapprehension as to the necessity for making an application for leave to appeal, is sufficient. On the language of the rule, however, no question of the sufficiency or insufficiency of the cause which prevented counsel from making an application, or even of the existence or non-existence of a cause, can arise. The last sentence of the first paragraph of the rule quoted above clearly means, "no application for such leave to appeal other than one made immediately after the judgment is delivered shall be entertained." That being so, I have no jurisdiction to entertain this application. The application is accordingly dismissed.

G.N./R.K. *Application dismissed.*

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* A. I. R. (29) 1942 Allahabad 261

YORKE J.

Gyan Prakash Mital and another — Plaintiffs — Appellants

v.

Kishori Lal — Defendant — Respondent.

Second Appeal No. 101 of 1942, Decided on 23rd January 1942, from decision of First Civil Judge, Meerut, D/- 30th March 1939.

(a) Civil P. C. (1908), Ss. 95, 104—No second appeal from order under S. 95.

No second appeal lies from an order of the first appellate Court in an appeal against an order of the trial Court under S. 95. [P 262 C 1]

C. P. C. —

('40) Chitaley, S. 104 N. 17 Pt. 4.

('41) Mulla, Page 352 Note "Appeal."

(b) Civil P. C. (1908), S. 115—Appeal may be treated as revision if points raised relate to jurisdiction.

An appeal may properly be converted into a revision and considered upon its merits if the points raised go very clearly to the question of jurisdiction. [P 262 C 1]

C. P. C. —

('40) Chitaley, S. 115 N. 19 Pt. 1.

('41) Mulla, Page 409 Pt. (f).

*** (c) Civil P. C. (1908), S. 95 — Application for removal of attachment dismissed and attachment withdrawn on deposit of amount — No allegation in application that attachment was obtained on insufficient grounds — Subsequent application for compensation under S. 95 is not maintainable.**

An application under S. 95 is not maintainable unless the order of attachment in respect of which the application has been made has been already set aside by the Court as having been made on insufficient grounds : *Case law referred.* [P 262 C 1]

Similarly, it cannot be open to a defendant in a suit against whom an order of attachment has been made and who has complied with that order with the result that it automatically terminated and with the result that the money deposited by him became available to the plaintiff in satisfaction of his decree to apply to the Court for compensation upon the ground that the order of attachment, in respect of which the Court is functus officio, was obtained upon insufficient grounds, a fortiori when that was not the basis of the only application he has ever made for the vacation of the order of attachment. And an application of the defendant under S. 95 is not maintainable, and the Court has no jurisdiction to take any action against the plaintiff under that section. [P 263 C 1]

C. P. C. —

('40) Chitaley, S. 95 Notes 2a and 4.

('41) Mulla, Page 350 Note "Scope of the section" and Page 351 Note "On insufficient grounds."

(d) Civil P. C. (1908), S. 95—'Injury' *(Quære).*

Whether the term 'injury' in S. 95 must be proved in terms of financial damages : 32 Mad. 170 and 35 Mad. 598, *Ref.* [P 263 C 2]

K. C. Mital — for Appellants.

Gajadhar Prasad Bhargava — for Respondent.

JUDGMENT. — This is a second appeal by certain persons who were the plaintiffs in a suit for ejectment and for arrears of rent. This suit related to a shop said by the plaintiffs of the suit to have been let to the defendant at Rs. 40 per mensem. It was further said that on 10th April 1937 the plaintiffs gave to the defendant a notice to quit and also to pay up arrears of rent. As the defendant did not vacate the shop the plaintiffs on 25th May 1937 filed Suit No. 553 of 1937 for ejectment and for arrears of rent. While the suit was pending the plaintiffs on 31st May, six days after institution, filed an application under S. 94 read with O. 38, R. 5, for attachment before judgment of the goods of the defendant in the shop in dispute. They gave as their ground that the defendant was removing his goods from the shop, which strictly speaking was not a ground which fell precisely within the terms of R. 5 of O. 38. The Court, however, made an order in favour of the plaintiffs, and on 2nd June 1937 the Amin attached the goods of the defendant in the shop and thereupon the defendant paid up a sum of Rs. 100 towards the arrears claimed. On 6th

July 1937 the defendant followed up this payment by filing an application in which he asked for the removal of the attachment on the grounds that the amount owed by him to the plaintiffs was only Rs. 99 and that he had paid up Rs. 100 and that therefore the attachment was "fazul," by which I understand that he meant that it was unnecessary or superfluous or useless. The objection was not sustained by the Court which on 9th July 1937 made an order that if within a certain number of days the defendant should deposit a sum of Rs. 45, being the balance of the arrears, the attachment would be withdrawn. On 12th July the defendant did deposit in Court this amount and the attachment was thereupon withdrawn. The order of the Court was clearly an order under R. 9 of O. 38 and it would follow from such an order that upon compliance with the order the attachment would be withdrawn.

Subsequent to these proceedings, the suit was fought out and contested on various grounds including a ground in regard to the rate of rent. On 2nd February 1938, the suit was decreed for Rs. 138-5-0 less sums of Rs. 100 and Re. 1 already paid into Court, that is for Rs. 37-5-0, and also for ejectment. It is said that subsequently the defendant appealed against that decree but without success. It is not certain when he filed the appeal but it is certain that either before he filed it or while the appeal was pending he made an application to the trial Court on 23rd February 1938 under S. 95, Civil P. C., claiming Rs. 500 as compensation for the expense or injury caused to him by the attachment. Actually Rs. 250 was claimed in respect of loss of business and Rs. 250 in respect of damage to his reputation as a businessman. The learned Munsif entertained this application and he made an order under S. 95 awarding Rs. 75 as damages for loss of reputation but disallowing the claim for financial loss in the defendant's business. Against this order an appeal was filed but this was dismissed by the First Civil Judge of Meerut on 30th March 1939.

A preliminary objection has been put forward by Mr. Jwala Prasad, holding the brief of Mr. Gajadhar Prasad, that this appeal is not maintainable and in view of the provisions of S. 104 (2), Civil P. C., it is clear that this preliminary objection must be sustained. Mr. Mital, however, asks that the appeal be treated as a revision and it is apparent to me that the appeal was really drafted rather as a revision than an appeal and I think this is a case in which the appeal may properly be converted into a revision and considered upon its merits, since the points raised go very clearly to the question of jurisdiction. Learned counsel for the opposite party has referred me to a recent Single Judge decision of this Court in which it was held that not in all cases should an appeal be allowed to be converted into an application in revision. But the case relied upon was rather a special case in which learned counsel for the appellant had pressed his appeal with great force for several hours before as a last hope making the request that it should be treated as a revision, and what was even worse was that the points raised did not prima facie fall within the scope of S. 115, Civil P. C.

The main ground upon which learned counsel for the appellant-applicant founds his argument is that it has been held that in such a case as the present one an application under S. 95 is not maintainable unless the order of attachment in respect of which the application has been made has been already set aside by the Court as having been made on insufficient grounds. Learned counsel points out that the original application for setting aside the order of attachment was not even based upon the contention that the application was made upon insufficient grounds and that in itself should have been a very strong point in the eyes of the trial Court. On the other hand, it might be said that that was a point which went rather to the merits than to the question of jurisdiction and I think that that might be said with some force. An application for compensation on the ground that an attachment was asked for upon insufficient grounds must obviously be considered to be very weak when it is found that the application to set aside the attachment itself was not founded upon those grounds, but the point upon which reliance is really placed is the legal aspect of the matter. There is no case in point of this Court and learned counsel has had to rely in the main on cases of Calcutta and Madras founded upon certain English cases. I shall take the cases in the order in which they have been put forward by him. In A. I. R. 1932 Cal. 821,[1] a Bench case, the judgment was pronounced by Rankin C. J. The circumstances were that an order of attachment before judgment was made. An application to vacate that order of attachment was made but was not prosecuted to a conclusion and no order vacating the attachment was obtained. On the contrary under that order for attachment certain monies were recovered which monies were allowed after the decree to go to the plaintiffs in the case in satisfaction of their decree. It was held that in these circumstances the rightness or wrongness of the order for attachment before judgment could not be canvassed in a subsequent suit on the question of damages for malicious prosecution, and such a suit was not maintainable where in the prior suit the order of attachment was not vacated and the rights of the parties were determined on the basis that it was a right order. A good deal of the argument was based upon the consideration that the Court which had to deal with the suit for compensation was a different Court from that in which the order for attachment before judgment was made, but reliance was placed on a number of cases in which certain principles were laid down. Reference was made to A. I. R. 1921 Cal. 774,[2] where the learned Judges had observed:

"It may be pointed out that the limitation of one year under Art. 29 is to run from the date of the seizure; but so long as the writ is not set aside the seizure cannot be said to be wrongful except in instances such as mentioned above (that is in certain special cases)."

Further on Rankin C. J. remarked:

"That authority is good so far as it affirms the principle in a case exactly like the present that the plaintiff cannot come and complain of an improper attachment unless the attachment is first set aside."

And he went on to say that he considered it important to adhere to this principle, otherwise in every case of attachment before judgment in the guise of a suit for damages the decision of one Court would have to be reviewed by another. Certain distinctions certainly do arise from the fact that what was being dealt with was a suit and not an application under S. 95. On the other hand, the same view has been taken by an Hon'ble Chief Justice of the Madras High Court in a case under S. 95. That is in A.I.R.

1. ('32) 19 A.I.R. 1932 Cal. 821 : 141 I.C. 253 : 59 Cal. 1073 : 58 C.L.J. 243 : 36 C.W.N. 447, Satish Chandra v. Munilal.

2. ('21) 8 A.I.R. 1921 Cal. 774 : 64 I. C. 513 : 35 C. L. J. 480, Arjun Biswas v. Abdul Biswas.

1934 Mad. 638,[3] where it was held by Beasley C. J. that where an attachment before judgment is ordered and the property is attached, unless the order of attachment is set aside, an application for compensation cannot be entertained. In this case reliance was placed on the English case in (1878) 7 Ch. D. 866.[4] (1878) 7 Ch. D. 866[4] was a case in which a writ of '*ne exeat*' against a defendant was obtained by the plaintiff immediately after the commencement of an action. The defendant was arrested, but was discharged upon payment to the Sheriff of the sum for which the writ was marked. By this statement of defence the defendant alleged that the writ had been improperly obtained, and claimed damages for his arrest, and at the trial he insisted upon this claim. It was held that as the defendant had not moved to discharge the writ, it must be taken to have been properly issued and consequently that the defendant was not entitled to any damages. The order in the suit was :

"There will be judgment for the ordinary partnership accounts, with a declaration that the defendant Patterson is not to be allowed any set-off by way of damages for the alleged improper issue of the writ of *ne exeat.*"

A somewhat similar view of the necessity of getting rid of a prior binding order by having it set aside before a suit could be maintained for damages was expressed in (1885) 10 A. C. 210.[5] In that case it was held that : "A bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy ; and such an action may be summarily dismissed upon summons as frivolous and vexatious."

It was in fact held by the Lord Chancellor as follows :

"Under those circumstances it is perfectly clear and certain that Mr. Pooley, as a bankrupt and as a bankrupt irreversibly found to be so (he had appealed against the order of adjudication without success), has no locus standi to come into Court and to say what he does say by his statement of claim that he has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring him to be adjudicated bankrupt."

By a parallel process of reasoning, it cannot be open to the defendant in a suit against whom an order of attachment has been made and who has complied with that order with the result that it automatically terminated and with the result that the money deposited by him became available to the plaintiff in satisfaction of his decree, to apply to the Court for compensation upon the ground that the order of attachment, in respect of which the Court is functus officio, was obtained upon insufficient grounds, a fortiori when that was not the basis of the only application he has ever made for the vacation of the order of attachment. In my judgment therefore in the circumstances in which it was made the application of the defendant under S. 95, Civil P. C., was not maintainable, and it is rightly contended in the grounds of appeal that the trial Court had no jurisdiction to take any action against the plaintiff-appellant under S. 95 of the Code. This application must therefore be allowed.

A second point was also taken by learned counsel that in the present case there is no injury proved within the meaning of that word as it occurs in S. 95. His suggestion is that injury must be proved in terms of financial damages and that it is not sufficient to hold that the attachment of the property of a business firm must necessarily result in loss of reputation and damage to credit. Some rulings have been cited but in the view I take on the first point I do not think it necessary to decide this point And it will be sufficient to say that there certainly are cases which support the view taken by the trial Court and the lower appellate Court, *vide* for example 2 I. C. 345[6] and 12 I. C. 507.[7] Upon the ground which I have stated in dealing with the first line of argument put forward by learned counsel for the applicant this appeal which I am treating as a revision is allowed. The order awarding compensation of the trial Court which was maintained by the lower appellate Court is set aside and the application for compensation of the opposite party dismissed with costs in all Courts, but in this Court the costs will be as in a revision. If the amount of compensation has been recovered from the present applicant it shall be refunded to him.

K.S./R.K. *Appeal allowed.*

3. ('34) 21 A.I.R. 1934 Mad. 638 : 151 I. C. 994 : 67 M.L.J. 448, Rama Mudali v. Marappa Goundan.
4. (1878) 7 Ch. D. 866 : 47 L. J. Ch. 616 : 38 L. T. 451 : 26 W. R. 399, Lees v. Patterson.
5. (1885) 10 A. C. 210 : 54 L.J.Q.B. 449 : 53 L. T. 163 : 33 W. R. 709 : 49 J. P. 756, Metropolitan Bank, Limited v. Pooley.
6. ('09) 32 Mad. 170 : 2 I. C. 345 : 18 M.L.J. 490, Palani Kumarasamia Pillai v. Udayar Nadan.
7. ('12) 35 Mad. 598 : 12 I. C. 507 : 21 M. L. J. 1052, Nanjappa Chettiar v. Ganapathi Goundan.

* A. I. R. (29) 1942 Allahabad 263

ALLSOP AND VERMA JJ.

Brij Behari Gupta, Official Receiver — Appellant

v.

Budh Sen and another — Respondents.

First Appeal No. 108 of 1940, Decided on 11th February 1942, from order of District Judge, Bulandshahr, D/- 2nd March 1940.

Provincial Insolvency Act (1920), S. 28 (2) and (7) and S. 51—Order of adjudication made —Insolvent's property vests in Official Receiver from date of insolvency petition—Official Receiver can challenge sale in execution of decree against insolvent held after insolvency petition — Effect of S. 51 on rights of receiver explained : 1934 A. L. J. 857=('34) 21 A. I. R. 1934 All. 252=148 I. C. 891, *OVERRULED.*

The effect of sub-sections (2) and (7) of S. 28 read together, is that as soon as an order of adjudication is made the whole of the property of the insolvent vests in the receiver with effect from the date of the presentation of the petition in insolvency. The Official Receiver therefore can challenge a sale in execution of a decree against the insolvent held after the date of the petition. The only adverse effects which S. 51 has on the rights of the receiver—in whom the property vests with effect from the date of the presentation of the petition—are, firstly, that if any assets have been realized, in execution of a decree, before the date of the admission of the petition, the receiver will have no right to prevent the decree-holder from getting the benefit of those assets even if such assets are in the hands of the Court and have not been paid over to the decree-holder before the date of the admission by the Insolvency Court of the petition; and, secondly, that an auction purchaser who can

establish good faith can acquire a good title to the property against the receiver: 1934 A. L. J. 857= ('34) 21 A. I. R. 1934 All. 252=148 I. C. 891, *OVERRULED*; ('35) 22 A. I. R. 1935 Cal. 612 and ('38) 25 A. I. R. 1938 Mad 718, *Rel. on*; ('31) 18 A. I. R. 1931 Pat. 70, *Disting.*; ('20) 7 A. I. R. 1920 All. 253, *Expl.* [P 264 C 2]

C. B. Agarwala — for Appellant.

Panna Lal — for Respondents.

VERMA J. — This appeal has arisen out of an application made by the appellant—who is the Official Receiver at Bulandshahr — praying that a sale of certain property in execution of a decree against the insolvent, Bishambar Lal be set aside. The Court below held that the Official Receiver had no locus standi and had no right to challenge the sale. It accordingly dismissed the application. The admitted facts are these. In execution of a money decree, obtained by one Mool Chand in the Court of a Munsif, against Bishambhar Lal, a house belonging to the judgment-debtor was attached. While these proceedings in execution of the decree were pending in the Munsif's Court, the judgment-debtor, Bishambhar Lal, presented on 20th of October 1938, in the Court of the District Judge, a petition praying that he be adjudged an insolvent. The petition was admitted the same day. On 21st December 1938, the house which had been attached in execution of Mool Chand's decree was sold and was purchased by the respondents before us. On 21st January 1939, the District Judge granted the petition in insolvency presented by Bishambar Lal and passed an order of adjudication. He further directed that the Official Receiver should be the receiver of the insolvent's property. On the same day, the auction sale which had taken place on 21st December 1938, came up for confirmation before the Munsif and he passed an order confirming the sale. On 1st June 1939, the Official Receiver presented the application which has given rise to this appeal.

The Court below has stated in its judgment that there are two decisions, one of the Calcutta High Court, *viz.*, A. I. R. 1935 Cal. 612,[1] and the other of the Madras High Court, *viz.*, A.I.R. 1938 Mad. 718[2] which are in favour of the Official Receiver, but that there is a ruling of this Court in 1934 A.L.J. 857,[3] which is against him and that, being bound to follow the ruling of this Court, it had to dismiss the Official Receiver's application. Learned counsel for the appellant has argued that the view taken by the learned single Judge, who decided 1934 A. L. J. 857[3] with regard to the effect of S. 51 on the provisions of S. 28, Provincial Insolvency Act (5 of 1920) was not correct. We have come to the conclusion that this contention is well founded. Under S. 28 (7) an order of adjudication relates back to, and takes effect from the date of the presentation of the petition on which it is made. Under sub-s. (1) of that section the whole of the property of the insolvent vests in the Court, or in the receiver appointed by the Court, as soon as an order of adjudication is made. The result is that the entire property belonging to Bishambhar Lal vested in the Official Receiver with effect from 20th October 1938. Thus the house in question, when it came to be sold a month later, no longer belonged to Bishambhar Lal but vested in the appellant. It is however argued by learned counsel for the respondents that S. 28 is modified by S. 51 of the Act and reliance is placed on an observation to that effect made in the judgment in 1934 A.L.J. 857.[3] With great respect to the learned Judge who decided that case, we are of opinion that the view that S. 28 was modified by S. 51, in the sense in which the learned Judge held that it was modified, cannot be sustained. The effect of sub-ss. (2) and (7) of S. 28, read together, is that the whole of the property of the insolvent vests in the receiver with effect from the date of the presentation of the petition in insolvency. To the same effect were the provisions of S. 16 of the old Act (Act 3 of 1907). But in sub-s.(1) of S. 34 of that Act, which corresponded substantially with S. 51 of the present Act, the date before which the assets had to be realised in order that persons other than the receiver might be entitled to the benefit of the execution was the date of the order of adjudication. This gave rise to certain anomalies and resulted in a conflict of judicial decisions. The Legislature therefore when it came to enact Act 5 of 1920, altered the language of the sub-section and made the date of the admission of the petition the crucial date. Sub-sections (1) and (3) of S. 51 lead to the result that the receiver is in any event entitled to the assets realised after the date of the admission of the petition, and that he is entitled even to the property if he can successfully challenge the good faith of the auction purchaser. The order of the Court below deprives the Official Receiver even of an opportunity to raise the question of the auction purchaser's good faith. This, in our judgment, was not the intention of the Legislature and is not a correct interpretation of the language of S. 51.

Mr. Panna Lal has referred to the case in 42 All. 336.[4] That however was a case which was concerned with the Act of 1907 and whatever views, relevant to the point under consideration, were expressed in that judgment were based on the language of S. 34 (1) of that Act. The case is therefore not applicable to the case before us. The Patna case, 9 Pat. 945,[5] to which reference is made in the judgment in 1934 A. L. J. 857[3] is clearly distinguishable on the facts and does not really deal with the question which arises before us. In our judgment, the view taken in the Calcutta and Madras cases mentioned above was correct. It seems to us that the only adverse effects which S. 51 has on the rights of the receiver — in whom the property vests with effect from the date of the presentation of the petition—are, firstly, that if any assets have been realized, in execution of a decree, before the date of the admission of the petition, the receiver will have no right to prevent the decree-holder from getting the benefit of those assets even if such assets are in the hands of the Court and have not been paid over to the decree-holder before the date of the admission by the insolvency Court of the petition; and, secondly, that an auction purchaser who can establish good faith can acquire a good title to the property against the receiver. For the reasons given above, we allow this appeal, set aside the order of the Court below, and send the case back to that Court for disposal according to law. The appellant is entitled to his costs in

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1. ('35) 22 A.I.R. 1935 Cal. 612: 158 I.C. 574: 62 C.L.J. 79: 39 C.W.N. 1289: 63 Cal. 176, Jogendra Nath v. Jogneshwar Mandal.

2. ('38) 25 A. I. R. 1938 Mad. 718: 181 I. C. 507: (1938) 1 M. L. J. 781, Cheedalla Polamma v. Official Receiver, Nellore.

3. ('34) 21 A. I. R. 1934 All. 252 : 148 I. C. 891: 1934 A.L.J. 857, Kishan Swarup v. Mukandi Lal.

4. ('20) 7 A.I.R. 1920 All. 253: 59 I.C. 67: 42 All. 336 : 18 A.L.J. 287, Din Dayal v. Gur Saran Lal.

5. ('31) 18 A. I. R. 1931 Pat. 70 : 130 I.C. 38 : 9 Pat. 945, Jokhiram Surajmal v. Chouthmal Bhagirath.

this Court. The costs in the Court below will abide the event.

G.N./R.K. *Appeal allowed.*

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COLLISTER AND BAJPAI JJ.

Rev. J. C. Manry — Applicant

v.

Commissioner of Income-tax, Central and United Provinces — Opposite Party.

Misc. Case No. 220 of 1940, Decided on 24th February 1942.

Income-tax Act (1922), Ss. 6, 7 — "Perquisite" — Meaning explained — Allowance given to children of assessee dependent on services of assessee to Missionary Board and to be paid during continuance of his employment—Allowance held to be income of assessee under Ss. 6 and 7.

"Perquisite" means a gain or profit incidentally made from employment in addition to regular salary or wages, especially one of a kind expected or promised. [P 265 C 2; P 266 C 1]

The assessee and his wife were receiving separate allowance for the missionary work they were doing from a missionary Board. Under the rules of the Board, the children of the assessee were given allowances. Such allowances were directly dependent upon service; they were paid on account of and during the continuance of employment and if the missionary who was entitled to receive these allowances on behalf of his or her children elected to quit the service of the Board, he or she was no longer entitled to receive them :

Held that the allowances given to the children should be regarded as falling under the head of "Salaries" as contemplated by S. 6 and S. 7 (1) of the Act : [P 266 C 2]

Held further that the assessee could not claim exemption on the ground that it could not be said that the assessee rather than his wife was liable to pay the tax in respect to these allowances, as the father was the natural guardian of the children and would receive the allowance for the children. [P 266 C 2]

Ram Nama Prasad — for Applicant.

N. P. Asthana — for Opposite Party.

COLLISTER J. — This is a reference under S. 66 (2), Income-tax Act. The assessee is the Rev. J. C. Manry and the year of assessment is 1936-37. The assessee belongs to the Board of Foreign Missions of the Presbyterian Church of the United States of America; and so too does his wife. They had at the material time four children, two boys and two girls. The assessee and his wife each receive a separate salary and a house allowance from the Board, and the Board also pays an allowance in respect to each of the four children. Upto and including the year 1935-36 the salaries of the assessee and his wife and the allowances on account of the children were lumped together by the income-tax authorities and were assessed jointly to tax. This was done, as stated by the Commissioner of Income-tax in his statement of the case, on the assumption that the wife's salary and the allowances for the children were "additional emoluments paid to the assessee to meet the additional cost of married life and education of his children." For the year 1936-37 the assessee returned an income of Rs. 2318 only, which represented his own salary and house allowance; he claimed that his wife should be separately assessed on her salary and that the allowances for the children were exempt from taxation on the ground that they were personal allowances to the children and were not perquisites within the meaning of S. 7 of the Act either of the assessee or of his wife. The Income-tax Officer repelled this claim and assessed the assessee upon a total income of Rs. 7712, which included the salary and the house allowance of the assessee's wife and the allowances for the children.

Against this assessment an appeal was preferred and the Assistant Commissioner allowed the assessee's claim for the exclusion of his wife's salary on the ground that it was the latter's own income; but he rejected the claim for exemption in respect to the allowances for the children on the ground that they were paid by the Board to meet the additional cost of maintenance and education of the children and were in the nature of perquisites taxable in the hands of the assessee. Thereafter the assessee preferred an application to the Commissioner of Income-tax for the exercise of his revisionary powers under S. 33 or alternatively for a reference to this Court under S. 66 (2) of the Act. The Commissioner declined to exercise his powers of revision under S. 33 of the Act, but he has referred the following question of law to this Court :

"Whether on the facts of the case the sum of Rs. 3078 paid by the board for the maintenance and education of the assessee's children is the income, profits and gains of the assessee within the meaning of S. 3 of the Act, and taxable in his hands ?"

The Commissioner is of opinion that the answer should be in the affirmative. In stating his opinion he says :

"It will be observed that the allowance commences from the first day of the month in which the child is born and it is obvious that it is the parent to whom the allowance is payable."

Further on he says :

"The children's allowances become payable only by reason of the employment of the parent on missionary work by the board and it is clearly stated in the paragraph quoted" (by this is meant para. 144 of the Manual of the Board of Foreign Missions of the Presbyterian Church in the U. S. A., revised edition of 1933) "that the allowances terminate when the missionary leaves the service of the Board. The payment of the allowances is thus entirely dependent on the missionary's service with the Board, and, therefore, in my opinion the allowances constitute "perquisites or profits" to the missionary parent within the meaning of S. 7 (1) of the Act, and are as such taxable as salary in the hands of the parent."

Then the Commissioner says :

"There is a further question as to whether the allowances should be treated as part of the salary of the father or the mother or of both. This question has only arisen because Mrs. Manry also happens to be employed on missionary work by the Board. But the allowances would have been payable even if Mrs. Manry was not so employed and as it is the father who is primarily responsible for the maintenance and education of the children, I am of opinion that the allowances should be treated as part of the salary of the assessee."

In our opinion the Commissioner's view is correct. "Perquisite" is defined inter alia in Webster's Dictionary as "a gain or profit incidentally

made from employment in addition to regular salary or wages, especially one of a kind expected or promised . . . . . ." In Murray's English Dictionary it is defined as "any casual emolument, fee or profit attached to an office or position in addition to salary or wages." What we have to consider is whether the allowances which are paid by the Board for the children of the assessee are or are not perquisites or profits in addition to his salary and whether they fall under the head of "salaries" under Ss. 6 and 7 (1), Income-tax Act. Mr. Ramnama Prasad, who has vigorously argued this reference on behalf of the assessee, pleads in the first place that the allowances belong to the children themselves and form no part of the income, profits or gains of either of the parents. Alternatively he contends that if the allowances do form part of such income, profits or gains, the assessee and his wife are equally entitled to these allowances and it is impossible to say that they form part of the income, profits and gains of the one rather than of the other; and in these circumstances the assessee is not liable to be taxed in respect to them. Paragraph 144 of the manual has been re-produced by the Commissioner of Income-tax and it reads as follows :

"The Board makes certain provisions towards the increased costs of the children of missionary parents by an allowance of 200 dollars per year for each child under ten years of age, 300 dollars for the next six years, and 420 dollars for the following five years, the final increase being only for those in school or college. No allowances will be paid after 18 years of age and if the child becomes self-supporting, has married or has left school for other than health reasons. All allowances cease at the end of the 21st year, or one month after a child's death at an early age. They are usually suspended during furlough extensions (Arts. 38, 196). The allowances are computed in full months from the first day of the month in which the birth occurs, increases to begin from corresponding dates. Allowances for children taken to the field by new missionaries begin with the departure from home on the outward journey. All children's allowances terminate when the missionary leaves the service of the Board, save that, in co-operation with the pension Board, the allowances of children whose father has died in active service are continued as though the father were continuing in service. The Board cannot provide allowances for travel for adopted children, nor advance travel funds for them as a loan."

Upon the plain language of this paragraph it would appear that these allowances are paid to missionary parents by reason of increased cost which they have to incur on account of their children. The rule provides that when the missionary leaves the service of the Board, these allowances shall terminate — except where the father has died in harness, so to speak, in which case the allowances continue (until the age of 21) as a sort of pension. This shows that the allowances are directly dependent upon service; they are paid on account of and during the continuance of employment and if the missionary who is entitled to receive these allowances on behalf of his or her children elects to quit the service of the Board, he or she is no longer entitled to receive them. There is before us an extract from an affidavit which was sworn by the Treasurer of the Board on 18th August 1936, in which he says :

" The allowances to children of missionaries of the Board of Foreign Missions of the Presbyterian Church in the United States of America are in no sense or manner part of the salaries or remuneration of their parents."

We have no doubt that the Treasurer made this statement in good faith and it presumably represents his interpretation of the rules ; but we find it difficult to reconcile his statement with the relevant portion of the Manual. Chapter 7 is headed "Salaries, Allowances and Furloughs" and it is divided into seven main headings marked A B C D E F G. Heading A is "Salaries" and it is under this very heading that we find the provisions in respect to allowances for children, which indicates that, whatever opinion the Treasurer may have held, the Board itself regarded these allowances as forming part of the salary of the missionary concerned. In all the circumstances we are of opinion that these allowances must be regarded as falling under the head of "Salaries" as contemplated by S. 6 and S. 7 (1) of the Act. This finding does not quite conclude the matter, for learned counsel for the assessee further claims exemption on the ground that it cannot be said that the assessee rather than his wife is liable to pay the tax in respect to these allowances. We do not think that there is any real force in this contention. Under English law the father is the natural guardian of his children and it is not suggested before us that the American law is in any way different. The assessee in his letter dated 5th May 1938 has by clear implication admitted that it was he himself who received these allowances, and this is only what one would expect. The allowances are for the maintenance and education of the children and it is naturally the father who would receive them. He certainly goes on to say :

" From the age of 16 my son Robert himself received his own allowance each month and was responsible for its expenditure himself. My second son, John, has just reached the age of 16 on 26th March 1938 and has begun to receive his own allowance each month and to spend it himself."

We accept this statement of the assessee as correct : but he does not say from whom his two sons have been receiving the allowance, whether from himself or from the Treasurer. Assuming that it is the Treasurer who has been paying these allowances to Robert and John, there is nothing in the assessee's letter to indicate whether this was done by the Treasurer on his own account or at the instance of the assessee; and we find it difficult to believe that the Board can ever have contemplated that these allowances should be paid direct to the minor children. They may have been nominally received by these two boys, but in the circumstances the actual recipient must be deemed to have been their father, the assessee. In our opinion, the allowances must be treated as an addition to the assessee's income under S. 7 (1) of the Act and we therefore answer the reference in the affirmative. The assessee will pay the costs of this reference. We fix the Advocate-General's fee at Rs. 200. A copy of our judgment will be sent under the signature of the Registrar and the seal of the Court to the Commissioner of Income-tax.

K.S./R.K. *Reference answered.*

a **A. I. R. (29) 1942 Allahabad 267 (1)**

IQBAL AHMAD C. J. AND DAR J.

Mt. Imtiazun-nissa — Plaintiff — Appellant

v.

Abdul Qasim alias Mohd. Jan and others — Defendants — Respondents.

Second Appeal No. 1038 of 1940, Decided on 12th February 1942, from decision of Civil Judge, Moradabad, D/- 29th February 1940.

Mortgage—*A* and *N* owning one-third and two-third share in house—*A* mortgaging his share to *T*—Suit by *N* against *A* for partition of his share — Specific portion of house allotted to *A* and another portion to *N*—*T* obtaining decree on her b **mortgage, putting to sale *A*'s one-third share in entire house for sale and purchasing it herself —Principle of substituted security held not applicable — Still *T* held entitled to possession of specific portion of house allotted to *A* by partition decree.**

A had a one-third share and *N* a two-third share in a house. After *A* had mortgaged his one-third share to *T*, *N* brought a suit against *A* for partition of his two-third share, and as a result of the decree in that suit a specific portion of the house was allotted to *A* and another portion of the house was allotted to *N*. After the decree in the partition suit *T* put her mortgage into suit and obtained a decree. The decree was for sale of one-third share of *A* in the entire house and not for a sale of the specific portion of the house that, as a result of the partition c decree, was allotted to *A*. The one-third share of *A* in the entire house was put to sale and purchased by *T* who in execution prayed for possession of that portion of the house that was, as a result of the partition, given to *A* :

Held that the mortgage in favour of *T* having merged into the decree ceased to exist and as such the principle of substituted security was not applicable to the case, but since *A* had mortgaged his entire one-third share in the house to *T*, the share allotted to *A* on partition represented the security which *A* had given to *T* and therefore as a purchaser of *A*'s share in the entire house, *T* was entitled to possession of that portion of the house that was allotted to *A*. [P 267 C 2]

T. P. Act —

('36) Mulla, Page 199, Notes 1 and 3.

d ('34) Mitra, Page 166, N. 204; Page 167, N. 205.

M. A. Aziz — for Appellant.

S. B. Johari — for Respondents.

IQBAL AHMAD C. J. — This is a plaintiff's appeal arising out of a suit for possession over a specific portion of a house. The facts as found by the lower appellate Court are as follows : The house in dispute belonged to two persons named Abdul Qasim and Nabi Bux. Abdul Qasim had a one-third share and Nabi Bux had a two-third share in the house in dispute. On 20th January 1913, Abdul Qasim mortgaged by means of a simple mortgage his one-third share in the house to one Mt. Imtiaz-un-nissa. Thereafter, in 1914, Nabi Bux brought a suit against Abdul Qasim for partition of his two-third share. Mt. Imtiazun-nissa, the mortgagee, applied in that suit to be made a party, but her application was dismissed. The partition suit was ultimately decided and as a result of the decree in that suit a specific portion of the house was allotted to Abdul Qasim and another portion of the house e was allotted to Nabi Bux. After the decree in the partition suit, Mt. Imtiazun-nissa put her mortgage into suit and obtained a decree. The decree was for sale of one-third share of Abdul Qasim in the entire house and not for a sale of the specific portion of the house that, as a result of the partition decree, was allotted to Abdul Qasim. The one-third share of Abdul Qasim in the entire house was put to sale and purchased by Mt. Imtiazun-nissa. In execution Mt. Imtiazun-nissa prayed for possession of that portion of the house that was, as a result of the partition, given to Abdul Qasim. Abdul Qasim successfully objected in the execution department and Mt. Imtiazun-nissa's application for delivery of possession was dismissed. She then brought a suit giving rise to the present appeal for possession of the specific portion of the house that has been allotted to Abdul Qasim. The trial Court decreed f the suit but the lower appellate Court reversed the decree of the trial Court.

In our judgment, the decree of the trial Court was perfectly correct and ought to be restored. It cannot be disputed that the specific share in the house that was allotted to Abdul Qasim was in lieu of his one-third share in the entire house. In other words, the share allotted to Abdul Qasim represented his share in the entire house. Abdul Qasim had, as already stated, mortgaged his entire one-third share in the house to Mt. Imtiazun-nissa. The share allotted to Abdul Qasim on partition, therefore, represents the security which Abdul Qasim had given to Mt. Imtiazun-nissa. It follows that, as a purchaser of Abdul Qasim's share in the entire house, Mt. Imtiazun-nissa is entitled to possession of that portion of the house that was allotted to Abdul Qasim by the parti- g tion decree. It is true that the mortgage in favour of Mt. Imtiazun-nissa having merged into the decree ceased to exist and as such the principle of substituted security may not be applicable to the case, but there can be no doubt that Mt. Imtiazun-nissa is asking for no more than what was in substance given to her by the decreee for sale and what in substance she had purchased at the auction sale. As a result of the decree for sale and execution of that decree, Abdul Qazim lost his entire rights and interests in the house in suit and those rights and interests vested in Mt. Imtiazun-nissa. Mt. Imtiazun-nissa is therefore entitled to be put in possession of that portion of the house which was allotted to Abdul Qasim in lieu of his one-third share in the entire house. We accordingly allow this appeal, set aside the decree of the lower appellate Court and restore the decree of the trial Court with costs in h all Courts. This decree will not operate as against Bishambhar Nath, respondent 3, or his legal representatives, inasmuch as Bishambhar Nath died during the pendency of the appeal in this Court and his legal representatives were not brought on the record.

G.N./R.K. *Appeal allowed.*

**** A. I. R. (29) 1942 Allahabad 267 (2)**

COLLISTER AND ALLSOP JJ.

Bhagwati Saran Singh and others — Defendants — Appellants

v.

Kumar Parmeshwari Nandan Singh and others—Plaintiffs—Respondents.

First Appeal Nos. 66 and 14 of 1938, Decided on 26th February 1942, from decision of Addl. Civil Judge, Benares, D/- 25th November 1937.

** **(a) Hindu law—Partition—Lunatic cannot claim share—He however succeeds by survivorship if sole coparcener — Even manager or guardian cannot claim partition for him—Sane brother can however disclaim or renounce his claims on lunatic's share.**

A person who has become a lunatic is debarred from claiming his share by partition and is not entitled to claim a share when the coparcenary estate is partitioned ; but his right is not extinguished, and he succeeds by survivorship if he finds himself the last coparcener. A lunatic cannot claim his share even through a guardian or manager as a guardian or manager cannot obtain for him what he is not qualified to obtain for himself under Hindu law : *Case law discussed.* [P 277 C 1,2]

Hence decrees obtained by the manager of a lunatic coparcener against other coparceners do not operate as a partition on behalf of the lunatic, as the lunatic was debarred from participation by his personal law. There is nothing to prohibit a lunatic coparcener from receiving property in lieu of maintenance and he can receive what would have amounted to his share if he were under no disability, if the other coparcener or coparceners choose to let him have it, e. g., the sane brother disclaiming or renouncing his claim over lunatic's share.

[P 278 C 1 ; P 282 C 1]

[Acts and conduct held manifested an intention on the part of the sane brother to renounce his title in favour of his brother in respect to the moiety of the estate in which his brother would have had an enjoyable interest if not under a disability, and it also manifests an intention to disrupt the status.]

[P 285 C 1]

Per *Allsop J.* — Where exclusion depends upon unsoundness of mind it is clear that there can be no absolute criterion by which to judge whether a person is liable to be excluded. In each case it would be necessary to decide whether unsoundness of mind was of such a character as would justify exclusion. It is a question of degree and the members of a family who were of sound mind at the time of a partition might well in some circumstances hesitate whether the person of unsound mind was in such a condition that exclusion was justifiable. It would surely not be right, if they gave him a share, afterwards to allow them to resile from their position and to allege that the share should not have been given and that the partition was liable to be avoided. There might also be cases where the members of sound mind might consider it more convenient to allow the person of unsound mind a share rather than to render themselves liable for his maintenance after the partition. Therefore, it cannot be laid down as an absolute rule that there can be no partition between a brother of sound mind and one of unsound mind. [P 292 C 2]

Hindu law —

('40) Mulla, Page 103 Pts. (k), (m).

('38) Gour, Page 600 Para. 1489.

(b) Lunacy Act (1858) — Whether manager can be appointed of lunatic coparcener's interest *(Quære).*

Whether the manager of a lunatic can be legally appointed in respect to the lunatic's interest in the coparcenary property : *Case law discussed.*

[P 278 C 1]

(c) Lunacy Act (1858), S. 9—Manager under, cannot interfere with personal law of Hindu lunatic coparcener.

The Legislature never intended that a manager appointed under S. 9 of the Act should be competent to interfere with the personal law of a lunatic member of a joint Hindu family. [P 278 C 1]

(d) Hindu law—Partition—Lunatic — Person held insane.

A person who was found by the Court as incapable of protecting his own interests although capable of understanding simple words of command was held to have been insane person in the sense that he was debarred from participation in the ancestral estate.

[P 278 C 2]

(e) Hindu law—Partition—Sane brother can separate from insane brother.

There is no rule of Hindu law which precludes a sane person from separating himself from his insane brother. [P 282 C 1]

(f) Hindu law—Partition — Auction sale of share of coparcener whether effects severance *(Quære).*

Whether, when the share of one coparcener has been sold at auction, there is or is not a severance of status between himself and the other coparceners.

[P 285 C 2]

(g) U. P. Land Revenue Act (3 of 1901), S. 233K—Partition complete—Question of title if could be raised in partition proceedings cannot be raised in civil Courts.

If a question of title affecting the partition which might have been raised in the partition proceedings is not so raised and the partition is completed S. 233 (k) debars parties to the partition from raising the question subsequently in a civil Court : ('38) 25 A.I.R. 1938 P. C. 210, *Foll.*; *Case law discussed.* [P 287 C 1]

C. P. C.—

('40) Chitaley, S. 11 N. 77 Pt. 1.

('41) Mulla, Page 75 Pt. (e).

(h) Res judicata — Lunatic's claim decreed against brother's creditors—Decision operates as res judicata with respect to whole property.

Where the lunatic's claim for a declaration of his proprietary rights and for possession of his half share is decreed against the creditors of the other brother, such decision operates as res judicata even in respect to the lunatic's half share in the whole of what had been the joint ancestral estate : ('22) 9 A.I.R. 1922 P. C. 80, *Rel. on.* [P 287 C 1,2]

(i) Limitation Act (1908), Arts. 127 and 144—Open and continuous exclusion by lunatic brother of his joint sane brother — Claim by sane brother—Art. 127 applies—Lunatic brother dying — Court of Wards retaining possession for his widow — Art. 144 applies.

The exclusion or ouster by a lunatic brother of his joint sane brother if open and continuous bars the sane brother's claim under Art. 127. If after the death of the lunatic brother, the Court of Wards openly retains possession on behalf of the widow then Art. 144 applies : 8 Bom. 585, *Expl., and Disting.* [P 288 C 1, 2]

Limitation Act—

('42) Chitaley, Art. 127, N. 2 Pt. 1; Art. 142, N. 71*a* Pt. 2.

('38) Rustomji, Page 1095, Pt. 2.

* **(j) Hindu law—Marriage—Lunatic — Marriage of, is not invalid if solemnized.**

The marriage of Hindu lunatic, though improper and immoral and discouraged by Hindu law, is not invalid if duly solemnized. Whatever injunction against such a marriage may be read into the ancient commentaries, it would be of a directory rather than of a mandatory character: *Case law discussed.*

[P 291 C 2]

Hindu law—
('40) Mulla, Page 499 Pt. (i).
('38) Gour, Page 114 Pt. 5.

(k) Hindu law—Partition — Member of joint family cannot be deprived of his right to claim share — Division can be made for convenience of enjoyment without intention of severing title —Intention can be gathered from conduct.

A member of a joint Hindu family who is ordinarily entitled to disrupt the family at will should not be deprived of that right merely because the result would be that he could take the whole family property as a result of the disruption and leave to the other member only a right to be maintained. It is possible for members of a joint family to divide the property up among themselves for the purpose of more convenient enjoyment or management without the intention of making a partition which would sever the title so that some might be full proprietors of certain of the original properties and some absolute proprietors of others. That would, of course, be a matter of intention, but the intention can only be gathered from the conduct of the members of the family. No Court can consider alleged mental reservations. [P 293 C 1]

Hindu law—
('40) Mulla, Page 391, S. 322.
('38) Gour, Page 588, Para. 1464 ; Page 589 Para. 1466.

(l) Evidence — Judicial notice.

Courts can take judicial cognizance of the fact that the Court of Wards is much concerned with the welfare of its wards. [P 294 C 1]

(m) Civil P. C. (1908), O. 32—Applicability— Plaintiff not competent to sue.

Order 32 merely contains procedural rules. These rules are applicable to a plaintiff who is competent to sue, but they can have no application where he is not so competent under the substantive law. [P 277 C 2]

C. P. C. —
('40) Chitaley, O. 32 Gen. Note 1.

Sir Tej Bahadur Sapru, N. P. Asthana, T. N. Sapru, B. Malik, G. S. Pathak, Ambika Prasad, K. N. Gupta, J. K. Srivastava, Ajudhaya Nath, C. S. Saran, S. K. Verma, Krishna Shankar, Triloki Nath Madan and J. N. Chatterji — for Appellants.

P. L. Banerji, K. N. Katju, P. R. Das, Harnandan Prasad, R. K. Malaviya, H. P. Sen, S. N. Verma and S. N. Katju — for Respondents.

COLLISTER J.—This is a defendants' appeal. The suit was for possession of a house at Allahabad, an haveli at Anapur, some house sites in the city of Benares, some property endowed to defendant 5 and a big landed estate comprising many villages in several districts. The headquarters of the estate are at Anapur in the District of Allahabad and its annual income is said to be Rs. 75,920, and mesne profits at this rate are also claimed. The property is known as the Anapur Estate. There is a pedigree in the lower Court's judgment at page 152 of our paper-book which gives the date of birth and the date of death of various members of the family, and this pedigree is admitted by the parties. It will be seen that one Chintaman Singh was the common ancestor of the plaintiffs and defendants 1, 2 and 7. Defendants 3 and 4 are nephews of Babuain Jodha Kunwar, the wife of Gauri Shanker Prasad Singh. As will shortly be seen, the latter—who died in 1902—figures prominently in the dispute. Defendant 5 is a deity and a Pathshala. Defendant 6 is a lessee from Babuain Jodha Kunwar ; but he did not put in an appearance. The principal defendants are 1 and 2, namely Bhagwati Saran Singh and his cousin Bindeshwari Saran Singh. They and their nephew, defendant 7, are descended from one of the three sons of Chintaman Singh, a man named Bishun Dat Singh. A joint written statement was put in by defendants 1, 2 and 5. Another written statement was filed by defendants 3 and 4, Ram Subhag Singh and Sukhdeo Narain Singh, who, as I have already said, are the nephews of Babuain Jodha Kunwar, now deceased. They were represented by counsel at the trial of the suit, but he apparently took no part in the proceedings. They have nevertheless joined in this appeal. There is on the record a third written statement on behalf of defendant 7 but he did not contest the suit and has not appealed.

The plaintiffs are Parmeshwari Nandan Singh and Audeshwari Nandan Singh. They are the sons of Babuain Raj Kishori Kunwar and are directly descended from Deoki Nandan Singh, who was one of the three sons of Chintaman Singh and was a brother of Bishun Dat Singh, the ancestor of defendants 1, 2 and 7. The allegations in the plaint were to the following effect: The property in dispute was acquired by Deoki Nandan Singh. In course of time, it was inherited by his son and subsequently it passed by survivorship to his two grandsons, Ram Ratan Singh and Ram Parsan Singh. Ram Ratan Singh died on 31st December 1846 leaving two sons, Har Shanker Prasad Singh and Gauri Shankar Prasad Singh. Har Shanker Prasad Singh was born in 1835 and died on 16th June 1903. Gauri Shankar Prasad Singh was born on 2nd February 1842 and died in August 1902. Gauri Shankar Prasad Singh was born deaf, dumb and blind and was a congenital lunatic, and subsequently it became known that he was also congenitally impotent. After the death of Ram Ratan Singh the property passed by survivorship to Har Shankar Prasad Singh and his uncle Ram Parsan Singh. Gauri Shankar Prasad Singh, owing to his disability, was only entitled under the Hindu law to maintenance and protection. Ram Parsan Singh died on 29th January 1854 leaving a widow, Babuain Narain Kunwar. Thus Har Shankar Prasad Singh became the exclusive owner of the property, with an obligation to maintain his brother and his aunt, namely Gauri Shankar Prasad Singh and Babuain Narain Kunwar.

At the date of Ram Parsan Singh's death in 1854 no debts were due from the family ; but Har Shankar Prasad Singh was improvident, extravagant and licentious and he began to borrow money right and left and soon fell very heavily into debt. In course of time, several decrees for money and decrees for sale of property were obtained against him by his creditors and he then devised a plan for saving half the property. He gave it out that Gauri Shankar Prasad Singh had not been born deaf, dumb, blind and an idiot and he schemed to save a moiety of the property as belonging to Gauri Shanker Prasad Singh. At his instigation Babuain Narain Kunwar on 23rd June 1874 applied to the District Judge of Allahabad under Act 35 of 1858. She stated in her application that Gauri Shanker Singh was at that time a lunatic and incapable of managing his property and that his brother was squandering it, and she accordingly prayed that she be appointed the guardian of Gauri Shankar Prasad Singh and that a manager of his property be also appointed. This application was not opposed by Har Shankar Prasad Singh and was allowed on 14th August 1874. Babuain Narain Kunwar was appointed guardian and her nephew, a man named Dalthaman Singh,

was appointed manager of Gauri Shankar Prasad Singh's property. Thereafter, Dalthaman Singh instituted several suits on behalf of Gauri Shankar Prasad Singh against Har Shankar Prasad Singh and the latter's creditors and transferees ; and all this was done at the instigation of Har Shankar Prasad Singh. It was alleged in these suits that Gauri Shankar Prasad Singh had become a lunatic at the age of 16 and that Har Shankar Prasad Singh's transfers were without legal necessity and were not binding as against Gauri Shankar Prasad Singh's half share of the property. It was held by the Court that Gauri Shankar Prasad Singh was not a congenital idiot and that his moiety share in the property was not liable for sale in satisfaction of the debts due from Har Shankar Prasad Singh.

Subsequently the District Judge, acting under S. 326 of Act 10 of 1877—which was the Code of Civil Procedure then in force — placed a portion of Har Shankar Prasad Singh's share of the estate under the management of the Collector for the liquidation of Har Shankar Prasad Singh's debts. After the death of Babuain Narain Kunwar which took place on some date prior to 1880—and of Dalthaman Singh, an application was preferred by Babuain Jodha Kunwar at the instigation of Har Shankar Prasad Singh for her appointment as guardian of her husband, Gauri Shankar Prasad Singh. At the same time, Har Shankar Prasad Singh exerted himself to have the whole estate placed under the Court of Wards; and in this he succeeded. Thereafter, at his instigation, the application which had been preferred by Babuain Jodha Kunwar was struck off in the Court of the District Judge. Thereafter, again at the instance of Har Shankar Prasad Singh, an application was preferred by Babuain Jodha Kunwar to the Court of Wards, praying that the debts due to Har Shankar Prasad Singh's creditors be paid off from the profits of the whole estate. This application was not allowed; but some of the properties which had been sold or were about to be sold were re-acquired from the income of the whole estate.

On 12th June 1889, Har Shankar Prasad Singh took in adoption Gopal Saran Singh, who was a member of Bishun Dat Singh's branch of the family, as will appear from the pedigree. Har Shankar Prasad Singh was still heavily in debt and accordingly on 19th June 1897, he executed a sale deed in respect to 79 villages — which represented the property remaining in his possession—in favour of Gauri Shankar Prasad Singh for a sum of rupees 2,12,521. There was, however, no transfer of this property; nor was any intended. Thus Har Shankar Prasad Singh's debts were all paid up and he retained possession of these 79 villages. All this was done "out of policy" and with the assistance of the Court of Wards. Gauri Shankar Prasad Singh died in 1902, and Har Shankar Prasad Singh remained as before the sole and exclusive owner of the whole estate, or alternatively he succeeded to Gauri Shankar Prasad Singh's interest by survivorship, but "out of policy" and for the sake of consolation he allowed Babuain Jodha Kunwar's name to be recorded in the village papers; but she continued to live with Har Shankar Prasad Singh and was maintained by him and she acquired no right in the property as the widow of Gauri Shankar Prasad Singh for the reason that Gauri Shankar Prasad Singh himself, owing to his disability, had no title in the property. By an amendment of the plaint dated 18th May 1937, it was pleaded that, even if the Court were to find that Gauri Shankar Prasad Singh died separate and possessed of property his inheritance did not devolve upon Babuain Jodha Kunwar, but upon Har Shankar Prasad Singh, for the reason that Gauri Shankar Prasad Singh was insane and impotent and therefore even if there was a marriage in fact, there was no marriage as recognized by Hindu law.

The plaint then goes on to state as follows : Har Shankar Prasad Singh died on 16th June 1903 and was succeeded by his adopted son, Gopal Saran Singh but Gopal Saran Singh himself died on 24th November 1903. The Court of Wards, however, continued to hold possession of the estate under S. 42, Court of Wards Act (3 of 1899). Babuain Shiam Dulari Kunwar, the wife of Gopal Saran Singh, gave birth to a posthumous son on 15th May 1904, but he died on 6th August 1905, and Babuain Shiam Dulari Kunwar then acquired a life estate in the property. Gopal Saran Singh left a daughter, Babuain Raj Kishori Kunwar. She was given in marriage not by Babuain Shiam Dulari Kunwar, who was overwhelmed with grief and had religious inclinations, but by Babuain Jodha Kunwar, and the aforesaid daughter gave birth to two sons who are the plaintiffs to the suit. Babuain Raj Kishori Kunwar died on 10th July 1924 and the plaintiffs, being sister's sons of the posthumous son of Gopal Saran Singh, are entitled to the estate. Meanwhile, on 1st October 1920 the estate was released by the Court of Wards. Thereafter defendants 1 to 4 acquired influence over Babuain Shiam Dulari Kunwar and Babuain Jodha Kunwar and obtained inter alia a tamliknama on 3rd September 1923 from Babuain Jodha Kunwar, which she had no right to execute and which contained a false recital that Gauri Shankar Prasad Singh had been the exclusive owner of the estate, that the executant had a limited interest therein as a Hindu widow and that the aforesaid defendants were entitled to succeed after the death of the executant. Thereafter defendants 1 and 2 had other invalid conveyances executed by Mt. Jodha Kunwar which were beneficial to themselves. Babuain Jodha Kunwar died on 16th August 1932 and thereafter Babuain Shiam Dulari Kunwar remained in possession. The latter died on 13th December 1935 at Benares in a house known as Deoki Nandan's haveli; and thereafter the plaintiffs entered into possession of it as owners. The rest of the property is in the possession of the defendants. The above is, I think, a fair summary of the allegations in the plaint. Defendants 1, 2 and 5 filed a joint written statement. In it there is a denial of all the allegations in the plaint which these defendants are interested in denying. Their case, as it appears in the written statement and as amplified at the trial, may be thus summarised :

Gauri Shankar Prasad Singh was not born deaf, dumb, blind and an idiot ; nor was he congenitally impotent. He was therefore not disqualified under the Hindu law and he acquired at birth an interest in the family estate as a coparcener. This fact has been found in the suits which were instituted by Dalthaman Singh and the matter is therefore res judicata. Har Shankar Prasad Singh has continuously admitted Gauri Shankar Prasad Singh's interest in the estate, except for one occasion in 1872 when he chose to deny this fact. The plaintiffs are bound by the conduct of Har Shankar Prasad Singh whom they now represent. Har Shankar Prasad Singh, being a man of profligate habits, began to waste the property and accordingly in 1874 Babuain Narain Kunwar applied to be appointed guardian of Gauri Shankar Prasad Singh on the ground that the latter had become a lunatic at the age of 16. A certificate was granted to Babuain Narain Kunwar, and

Dalthaman Singh was appointed manager under the Lunacy Act (Act 35 of 1858). These proceedings amounted to an unequivocal intention to separate on behalf of Gauri Shankar Prasad Singh, and this was accepted by the Court. There was thus a separation between the two brothers and ever since they have been in separate possession of their respective shares of the estate. Thereafter, Dalthaman Singh instituted suits on behalf of Gauri Shankar Prasad Singh against Har Shankar Prasad Singh and his creditors and transferees in order to protect Gauri Shankar Prasad Singh's share of the properties which had been alienated. The suits were defended by the creditors on the ground that Gauri Shankar Prasad Singh was congenitally deaf, dumb, blind and was insane and was therefore excluded from any title to the property; but the suits were decreed in the trial Court and in appeal.

There was no such "scheme" on the part of Har Shankar Prasad Singh as alleged in the plaint; but even assuming that it was at his instance that applications were preferred by Mt. Narain Kunwar and Mt. Jodha Kunwar and suits were instituted by Dalthaman Singh, the plaintiffs cannot take advantage of the fraud practised by their predecessor-in-interest. On the death of Mt. Narain Kunwar the share of Gauri Shankar Prasad Singh was taken over by the Court of Wards in 1881, while the share of Har Shankar Prasad Singh was managed by the Collector under the provisions of the Civil Procedure Code with a view to effect the liquidation of the owner's debts. In the years 1882-84 there was a perfect partition of villages forming part of the original joint estate, and 10 years later there were other partitions. This is further evidence of severance.

The shares of Har Shankar Prasad Singh in the ancestral properties were sold at auction and were purchased either by his creditors or else by the Court of Wards on behalf of Gauri Shankar Prasad Singh. In 1897 the Court of Wards purchased on behalf of Gauri Shankar Prasad Singh the remaining property of Har Shankar Prasad Singh (i. e., the 79 villages already referred to). The sale deed was executed not only by Har Shankar Prasad Singh, but also by his adopted son Gopal Saran Singh. It was a real and bona fide transaction and was duly effectuated. The title of Har Shankar Prasad Singh in the sold property was thereby extinguished and vested in Gauri Shankar Prasad Singh, who thus became the exclusive owner. This and previous acts and transactions are proof of separation.

After Gauri Shankar Prasad Singh's death his widow, Babuain Jodha Kunwar, succeeded to the estate as a Hindu widow with limited interest and was so recognized by the Court of Wards, which continued to manage the property in her name and on her behalf. Babuain Jodha Kunwar was thereafter in adverse and proprietary possession through the Court of Wards; and after the estate had been released in 1920 she entered into actual possession and this continued until her death in 1932. The suit is barred by limitation. During her lifetime Babuain Jodha Kunwar executed five documents in 1923. These were: (1) A tamliknama in favour of defendants 1, 2 and 5. (2) A wakfnama in favour of defendant 5. (3) A deed of gift in favour of the plaintiffs' mother. (4) A deed of transfer in favour of Babuain Shiam Dulari Kunwar. (5) A deed of gift in favour of two nephews, defendants 3 and 4. Under the tamliknama Babuain Jodh Kunwar recognized the right of these defendants as nearest reversioners; and as regards the deed of gift in favour of Babuain Kishori Kunwar, the plaintiffs have now inherited the gifted property from their mother and are in possession.

After the death of Babuain Jodha Kunwar in 1932 these defendants succeeded to the estate and rightfully entered into possession. The plaintiffs are no heirs to the estate of Gauri Prasad Singh and have no title to it as against the defendants. Finally it is alleged that Babuain Shiam Dulari Kunwar, the grandmother of the plaintiffs, occupied a portion of the house at Benares with the consent and permission of Babuain Jodha Kunwar; but these defendants were in actual possession of the remainder of the house after the death of Babuain Jodha Kunwar. On the occasion of Babuain Shiam Dulari Kunwar's death however the plaintiffs forcibly dispossessed these defendants from the aforesaid house in December 1935 and the defendants have instituted a separate suit for possession. I may mention that the decree in the aforesaid suit is the subject of appeal in F. A. 14 of 1938 in which judgment is being delivered by us today. Before leaving this written statement, it may be noted that there is also a denial of the allegations in para. 20 of the plaint which are to the effect that Babuain Shiam Dulari Kunwar gave birth to a posthumous son, who thereupon became owner of the property, but that he died shortly afterwards and his mother inherited the property with a life interest. The denial of these allegations will explain why there is no mention of the posthumous son in the pedigree set out in the judgment and admitted by the parties but the fact of the birth of a posthumous son appears in the typed pedigree which has been supplied to us by Sir Tej Bahadur Sapru on behalf of these defendants. There is no longer any controversy on this point. The plaintiffs are the sister's sons of the son born posthumously to Gopal Saran Singh. Defendants 3 and 4 pleaded that Gauri Shankar Prasad Singh was in no way disqualified under the Hindu law, that the suit was barred by the rule of res judicata, that the two brothers were separate in all respects and the estate passed to Mt. Jodha Kunwar as a Hindu widow, that the suit was barred by limitation and that the plaintiffs are estopped from challenging the transfers made in 1923, especially the deed of gift in favour of their own mother, which they have taken care not to mention in the plaint. This latter plea is also implied in para. 13 of the written statement of defendants 1 and 2. As I have already said, defendant 7 also filed a written statement but he has not joined in this appeal and it is therefore unnecessary to set out his allegations. Defendant 6 put in no appearance at all.

The main findings of the learned Judge are as follows: (1) Mt. Shiam Dulari Kunwar, the widow of Gopal Saran Singh, gave birth to a posthumous child, who died in the following year. (2) The judgments in the various suits which were instituted by Dalthaman Singh in 1876-1877 operate as res judicata whereby the plaintiffs are estopped from pleading that Gauri Shankar Prasad Singh was excluded from succession by reason of congenital disability. The evidence, moreover, proves that Gauri Shankar Prasad Singh suffered from no congenital disability and that he and his brother were joint owners of the ancestral estate at the death of their father and uncle. Lunacy supervened at a later date. (3) The marriage of Gauri Shankar Prasad Singh with Babuain Jodha Kunwar was performed according to Hindu rites and was a valid marriage, notwithstanding the fact of lunacy and accordingly Babuain Jodha Kunwar was entitled to succeed to her husband "in respect of separate share or his self-acquired property." (4) There could be no legal

partition between Har Shankar Prasad Singh and Gauri Shankar Prasad Singh; but even if a contrary view be held, Gauri Shankar Prasad Singh had no right to any share on partition for the reason that he had become a lunatic. (5) Nor was there any partition in fact inasmuch as no unambiguous and unequivocal intention to separate was expressed either by Har Shankar Prasad Singh or by the guardian of Gauri Shankar Prasad Singh. (6) The sale deed of 1897 did not operate as a partition and did not affect the joint status of the two brothers; but it had the effect in law of extinguishing the rights of Har Shankar Prasad Singh and his adopted son in the property sold, and the plaintiffs are estopped from questioning the validity of the aforesaid sale deed. The property conveyed to the Court of Wards on behalf of Gauri Shankar Prasad Singh became the latter's exclusive property and on his death it passed to his wife, Babuain Jodha Kunwar. When she died in 1932, it devolved upon defendants 1 and 2, who are the nearest male reversioners of Gauri Shankar Prasad Singh. (7) On the death of Gauri Shankar Prasad Singh in 1902 the whole estate—excepting the property covered by the sale deed of 1897—vested in Har Shankar Prasad Singh and his adopted son by survivorship. When they died in 1903 and 1904 respectively, the estate vested in the posthumous son of Gopal Saran Singh, and on the latter's death in 1905 it vested in Babuain Shiam Dulari Kunwar as a widow's estate. On her death in 1935 the plaintiffs acquired a title to the aforesaid estate as sister's sons of the posthumous son of Gopal Saran Singh. Even if Gopal Saran Singh had had no posthumous son, the plaintiffs would still be entitled to the property as the daughter's sons of Gopal Saran Singh. (8) The suit is not barred by limitation. (9) Har Shankar Prasad Singh committed no fraud such as would bar the plaintiffs as his legal representatives from claiming the property.

These are the findings, and in the result the learned Judge has dismissed the suit as regards the 79 villages which were transferred under the sale deed of 19th June 1897, but has decreed the suit in respect to the rest of the claim. There is an appeal before us on behalf of defendants 1, 2 and 5 and on behalf of defendants 3 and 4. There is also a cross-objection in respect to that portion of the decree in which the claim for recovery of the 79 villages has been dismissed and in respect to the validity of the marrige between Gauri Shankar Prasad Singh and Babuain Jodha Kunwar. In order that the points in controversy may be appreciated it is necessary to set out chronologically a long series of facts and events and of divers acts performed by various members of the family. Many of these are strongly relied upon by learned counsel for the appellants as significant indications of conduct which, it is said, both individually and in their cumulative result, support the case of the defendants. In 1846 the descendants of Deoki Nandan Singh who had admittedly acquired the estate in suit consisted of his two grandsons, Ram Ratan Singh and Ram Persan Singh, and the two minor sons of Ram Ratan Singh, namely Har Shankar Prasad Singh and Gauri Shankar Prasad Singh. Ram Ratan Singh died on 31st December of that year and on 5th February 1847 Ram Persan Singh applied for a succession certificate as guardian of the two minor sons of the deceased; and a certificate was granted on 26th February of that year. Har Shankar Prasad Singh was at that time 12 years of age and Gauri Shankar Prasad Singh was 5. On 29th January 1854 Ram Parsan Singh died leaving a widow, Babuain Narain Kunwar, and on 22nd February Har Shankar Prasad Singh — who was then of age — applied for mutation of names on his own behalf and on behalf of his minor brother Gauri Shankar Prasad Singh, and the application was allowed on 31st March. At this date Har Shankar Prasad was 19 and Gauri Shankar Prasad Singh was 12 years of age. On 3rd November 1854, Har Shankar Prasad Singh applied for a succession certificate in respect to the estate of Ram Parsan Singh. This application was on his behalf and as guardian of his minor brother, and it was stated therein that the deceased had been joint in status with the applicants. The certificate was granted.

Why these succession certificates were sought when the family was admittedly joint is not clear; but nothing turns on this. It is pointed out that in none of the above-mentioned applications was there any suggestion of Gauri Shankar Prasad Singh being under any legal disability; but it is now common ground that lunacy supervened when he was about 16 years of age. On 25th May 1872 Har Shankar Prasad Singh executed a simple mortgage-bond in favour of one Madho Das for the formidable sum of Rs. 2,50,000. There was no mention of Gauri Shankar Prasad Singh in this bond; but at the same time it is pointed out that the executant did not describe himself as sole and exclusive owner of the property mortgaged. A few months later, on 15th August 1872, Har Shankar Prasad Singh's statement was recorded in mutation proceedings arising out of a sale-deed which he had executed on 29th May 1872, and in that statement Har Shankar Prasad Singh asserted—for the first and last time—that his brother was congenitally blind, deaf, dumb and insane and that the entry of his name in the revenue papers was "nominal"; he claimed to have had exclusive possession on the property sold and asserted that his mother had no right in it.

Apparently the above statement was made by Har Shankar Prasad Singh with a view to satisfy his vendees; but soon after this steps were taken by Babuain Narain Kunwar with a view to protect Gauri Shankar Prasad Singh's interest in the joint estate. On 31st July 1874 she applied to the Court of the District Judge praying that she be appointed the guardian of the person of Gauri Shankar Prasad Singh and that her nephew, a man named Dalthaman Singh, be appointed manager of the property under S. 9 of Act 35 of 1858. By that time Gauri Shankar Prasad Singh was admittedly a lunatic, and it was stated in the application that his brother was squandering the property. On 14th August 1874, the Court allowed the application and appointed Babuain Narain Kunwar as guardian of the person of the lunatic under S. 10 and appointed Dalthaman Singh as manager of his property under S. 9 of the Act. On 3rd May 1875 a decree was obtained against Har Shankar Prasad Singh upon the mortgage-bond which he had executed on 25th May 1872 for Rs. 2,50,000 in favour of Madho Das; and the estate was now in serious jeopardy. In his capacity as manager and to protect the interests of the lunatic Dalthaman Singh now began his task of separately managing the half share of Gauri Shankar Prasad Singh in the estate. He took and granted leases and we find that in the years 1875, 1876 and 1877 receipts were separately granted by Har Shankar Prasad Singh and on behalf of Gauri Shankar Prasad Singh. These receipts are printed at pp. 287, 289, 313, 333 and 381 of our paper-book. It will be observed that in each case a separate receipt was given on behalf of each brother for

exactly one-half of the amount received. At pp. 241 to 249 and 755 to 759 there is a series of wajib-ul-arzes relating to different villages. The first of these relates to the year 1872 and it shows that Har Shankar Prasad Singh was realizing rent "collectively" and it states :

"There is no need of division of profits with respect to 10 anna 8 pie share on account of jointness and close relationship . . . . . ."

This was before the appointment of a guardian and manager for Gauri Shankar Prasad Singh. The remaining wajib-ul-arzes relate to the years 1875 to 1884 and these all show that rents were being separately collected and that revenue was being separately paid by Har Shankar Prasad Singh and on behalf of Gauri Shankar Prasad Singh. As we have already seen, Madho Das obtained a decree for sale on his mortgage of 1872 and in execution thereof he purchased zamindari and house property. Resistance was offered as regards the house property on the ground that Gauri Shankar Prasad had an interest in it and was not bound by the decree. On 11th December 1875, the auction purchaser applied to the Court for possession against the persons resisting and in that application it was pleaded that Gauri Shankar Prasad Singh was suffering from congenital disability. The application was disallowed. Thereafter Dalthaman Singh began instituting suits on behalf of Gauri Shankar Prasad Singh. In 1876 he instituted a suit on behalf of Gauri Shankar Prasad Singh for a declaration of the latter's title in respect to a moiety of a 6 anna share, for cancellation of a sale deed in respect thereto which had been executed by Har Shankar Prasad Singh on 16th November 1864, in favour of Manohar Lal and for possession. This was Suit No. 714 of 1876. The suit was not contested by Har Shankar Prasad Singh; it was contested by Manohar Lal on the ground that Gauri Shankar Prasad Singh was a congenital lunatic and was congenitally blind, deaf and dumb and was also a cripple. The suit was however decreed on 18th December 1876, the Court holding that upto 1854 at least Gauri Shankar Prasad Singh had not been a lunatic. There was an appeal to this Court, but it was dismissed on 10th August 1877.

It will be observed that in this suit Dalthaman Singh sued for recovery of Gauri Shankar Prasad Singh's specific half share in the property which had been sold; he did not sue for avoidance of the sale deed as a whole. The suit was decreed for the specific share claimed. On 23rd May 1877, during the pendency of the appeal in the aforesaid suit, Dalthaman Singh with the permission of the District Judge mortgaged specific properties of Gauri Shankar Prasad Singh for Rs. 37,589 in favour of Manohar Das in order that he might purchase an 8 anna share in five villages which had been purchased at auction by the mortgagee in execution proceedings against Har Shankar Prasad Singh. This mortgage bond is at p. 347 of our paper-book and it will be observed that the whole 16 annas of five villages were mortgaged and fractional shares in eight other villages.

In 1877 Dalthaman Singh instituted seven suits on behalf of Gauri Shankar Prasad Singh against Har Shankar Prasad Singh and the latter's creditors and transferees. These were Suits Nos. 55, 56, 57, 58, 71, 72 and 85. Two other suits—Suits Nos. 47 and 51—were instituted against Har Shankar Prasad Singh and Gauri Shankar Prasad Singh as co-defendants. Thus there were nine suits in all and they were consolidated and were disposed of in a single judgment on 11th September 1877. The suits instituted on behalf of Gauri Shankar Prasad Singh were decreed, while the suits instituted against Har Shankar Prasad Singh and Gauri Shankar Prasad Singh were dismissed quoad Gauri Shankar Prasad Singh's share in the property. These suits were in respect to transfers which had been made by Har Shankar Prasad Singh. Har Shankar Prasad Singh put in no appearance in any of these suits, but the defence of the various creditors was that, prior to the death of his father and uncle, Gauri Shankar Prasad Singh had become blind, deaf, dumb, insane and impotent that he was unfit to perform the religious rites of his ancestors and that on that account he was deprived of his right of inheritance and his brother was therefore the owner of the whole property. It will thus be observed that there was no allegation in these suits of congenital lunacy. There was an appeal to the High Court, which was dismissed on 18th December 1878. It was held by this Court that lunacy had supervened after the death of the father and uncle of Gauri Shankar Prasad Singh and that he was not disqualified.

That same year a money suit was brought against the two brothers, but it was decreed on 20th February 1878 against Har Shankar Prasad Singh only and was dismissed as against Gauri Shankar Prasad Singh, the two brothers being apparently regarded as separate from each other. In 1879 a suit was instituted on behalf of Gauri Shankar Prasad Singh —Suit No. 40 of 1879—against Har Shankar Prasad Singh and others for possession of property which had been sold by Har Shankar Prasad Singh on 22nd April 1867 and the suit was decreed with mesne profits. In this same year, that is to say 1879, Har Shankar Prasad Singh's share in the estate in certain districts was taken out of his hands. There is a rubkar of the Collector of Ghazipur, dated 8th October 1879, which shows that the whole share of Har Shankar Prasad Singh in the Districts of Ghazipur and Azamgarh was taken over for management by the revenue department under S. 326, Civil P. C., (Act 10 of 1877). There was at that time no Court of Wards Act, but Chap. VI, Land Revenue Act (19 of 1873) conferred upon the Board of Revenue the powers of a Court of Wards and it is alleged on behalf of the appellants that these powers were applicable to a case where the property of a person had been placed under the charge of the Collector under S. 326, Civil P. C. This allegation is contested on behalf of the respondents.

On 5th September 1879, that is to say about a month before the Collector took over the estate of Har Shankar Prasad Singh, the latter leased 19 bighas of land to a certain person and on 22nd January 1880 Dalthaman Singh applied to the Court for permission to lease the corresponding 19 bighas belonging to Gauri Shankar Prasad Singh to the same lessee, and this was granted. This is another illustration of the fact that the share of Gauri Shankar Prasad Singh was being dealt with as separate property, and it is also relied upon as showing that Har Shankar Prasad Singh was separately dealing with his own share of the estate; but the admissibility of this recital is at least open to doubt. There was a similar application on 12th March 1880. On 1st October 1880 one Baij Nath Prasad executed a mortgage-deed in favour of Gauri Shankar Prasad Singh through Sarju Narain Singh, who was then the manager of the estate of Gauri Shankar Prasad Singh, Dalthaman and Babuain Narain Kunwar being by that time dead. This, so far as the record shows, was the last act of management performed under the provisions of the Lunacy Act. Soon afterwards the estate of Gauri

Shankar Prasad Singh was placed by the District Judge under the Court of Wards. The lunatic's wife, Babuain Jodha Kunwar, appealed against this order to the High Court, but her appeal appears to have been subsequently converted into an application under cl. 12, Letters Patent. The application was rejected by this Court on 13th December 1881 on the ground of want of jurisdiction. Thereafter, the estate of Gauri Shankar Prasad Singh was formally assumed by the Court of Wards, as is evidenced by a letter, dated 22nd December 1881, from the Secretary of the Board of Revenue to the Commissioner of Benares. Thus the share of one brother was under the control of the Collector (who acted, whether legally or otherwise, under the Court of Wards) and the share of the other brother was directly under the Court of Wards, and each share was managed as a separate estate. In the letter above referred to, it will be observed that provision was to be made for a separate budget in respect to the estate of Gauri Shankar Prasad Singh. On 16th June 1882, the Court of Wards through the Collector filed an application for the perfect partition of taluqa Umarganj on behalf of Har Shankar Prasad Singh against Gauri Shankar Prasad Singh. The applicant was shown as Har Shankar Prasad Singh, through the Collector of Ghazipur, Manager of the Court of Wards, and the opposite party was shown as Gauri Shankar Prasad Singh, insane, through the Collector of Ghazipur, Manager of the Court of Wards, and it was stated in the application that for a long time rents had been separately collected by reason of a private partition. This was partition case No. 12 of 1882. In 1883 there was apparently another application of the same character, for we find a rubkar of the revenue Court dated 3rd January 1883 which shows that, in respect to the application for partition of certain villages in pargana Zamania, Gauri Shankar Prasad Singh was required to pay his half share of the stamp duty.

There were also other partitions, for at p. 389 *et seq* there is a list of trees, houses and plots which had been partitioned in the abadi of Qadirpur in the district of Allahabad and these lists were signed inter alia by a karinda of Gauri Shankar Prasad Singh. The partition of taluqa Umarganj, case No. 12 of 1882, was sanctioned by the Collector on 24th July 1883 and there is a jama goshwara of that same date in which the amount of jama for each of the two brothers is separately stated. Taluqa Umarganj was apparently comprised of several villages and we find that separate entries were made in respect to each brother in the khataunis of 1883 of these various villages: *vide* pp. 787, 789, 791, 793, 795 and 811 and the same is the case as regards enumeration of houses : *vide* pp. 797, 895 and 807. We also find that qabuliyats were separately executed in respect of land in each of the two estates : *vide* pp. 417 and 421. On 27th March 1884, Babuain Jodha Kunwar applied to the Court of Wards asking them to utilize income from her husband's estate towards payment of the debts of Har Shankar Prasad Singh and she requested that a charge be imposed on the latter's estate for the amount so spent. There is also a rubkar dated 30th November 1886 of the revenue Court at Ghazipur, which shows that Har Shankar Prasad Singh had himself applied in that year for the liquidation of his debts out of the surplus income of the estate of Gauri Shankar Prasad Singh. These applications were disallowed.

Apparently Har Shankar Prasad Singh was getting a small allowance of Rs. 50 from his own estate and also an allowance of Rs. 50 from his brother's estate, and on 22nd March 1888, the Collector of Ghazipur wrote to the Commissioner recommending in strong terms that an increase of Rs. 50 be allowed to Har Shankar Prasad Singh from the income of his brother's estate. The letter was inspired by an application which the Collector had received from Har Shankar Prasad Singh, himself and this was forwarded to the Commissioner. It is not before us; probably, it no longer exists. The letter also shows that the estate of Gauri Shankar Prasad Singh yielded an annual profit of Rs. 20,000 and our attention is drawn to the fact that the amount asked for by the Collector for Har Shankar Prasad Singh out of this large annual profit of his brother's estate was only Rs. 50. In this connexion we have been referred to the evidence of Har Shankar, a witness for the plaintiffs, who was the head clerk of the Court of Wards at Ghazipur from 1900 to 1902 and from 1903 to 1904. His evidence shows that Babuain Jodha Kunwar herself received an allowance which varied between Rs. 700 and Rs. 2000 a month. This witness also states that Babuain Jodha Kunwar asked the Court of Wards for a sum of Rs. 5000 from the income of her husband's estate for the treatment of Har Shankar Prasad Singh's eyes; but the application was refused on the ground that Har Shankar Prasad Singh was himself not a ward and that the estate was in debt. Witness says that when she received this reply, Babuain Jodha Kunwar remarked that "they (i. e., she and the lunatic) and Har Shankar Prasad Singh were not two persons." We have no documentary evidence as regards this alleged request for Rs. 5000 on the part of Babuain Jodha Kunwar for the benefit of Har Shankar Prasad Singh.

In 1889, Har Shankar Prasad Singh adopted a son. The deed of adoption was executed on 20th July 1889 and the adopted boy Gopal Saran Singh who as will appear from the pedigree is a descendant of Bishun Dat Singh, the brother of Deoki Nandan Singh. It is mentioned in this deed of adoption that Gauri Shankar Prasad Singh was a lunatic; but at the same time the document contemplates the possibility of his having a son. We now come to some more partitions of zamindari property. On 3rd October 1891 the Collector applied for partition of Katia — which is described as a mahal, but which apparently contained several villages. Each of the two brothers was represented in that proceeding by the Collector of Ghazipur and it was stated in the application that each brother should be the exclusive owner of the *sir* land, groves, houses, etc., which might be allotted to him. This was partition case No. 18 of 1892 (or perhaps 1891); and there was a similar application dated 22nd February 1892 in respect to Gadora-partition case No. 12 of 1892. These partitions were confirmed by the revenue Court on 11th March 1892 and 11th August 1892 respectively. We have also been referred to the khewats of 1890-1891 of Trilokour and Satawar. In the first of these each of the two brothers is separately recorded and the revenue and cesses are separately apportioned. In the khewat of Satawar Gauri Shankar Prasad Singh is shown as owning the whole 16 annas. On 20th November 1891 the taluqas of Har Shankar Prasad Singh in Umarganj in Osia were purchased at auction by the Court of Wards on behalf of Gauri Shankar Prasad Singh.

We now come to the year 1897. By that time what remained of the property which was regarded as Har Shankar Prasad Singh's estate had been released by the Court of Wards, and on 19th June 1897 Har Shankar Prasad Singh and his adopted

son Gopal Saran Singh executed a sale deed in respect to 79 villages in favour of Gauri Shankar Prasad Singh under the Court of Wards. The consideration was Rs. 2,12,531-4-9 plus an annuity of Rs. 4180 to be paid to Har Shankar Prasad Singh during his life time and thereafter to his widow and Gopal Saran Singh and ultimately to the survivor of them. The property sold included the 16 anna interest in ten villages in Mahal Katia which had gone to Har Shankar Prasad Singh by partition in case No. 18 of 1892. After this Har Shankar Prasad Singh had no property left to him except the annuity but his debts were finally liquidated. The amount of Rs. 2,12,531-4-9 admittedly represented the sum total of the debts outstanding against him and they were paid by the Court of Wards. Lachman Prasad, a witness for the respondents, purports to have scribed this sale deed by which he presumably means that he made a fair copy of the draft which had come from the Legal Remembrancer's office. He used to be the second accountant in the office of the Court of Wards. He says that Har Shankar Prasad Singh wanted to have his debts paid out of the income of the joint estate, but the Collector insisted on this sale deed. Incidentally I may mention that this witness has stated—falsely, as it appears—that the income of the whole estate was jointly collected by the Court of Wards.

Gauri Shankar Prasad Singh died in August 1902 and Har Shankar Prasad Singh died on 16th June 1903. After the death of Gauri Shankar Prasad Singh, the Court of Wards continued to manage his estate on behalf of his widow, Babuain Jodha Kunwar. Har Shankar Prasad Singh made no claim, although he had no property left in his possession and had an adopted son. Gopal Saran Singh died a few months after his adoptive father, on 24th November 1903; but no mutation was made on behalf of his widow, Babuain Shiam Dulari Kunwar. Gopal Saran Singh's posthumous son was born on 15th May 1904; but no steps were taken to have his name mutated during his brief span of life. He died on 6th August 1905. Babuain Shiam Dulari Kunwar lived until 1935, but she made no effort to obtain possession of the estate. The explanation offered by the respondents is that after the death of her husband she took in religion; but it is pointed out on behalf of the appellants that she had a daughter, who gave birth to two sons and that she took possession of property which was conveyed to her in 1923.

There can be no doubt that after the lunatic's death the estate was being held by the Court of Wards on behalf of Babuain Jodha Kunwar — *vide* the judgment dated 12th December 1902 in civil Appeal No. 46 of 1902, page 495, the plaint dated 29th June 1903, page 497, the revenue decree of 31st March 1904, page 509, and the lease of the special manager dated 5th January 1915, page 525; and her name was recorded in the khewats — *vide* the khewats of Sarai Gopal, Usia and Basantpur for 1903-04, pages 199, 709 and 834. After Gopal Saran Singh's death Babuain Jodha Kunwar applied to the board of revenue for money for his funeral expenses, and a sum of Rs. 7000 was sanctioned on 19th January 1904. Some years later she, and not Babuain Shiam Dulari Kunwar, performed the marriage of Babuain Raj Kunwar and there is a letter from the board of revenue, dated 26th March 1912, sanctioning the expenditure of Rs. 15,000 for this purpose. On 11th November 1914, a sum of Rs. 10,000 was sanctioned for the gauna ceremony of Babuain Raj Kishori Kunwar. These orders of sanction were in favour of Babuain Jodha Kunwar. There is a report of the Court of Wards for the year ending 30th September 1920 which shows that the estate was released on 1st October 1920, and in that report Babuain Jodha Kunwar is described as the proprietor with a life interest.

Whatever the legal effect of all the above documents may be, they show at least that the Court of Wards held the estate on behalf of Babuain Jodha Kunwar as having a life interest in it as the widow of Gauri Shankar Prasad Singh. On 8th October 1920, after the release of the estate, Babuain Jodha Kunwar executed a power of attorney in which she stated that she had been in proprietary possession of the estate since its release. During all these years there was no assertion of claim either by Babuain Dulari Kunwar or her daughter. On the contrary they both accepted a conveyance of property from Babuain Jodha Kunwar. A deed of transfer was executed by the latter on 4th September 1923 in favour of Babuain Shiam Dulari Kunwar; and this instrument was also executed by defendants 1 and 2 in token of acquiescence. It was stipulated therein that on the death of the transferee the property should revert to the estate of Gauri Shankar Prasad Singh. The khewat of 1924 shows that the transferee took possession of some at least of the property, and it is admitted that in fact she took possession of the whole; and after her death possession was admittedly taken by defendants 1 and 2. On the same date a deed of gift was executed by the same persons in favour of Babuain Raj Kishori; but this was in perpetuity, presumably because she had two sons. The khewat of 1924 shows that she took possession of village Unchera. This was in pursuance of an application for mutation dated 6th September 1923. On the previous day a deed of gift had been executed in favour of Babuain Jodha Kunwar's nephews, defendants 3 and 4.

The above deeds of conveyance were executed in pursuance of the tamliknama dated 3rd September 1923, in which Babuain Jodha Kunwar agreed inter alia not to transfer any other properties and also agreed not to spend more than a certain amount on charity. It was also stipulated that defendants 1 and 2 should each receive an annual allowance of Rs. 2400. On 6th February 1925 defendant 7 sued for a declaration that the aforesaid conveyances would be null and void as against the "real reversioner" after the death of Babuain Jodha Kunwar. Among the defendants to the suit was Babuain Shiam Dulari Kunwar, and she contested it. On 11th November 1925 the Court upheld the gift in favour of the Sanskrit School, but declared the other conveyances to be not binding except upon defendants 1 and 2 to the present suit. Babuain Jodha Kunwar died on 11th August 1932. On 30th September 1933 defendants 1 and 2 obtained mutation of their names after contest by defendant 7, who claimed a one-third share, and this order was affirmed in appeal and in second appeal. The suit out of which this appeal has arisen was instituted on 27th April 1936. Wherever I have mentioned in the foregoing portion of the judgment the "estate" of Gauri Shankar Prasad Singh or his "share" in the ancestral estate I must be understood as referring to the property which was being managed as his estate, for the respondents contend that owing to disqualification Gauri Shankar Prasad Singh had no interest in the ancestral estate.

Having set out this bare and unadorned statement of facts and events from 1846 to 1935, I will now proceed to consider the various matters which are in controversy between the parties to this appeal. But I must first mention certain concessions which

have been made by Mr. Das, senior counsel for the respondents, who came here from Patna to argue the case for his clients. He conceded that Gauri Shankar Prasad Singh was not a congenital lunatic and was not congenitally deaf, dumb and blind, that he acquired an interest at birth and that his disability supervened later. Mr. Das also conceded that Har Shankar Prasad Singh devised no "scheme" as alleged in the plaint for saving the property for his own benefit. This was, however, the respondents' case as set up in their plaint, and possibly the concession may have been made in order to avoid the objection that no one can take advantage of his own fraud. The arguments in this appeal went on for many weeks and ultimately Mr. Das had to return to Patna. Arguments on behalf of the respondents were then continued by Mr. P. L. Banerji. The connected appeal—Appeal No. 14 of 1938—was argued on behalf of the respondents to this appeal by Dr. Katju. He did not accept the second concession which had been made by Mr. Das; he said that there was in fact a "scheme" in the sense that the various applications and suits were inspired by Har Shankar Prasad Singh, but he contended that it was in all respects a bona fide plan and that Har Shankar Prasad Singh had no intention of defrauding his creditors. As we have already seen, Har Shankar Prasad Singh alienated portions of the ancestral property and if he thereafter devised a plan whereby the creditors were deprived of a moiety of the property which he had conveyed to them for consideration or which had been sold by them at auction in execution of decrees against Har Shankar Prasad Singh, it is somewhat difficult to understand how, having regard to the allegation that his brother had no interest in the ancestral estate, there can have been no element of fraud on the part of Har Shankar Prasad Singh. It was further conceded on behalf of the respondents that the manager of the property of Gauri Shankar Prasad Singh dealt with it as a separate and divided share and that subsequently the Court of Wards dealt in similar fashion with the respective shares of the two brothers. But it is contended that although there may have been a division in fact of the ancestral estate, it was for convenience of management only and had no legal effect to bring about either a severance of status or a division of title. It is said that by the statutory acts of the manager and of the Court of Wards Har Shankar Prasad Singh was forced into a position of de facto separation in which the share to which his brother would have been entitled on partition, if sane, was separately possessed and administered on his behalf, but there was no legal severance of status or division of title.

A formidable mass of authorities have been cited before us going back from 1941 to Manu, the ancient law-giver. All these authorities have some relevance; otherwise they would not have been relied upon by the eminent counsel who have appeared before us. And all of them afford a useful background against which to view the points in controversy; but I only propose to mention such of them as appear to me to afford direct assistance on behalf of one party or the other in determining the interesting questions of law which are in dispute. The first question which I shall consider is the legal position of a Hindu lunatic vis-a-vis the coparcenary estate. It is now a matter of admission that Gauri Shankar Prasad Singh was not born disqualified; it is conceded that his disability supervened at the age of 16 or 17 as a result of an attack of smallpox. The year of this supervening disability has been stated somewhere in the evidence as 1859, when Gauri Shankar Prasad Singh was 17 years of age, and this may be accepted as approximately correct. I may mention here that Sir Tej Bahadur Sapru on behalf of appellants 1 and 2 has accepted the position that at or about that time Gauri Shankar Prasad Singh became a lunatic. Mr. Malik who appears for appellants 4 and 5, has, however, contended that the unsoundness of mind of Gauri Shankar Prasad Singh was not such as to create a legal disability under the Hindu law. I shall deal with this contention at a later stage. For the present, I shall assume that Gauri Shankar Prasad Singh was a lunatic. In Max Muller's "Law of Manu" in the "Sacred Books of the East" series, Vol. 25, p. 373, para. 201 says :

"Eunuchs and outcastes, persons born blind and deaf, the insane, idiots and the dumb . . . . receive no share."

Paragraph 202 reads :

"But it is just that a man who knows the law should give even to all of them food and raiment without stint according to his ability; he who gives it not will become an outcaste."

In the translation of the Mitakshara by Macnaghten and Colebrook, Chap. 2, S. 10 deals with exclusion from inheritance. Verse 140 reads as follows :

"An impotent person, an outcaste and his issue, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease as well as others similarly disqualified must be maintained; excluding them, however, from participation."

In placitum 5 we read :

"These persons (the impotent man and the rest) are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only: and the penalty of degradation is incurred if they be not maintained."

Placitum 6 says :

"They are debarred of their shares if their disqualification arose before the division of the property. But one already separated from his coheirs is not deprived of his allotment."

Placitum 7 provides that :

"If the defect be removed by medicaments or other means . . . . at a period subsequent to partition, the right of participation takes effect . . . . ."

The Privy Council has observed that the Mitakshara "is universally accepted by all the schools, except that of Bengal, as of the highest authority and in Bengal is received also as of high authority, yielding only to the Dayabhaga on those points where they differ."

In 8 Cal. 919[1] it was held that a lunatic who is a member of a joint Mitakshara family cannot sue to recover property belonging to the joint family for the reason that he is disqualified from inheritance and therefore entitled to no share or partition in the property, but only to maintenance. At p. 149 of this volume (8 Cal. 149)[2] there is another case relating to the same lunatic in which the same view had been taken. It was held that a coparcener who had become insane while in possession would lose his share on partition. The next case which I shall mention is from Madras. This is 43 Mad. 464,[3] where it was held that the right of a member of a joint Hindu family to share in ancestral property

1. ('82) 8 Cal. 919, Ram Soonder Roy v. Ram Sahye Bhugut.
2. ('82) 8 Cal. 149 : 9 C. L. R. 457, Ram Sahye Bhugut v. Lalla Laljee Sahaye.
3. ('20) 7 A.I.R. 1920 Mad. 652 : 55 I. C. 576 : 43 Mad. 464 : 38 M. L. J. 291, Muthusami Gurukkal v. Meenammal.

comes into existence at birth and is not lost, but is only in abeyance, by reason of a disqualification; it subsists all through, although it is incapable of enforcement at the time of partition if the disqualification then exists. It was further held that if, on the death of all the other members, the disqualified member becomes the sole survivor, he takes the whole property by survivorship. The same view was taken by the Patna High Court in 13 Pat. 712[4] and also by the Bombay High Court in A.I.R. 1936 Bom. 191.[5]

We now come to a Full Bench decision of our own Court, which is 1937 A. L. J. 631.[6] It was there held that a person who had not been a leper from birth, but was afflicted with leprosy of a sanious or virulent type at the time of his father's death and had previously acquired an interest in the joint ancestral property by his birth along with his brothers, would not be divested of such interest, though he would be disqualified from claiming a partition of his share or claiming an allotment of his share at the time of partition so long as his leprosy lasts. It was further held that if the leper becomes the sole survivor, he acquires the whole estate by survivorship if there has been no partition in the meanwhile. It was held that such disqualification is personal and temporary. An attempt has been made to differentiate the last named case on the ground that the person concerned was a leper and not a lunatic; but there is no force in this contention. The learned Judges referred to a number of cases relating to a person who was a lunatic and they followed inter alia 43 Mad. 464,[3] and the other decisions which I have mentioned above. In my opinion, the decision of our Full Bench is in all respects applicable to the case of a lunatic and is conclusive of the fact that a lunatic coparcener cannot claim a share at partition so long as his disability subsists. His interest in the estate is there, but is dormant. In 10 All. 272[7] at p. 287, there is the following dictum of the Privy Council :

"The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is in their Lordships' opinion so connected with the right of a partition that it does not exist where there is no right to it."

Learned counsel for the appellants relied on A. I. R. 1935 All. 875[8] and he points out that this decision was affirmed in appeal by the Privy Council in A. I. R. 1939 P. C. 174.[9] But this question was not argued before the Board and their Lordships affirmed the decision of this Court "upon the artificial assumption that a lunatic (if not a lunatic from birth) is entitled to a share upon partition." They also say that "there exists high authority in India for the view that he has no such right." They were referring to the Full Bench decision of this Court. It is thus clear that this authority does not assist the respondents in any way. So far therefore the position is clear. A person who has become a lunatic is debarred from claiming his share by partition and is not entitled to claim a share when the coparcenary estate is partitioned; but his right is not extinguished, and he succeeds by survivorship if he finds himself the last coparcener. Learned counsel for the appellants, however, pleads that there is no authority for the proposition that a lunatic cannot claim his share through a guardian or manager, and he invokes the analogy of a minor, who can sue for partition through a next friend and may have his share divided off if the Court is of opinion that it is for his benefit; and he also points out that O. 32, Civil P. C., is equally applicable to lunatics and minors. As to O. 32, this merely contains procedural rules ; they are applicable to a lunatic where the latter is competent to sue, but they can have no application where he is not so competent. It seems to me that the short answer to this contention is that a minor is qualified for partition while a lunatic is disqualified. If the lunatic is himself disqualified, how can a guardian or manager obtain for him what he is not qualified to obtain for himself ? Guardians were not unknown to the ancient law : *vide* Ganganath Jha's "Hindu Law and its Sources," Vol. 1, p. 56, paras. 45, 46 and 48. If therefore it had been contemplated that a lunatic might claim his share through a guardian, we should have expected some text on the subject ; but there is none. It is contended on behalf of the appellants that the appointment of a guardian and a manager operated ipso facto as a separation between the two brothers and reliance is placed on 1932 A.L.J. 1110[10] in which Mukerji and Bennet JJ. observed :

"It is well established law that if a family remains joint, it is not open to the District Judge to appoint a certified guardian for the minor members for their shares of joint family property. Therefore, we must assume that the appointment of a certified guardian implies that ipso facto the minor members are being separated from the adult members."

It is pointed out that this decision was affirmed in appeal by the Privy Council : *vide* A. I. R. 1939 P. C. 200.[11] The decision was certainly affirmed, but there was no discussion as to whether the appointment of a guardian of the interest of a minor in the coparcenary estate would ipso facto imply a separation of status; and in any case I have already rejected the analogy of minors, and for reasons which I shall state I am of opinion that the manager of a lunatic—assuming that he can be legally appointed in respect to the lunatic's interest in the coparcenary property—is not competent to effect a partition on behalf of the lunatic, which is forbidden by Hindu law. Learned counsel for the appellants pleads that Dalthamman Singh as a statutory manager was competent to sue for partition under S. 14 of Act 35 of 1858, which provides ; "every manager of the estate of a lunatic appointed as aforesaid may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic ; and may collect and pay all just claims, debts and liabilities due to or by the estate of the lunatic. But no such

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4. ('34) 21 A.I.R. 1934 Pat. 373 : 151 I.C. 419 : 13 Pat. 712 : 15 P. L. T. 479, Mt. Dilraj Kuar v. Rikheswar Ram Dube.

5. ('36) 23 A. I. R. 1936 Bom. 191 : 163 I.C. 129 : 38 Bom.L.R. 257, Vithaldas Govindram v. Vadialal Chhaganlal.

6. ('37) 24 A.I.R. 1937 All. 605 : 170 I. C. 833 : I.L.R. (1937) All. 825 : 1937 A.L.J. 631 (F.B.), Mool Chand v. Mt. Chahta Devi.

7. ('88) 10 All. 272: 15 I.A. 51 : 5 Sar. 139 (P.C.), Sartaj Kuari v. Deoraj Kuari.

8. ('35) 22 A.I.R. 1935 All. 875: 156 I.C. 736, Ram Narain Sahu v. Mt. Makhna.

9. ('39) 26 A.I.R. 1939 P. C. 174 : 181 I. C. 929: I. L. R. (1939) All. 680 : I. L. R. (1939) Kar. 279 (P.C.), Ram Narain Sahu v. Mt. Makhna.

10. ('33) 20 A.I.R. 1933 All. 180 : 143 I. C. 706 : 1932 A. L. J. 1110, Jagannath Prasad v. Chunni Lal.

11. ('39) 26 A. I. R. 1939 P. C. 200 : 183 I. C. 177 (P. C.), Chuni Lal v. Udai Prakash.

manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immovable property for any period exceeding five years, without an order of the civil Court previously obtained."

Founding upon these provisions, learned counsel contends that they override the personal law and that the manager had full power to seek a partition on behalf of the lunatic, and he contends that the decrees which Dalthamman Singh obtained did indeed effect a partition quoad the properties concerned. I shall deal later with these decrees when I consider the question of res judicata ; but I have no doubt in my mind that the Legislature never intended that a manager appointed under S. 9 of the Act should be competent to interfere with the personal law of a lunatic member of a joint Hindu family. This is of course on the assumption that a manager can legally be appointed for the property of a lunatic coparcener having no separate estate which is at least open to doubt. As regards minors, we have the authority of the Privy Council in 25 All. 407.[12] At p. 416 their Lordships say :

"It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And, in their Lordships' opinion, those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property."

In 17 I. C. 473[13] a Bench of the Madras High Court took this same view in respect to the appointment of a manager under Act 35 of 1858. At p. 477 Sadasiva Aiyar J. observes :

"I am, therefore, clear that Act 35 of 1858 was not intended to authorise Courts to entertain proceedings under it in respect of an alleged lunatic who is a member of a Malabar tarwad, or of a joint Hindu family and owns no separate property."

The same view was taken by the Patna High Court in 49 I. C. 907[14] where it was held that the guardian of the property of a lunatic cannot be properly appointed in respect of the lunatic's interest in the estate of an undivided Mitakshara family, the reason being that no outsider can be allowed to intermeddle with the property and affairs of a joint Hindu family merely by being appointed the guardian of an incompetent member of that family. In support of their view the learned Judges at p. 909 cited 25 All. 407[12] from which I have already quoted a passage and which was concerned with the appointment of the guardian of a minor's property. As regards a lunatic coparcener, however, some High Courts have expressed the view that a manager can be appointed in respect to his interest in the coparcenary property. For the purposes of this appeal I do not think it is necessary to express any final opinion on the subject, for I have already said that, whatever a manager may or may not do, he is not competent to interefere with the personal law by which the lunatic is governed. The decrees against Har Shankar Prasad Singh could not operate as a partition on behalf of the lunatic when the lunatic was debarred from participation by his personal law.

In my judgment, for the reasons which I have given, no partition was effected on the part of the lunatic by the decrees which were obtained by the manager appointed under the Lunacy Act. I will now consider Mr. Malik's plea that Gauri Shankar Prasad Singh is not proved to have suffered from such a degree of unsoundness of mind as would exclude him from his share of the coparcenary property. In the various suits which were instituted by Dalthaman Singh and in many other documents Gauri Shankar Prasad Singh was described as "insane" and for what it may be worth, there is the evidence of several witnesses for the respondents that he used to beat his head with his hands, tear his clothes and even bite the servants and that he could not stand up without support. We have not been referred to any evidence in rebuttal. Defendant 1 says :

"So far as I recollect he was very weak of intellect, his sight was also very weak, he was hard of hearing and he talked in such a manner that his attendants only could understand him and no outsider could follow what he said."

Further on he says :

" . . . . . subject to what I have already stated he was deaf, dumb, blind and fatr-ul-aql (of unsound mind) at the time of his death and I saw him in this condition since the time I saw him first."

Gauri Shankar Prasad Singh was found by inquisition to be a lunatic, which means that he was regarded by the Court as incapable of protecting his own interests. As I shall show in another connexion Gauri Shankar Prasad Singh was found by the Court in 1876 to be capable of understanding simple words of command, but I think we must hold him to have been an insane person in the sense that he was debarred from participation in the ancestral estate. We now come to what is perhaps the most difficult question in this appeal, namely whether Har Shankar Prasad Singh remained joint with or separated from his brother and whether the latter acquired title in a moiety share in the ancestral estate.

In the written statement of appellants 4 and 5 there was a clear allegation of separation. In the written statement of appellants 1 to 3 also there was an allegation of separation, but it was specifically based on one fact alone and that was the appointment of Babuain Narain Kunwar and Dalthamman Singh as guardian and manager of the lunatic in 1874 : *vide* paras. 4 and 5. When the suit went to trial, however, the defendants based their plea of separation on the six following facts : (1) The appointment of a guardian in 1874. (2). The judgments of 1876 and 1877 upholding the lunatic's claim against the creditors of his brother in respect to a moiety share in the estate. (3) Separate management of the share of the lunatic by the manager and subsequently by the Court of Wards. (4) Applications for partition which were preferred by the Collector in the revenue Court on behalf of Har Shankar Prasad Singh in 1882-1883 and in 1891-1892. (5) The deed of adoption dated 20th July 1889. (6) The sale-deed executed by Har Shankar Prasad Singh and his adopted son on 19th June 1897.

The respondents did not specifically aver jointness, but upto para. 18 (a) of the plaint which contains an alternative plea on the assumption of separation their meaning seems to have been that Gauri Shankar Prasad Singh, though joint in status, had no title to a share in the ancestral property by

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12. ('03) 25 All. 407 : 30 I. A. 165 : 8 Sar. 483 (P. C.), Gharib-Ullah v. Khalak Singh.

13. ('12) 23 M. L. J. 706 : 17 I. C. 473 : 1913 M. W. N. 79, Govindan Nair v. Narayanan Nair.

14. ('19) 6 A. I. R. 1919 Pat. 482 : 49 I. C. 907, Parma Dube v. Mahadeo Singh.

reason of his disqualification. Sir Tej Bahadur Sapru on behalf of appellants 1 and 2 concedes that upto 1897 at least none of the facts and circumstances on which he relied—except the appointment of a guardian and manager in 1874 — is enough in itself to prove separation, but he contends that an intention to separate must be read into the conduct of the parties from 1874 to the death of Har Shankar Prasad Singh in 1903. In this connexion he relies on various authorities. In Mayne's Hindu Law Edn. 10, p. 556 the learned author says :

" It is not sufficient that they should alter the mode of holding their property. They must alter and intend to alter their title to it. They must cease to be joint owners and become separate owners.". . .

The question however is one of fact to be decided in the light of legal principles as to the cumulative effect of all the circumstances. In 51 All. 1,[15] it was held by this Court that the intention to separate may be established either by explicit declaration or from a uniform and consistent course of conduct of the parties concerned or other members of the family. There had been an earlier decision by the Privy Council in an appeal from a judgment of this Court and it was held by their Lordships that in that particular case the High Court had erred in considering whether each document was by itself sufficient to rebut the prima facie presumption of jointness ; it ought to have taken into account the cumulative effect of all the documents : *vide* 31 All. 412[16] at p. 428. In 53 I.C. 866[17] their Lordships of the Privy Council observed that :

" . . . it is well established that the unequivocal and unmistakable manifestation by a member of a joint Hindu family, by his words or conduct, of a fixed or determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession or partition by metes and bounds does not take place or though there be no separation in food and dwelling."

In 1938 A.L.J. 763[18] we find the following dictum of the Privy Council :

"It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement, but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness or otherwise."

Gauri Shankar Prasad Singh was not in a position to express or entitled to express any volition in the matter and what we therefore have to look at is the acts, omissions and attitude of Har Shankar Prasad Singh. It is his conduct that we have to look at. It is contended that the lunatic's will was replaced by the will of his manager and subsequently by the will of the Court of Wards, but this proposition cannot be accepted ; neither the manager nor the Court of Wards was competent to affect in any way his status or the personal law to which he was subject. Thus, it is clear that nothing which was done on behalf of the lunatic would per se effect a separation of status. Whether the decrees which were obtained by his manager will operate as res judicata and whether the partitions which were made by the revenue Court at the instance of the Collector will attract the provisions of S. 233 (k), Land Revenue Act—or rather S. 241 (f) of the Act then in force — are matters which I shall consider at a later stage. Admittedly, Har Shankar Prasad Singh was a profligate. So far as our record goes, his extravagance is first evidenced by his mortgage in favour of Madho Das dated 25th February 1872 for a sum of two and a half lakhs of rupees. The village registers show that upto 1874 the two brothers were recorded as joint, and rents are shown as being collected jointly—which of course means that they were all being collected by Har Shankar Prasad Singh. Then came the appointment of Babuain Narain Kunwar as guardian and of Dalthaman Singh as manager and thereafter an alteration was made in the village registers. The two brothers were recorded as separate, rents were separately collected and revenue was separately paid by Har Shankar Prasad Singh on the one side and on behalf of Gauri Shankar Prasad Singh on the other.

There can be no doubt that, whether the application of Babuain Narain Kunwar was independently preferred or whether it was inspired by Har Shankar Prasad Singh, as alleged in the plaint, Dalthaman Singh under the warrant of his appointment, treated the lunatic as separate, and dealt with a moiety of the coparcenary property as the lunatic's separate share. He had the necessary alterations made in the village registers, he executed mortgages and leases, he purchased property for the lunatic and he instituted suits to recover the lunatic's share in ancestral property which had been alienated by Har Shankar Prasad Singh or which had been sold at auction in execution of decrees against the latter. In all these suits he was successful; and in the two suits in which Har Shankar Prasad Singh and his lunatic brother were co-defendants the claim failed in respect to the lunatic's share. In none of these suits did Har Shankar Prasad Singh put in an appearance. It is contended that it was not to his interest to contest the suits inasmuch as, if the suits were dismissed, it would mean that all the property would go to the creditors and nothing would be saved out of his brother's share. It is said that his object was simply to save a half share in the ancestral property. This aspect of the matter I shall consider in its proper place. For the present, it is enough to state that he did not contest the suits, and in one of them his wife deposed on behalf of her brother-in-law that he was not congenitally disqualified.

On 22nd December 1881 the lunatic's half share in the estate or what was conceived to be his half share, was taken over by the Court of Wards; and meanwhile on 8th October 1879 the Collector of Ghazipur, under S. 326, Civil P. C., — Act 10 of 1877 — had taken over property belonging to Har Shankar Prasad Singh. According to a rubkar dated 8th October 1879, the property so taken over was in two districts only, Ghazipur and Azamgarh, but there is a report of the Court of Wards dated 30th September 1920 which shows that 213 villages had been taken over in the districts of Allahabad, Benares, Ghazipur and Ballia. Originally Ballia formed part of the Ghazipur District, but was afterwards separated. I think there can be little doubt that in fact whatever property remained to Har Shankar Prasad Singh out of a moiety share in the ancestral estate was at some time or other taken

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15. ('28) 15 A. I. R. 1928 All. 422 : 111 I. C. 33 : 51 All. 1 : 26 A. L. J. 857, Ram Kali v. Khaman Lal.

16. ('09) 31 All. 412 : 3 I.C. 195 : 6 A.L.J. 597, Parbati v. Naunihal Singh.

17. ('19) 6 A.I.R. 1919 P.C. 91 : 53 I.C. 866 : 15 N.L.R. 165 (P.C.), Amritrao v. Mukundrao.

18. ('38) 25 A.I.R. 1938 P.C. 189 : 175 I.C. 332 : 32 S.L.R. 798 : 1938 A.L.J. 763 (P.C.), Harkishan Singh v. Partap Singh.

over by the Collector under S. 326 of Act 10 of 1877, and it is admitted that after the sale deed of 19th June 1897 Har Shankar Prasad Singh had no property left.

According to learned counsel for the appellant when this property was placed under the Collector, he was governed by the provisions of Chap. 6, Land Revenue Act, 14 of 1873, which contained provisions relating to the Court of Wards. Learned counsel for the respondents objects that the Court of Wards was not legally concerned with this property at all and he bases his objection on S. 193 of the aforesaid Act, which reads as follows :

"The Board shall have the powers of a Court of Wards for the superintendence of the persons and property of all proprietors of mahals or parts of mahals who are disqualified for the management of their own lands, or who are put under the charge of the Collector of the District by order of a civil Court under the provisions of any Act for the time being in force."

Learned counsel pleads that under this section not only the property of the owner, but also his person had to be under the Court of Wards, whereas it was only the estate of Har Shankar Prasad Singh which was handed over to the Collector. I shall presently consider this matter but I may say that, whatever force there may be in the contention, there can be no doubt that the Collector did act under the Court of Wards and it was the Court of Wards which ultimately released his estate in 1896. The last clause of S. 322 of Act 10 of 1877 provided:

"For the purpose of managing under this section the whole or any part of such property the Collector may exercise all the powers of its owner."

There was a similar provision in S. 323 (3) of the later Code (Act 14 of 1882). Purporting to act under the powers vested in him, the Collector proceeded to apply to the revenue Court on behalf of Har Shankar Prasad Singh for a perfect partition of various portions of zamindari property. Learned counsel for the respondents objects on the ejusdem generis principle that the Collector had no such power; but the contention need not be considered at this stage. The fact remains that he did effect these partitions; and at the same time the Court of Wards treated the lunatic's estate as entirely separate, and with its own budget. The first application for partition by the Collector as manager of the Court of Wards was preferred on 16th June 1882 and in the application it is stated :

"The mahal known after the name of the defendant is ancestral property of the parties and collection of rent, etc., from the tenants has been made separately for a long time according to a private partition. Owing to the jointness of the land, 'Sair' items and the groves, etc., however, there arise difficulties in the management thereof."

The word 'management' is emphasised by learned counsel for the respondents; but in later applications, as will appear hereafter, it was clearly stated that each party was to have exclusive title in the shares allotted. These partitions through the revenue Court were effected in 1882-1883 and again in 1891-1892. Har Shankar Prasad Singh — who does not appear to have been personally under the Court of Wards—raised no objection and we find that the wajib-ul-arzes and the partition khasras were signed by his own karinda: *vide* pp. 243, 755-759 and 734 of our paper-book. Har Shankar Prasad Singh was a sane person and we must assume that he knew perfectly what was being done by the Collector on his behalf; in fact the applications for partition at pp. 463 and 467 appear to have been signed on his behalf by his karinda. On 27th April 1884 Babuain Jodha Kunwar, the lunatic's wife, applied to the Court of Wards praying that income from her husband's estate be applied towards the payment of her brother-in-law's debts and that a charge therefor be created on the latter's property. If, as alleged in para. 13 of the plaint this application was inspired by Har Shankar Prasad Singh, it would seem to indicate that the latter recognized the two estates as separate. If not so inspired, it goes to show that Babuain Jodha Kunwar for her part at least did not regard the two estates as joint.

Har Shankar Prasad Singh was receiving an allowance of Rs. 50 a month from his own estate and was also being paid Rs. 50 a month from the income of his brother's estate. I have mentioned that on 22nd March 1888 he wrote a letter to the Commissioner, enclosing a petition from Har Shankar Prasad Singh, and strongly recommended that an additional Rs. 50 per mensem be allowed to Har Shankar Prasad Singh from the income of the lunatic's estate. On 7th April 1888, the Board of Revenue directed that an inquiry be made from the lunatic's wife as to whether she had any objection. We do not know what her reply was, but I have little doubt that she readily assented, for she appears to have had an affectionate regard for her brother-in-law, which lasted all his life and subsisted even after his death. This application which was forwarded by the Collector is relied upon on behalf of the appellants as proving that Har Shankar Prasad Singh looked upon his brother's estate as entirely separate and that it had in fact become separated. The income from the lunatic's estate was Rs. 20,000 per annum and there is evidence to show that his wife was receiving an allowance which ranged between Rs. 700 and Rs. 2000 per mensem, whereas all that Har Shankar Prasad Singh got was Rs. 50 from his own estate and Rs. 50 from the estate of his lunatic brother.

There is oral evidence, which on this point may well be true, that Babuain Jodha Kunwar asked the Court of Wards for Rs. 5000 from her husband's estate for the treatment of her brother-in-law's eyes; but this was refused. It is argued on behalf of the appellants that this also goes to show separation of the estate; and the same argument is advanced in respect to a later application by this same lady for Rs. 7000 for the funeral expenses of Gopal Saran Singh and for the marriage expenses of Babuain Raj Kishori Kunwar, the mother of the plaintiffs. But these applications were after the death of the lunatic and after the death of Har Shankar Prasad Singh and his adopted son, and I shall have to deal with them in another connexion. Any way, as regards the sum of Rs. 5000 which Babuain Jodha Kunwar unsuccessfully sought for the treatment of her brother-in-law's eyes, the argument on behalf of the appellants is that if the estate were joint, the money should have been claimed, not by the lunatic's wife, but by Babuain Shiam Dulari Kunwar and as of right; whereas on behalf of the respondents it is argued that the application is indicative of jointness rather than of separation, for it is said that by this application Babuain Jodha Kunwar clearly regarded her brother-in-law as having right to receive money from the lunatic's estate for his personal necessities. I will leave this matter here for the time being and will revert to the life-time of Har Shankar Prasad Singh. On 28th July 1898 he adopted Gopal Saran Singh, who, as will appear from the pedigree, was the son of a member of Bishun Dat Singh's branch. A deed of adoption—which is also

of a testamentary character — was drawn up and each party relies upon it in support of their own case. A translation of this document will be found at p. 443 and it contains the following recital :

"For our whole life I and my wife shall remain owners of all the household goods, ornaments, articles, houses and moveable and immovable properties and after our deaths our adopted son Babua Gopal Saran Singh shall be the owner of all moveable and immovable properties, household goods, cash, ornaments, clothes and articles, etc., ..."

Further on we read :

"There is no power to interfere with the will of God and so if by the grace of the Almighty, my wife or my brother B. Gauri Shankar Prasad Singh's wife brings forth an issue, in that case my or my brother's issue shall be the owner of one half of the property left by me and my adopted son aforesaid, shall be the owner of the other half ....."

On 6th March 1896 the estate of Har Shankar Prasad Singh was released by the Court of Wards. This is proved by a letter from the Collector to the District Judge which, for reasons stated by us, we have admitted in evidence; and on 19th June 1897, Har Shankar Prasad Singh and his adopted son sold 79 villages to the Court of Wards on behalf of his brother in consideration for a sum of rupees 2,12,531-4-9 and an annuity of Rs. 4180 to be paid to Har Shankar Prasad Singh for his life and afterwards to his widow and adopted son jointly, and ultimately to the survivor of them for his or her life. This sale deed was executed by Har Shankar Prasad Singh and Gopal Saran Singh independently and therefore even if the aforesaid letter were not admitted in evidence, there would be a strong presumption that the estate of Har Shankar Prasad Singh had been released; and even if it be held that no such presumption would arise, the permission of the Collector as required by S. 325A of Act 14 of 1882 must be presumed, since the document is an indenture, to which the Court of Wards was a party and is not a deed-poll. Admittedly, Har Shankar Prasad Singh had nothing left in his possession after the sale except the allowance which was to be paid to him and which was enjoyed by him and by his adopted son for the remainder of their life.

After the lunatic's death in 1902, the Court of Wards continued to hold the estate on behalf of his widow. Neither Har Shankar Prasad Singh nor Gopal Saran Singh took any steps to recover the property before the death of the former on 16th June 1903 and the death of the latter on 24th November of the same year. Babuain Shiam Dulari Kunwar similarly kept quiet after the death of her husband, Gopal Saran Singh; she did nothing either before or after the death of the posthumous son who was born to her husband. Not only did she do nothing in the matter of retrieving the property, but in 1923 she accepted a gift of a portion of that estate for her life time from Babuain Jodha Kunwar and appellants 1 and 2. It is contended that the reason why she took no steps to recover the estate from Babuain Jodha Kunwar was that her thoughts turned to religion. This is based on a statement of Lachhman Prasad, a witness for the respondents, who says, "she had no connexion with worldly matter." But her devotion to religion did not restrain her from obtaining mutation in respect to the property which had been gifted to her, and in the same manner Babuain Raj Kishori Kunwar accepted a gift of property and her gift was in perpetuity. Babuain Jodha Kunwar lived upto 1932 and these transfers were never challenged by anyone; and after the death of Babuain Raj Kishori Kunwar the respondents succeeded to the property which had been gifted to her. A suit was brought by defendant 7 for a declaration that the transfers of 1923 were not binding on the "real reversioner" and also for an injunction to restrain Babuain Jodha Kunwar from alienating any part of the Anapur Estate. On 11th November 1925 the Court upheld one only of the transfers which was a gift to a Sanskrit school —but it declared the other transfers as not binding except on appellants 1 and 2. This suit was contested by Babuain Shiam Dulari Kunwar, *vide* her written statement dated 30th April 1925.

After the death of Gopal Saran Singh, the Board of Revenue sanctioned Rs. 7000 for his funeral expenses presumably on the application of Babuain Jodha Kunwar and thereafter large sums of money were sanctioned on the application of Babuain Jodha Kunwar for the marriage expenses of Babuain Raj Kishori Kunwar. Learned counsel for the appellants contends that these acts of Babuain Jodha Kunwar go to indicate separation. He says that if the estate was joint, it was Babuain Shiam Dulari Kunwar who should have applied for these sums of money and he contends that he was under no obligation to do so. Babuain Jodha Kunwar spent these large amounts from the income of the property in which she had a life interest because of her affection for Har Shankar Prasad Singh and the members of his family. As regards this, learned counsel for the respondents says that if the status was not joint, Babuain Jodha Kunwar would never have spent such heavy sums on the funeral expenses of her pauper brother-in-law and on the marriage expenses of Babuain Raj Kishori Kunwar. After the release of the lunatic's estate on 1st October 1920 Babuain Jodha Kunwar executed a power of attorney in which she stated that she had been put in proprietary possession of the estate; and learned counsel for the appellants relies upon this as showing that the lady considered herself to have a widow's estate. As regards the transfers in pursuance of the tamliknama of 3rd September 1923, the contention of learned counsel for the respondents is that these were all effected through the influence of appellants 1 and 2 for motives of their own and he also says that the latter had their own reason for denying in the written statement the birth of a posthumous son to Gopal Saran Singh. It is conceivable that the appellants—who were signatories to the tamliknama and the various deeds of transfer may have had some such idea in their mind. They were interested in the property, and it is conceivable that they may have wanted to create evidence of separation, while at the same time keeping Babuain Jodha Kunwar's generosity within bounds by restraining her from making any further alienations : *vide* the stipulations in the tamliknama. But the acts of Babuain Jodha Kunwar after the release of the estate by the Court of Wards in 1920 and while she was probably under the influence of the appellants are not very important; what we have to see is whether there was a separation between Har Shankar Prasad Singh and his brother at the former's volition which had the effect of passing a moiety of what had originally been the joint ancestral estate to Gauri Shankar Prasad Singh. A point of law which arises in this connection is whether a sane coparcener can separate himself from his insane brother. The learned Judge of the Court below is of opinion that he cannot do so. It was held in A.I.R. 1935 Mad. 775[19] that a father can effect a severance

19. ('35) 22 A.I.R. 1935 Mad. 775 : 160 I.C. 624 : 69 M.L.J.410, Venkateswara Pattar v. Mankayammal.

of status between himself and his lunatic son. This is with reference to the special powers of a Hindu father, but the learned Judges go on to say :

"Once the conclusion is reached that a disqualified person may be 'coparcener' enough to take by survivorship, there is no reason why we should deny the possibility of such severance of the joint status as would put an end to the right of succession by survivorship."

Nothing has been shown to us in support of the proposition that a Hindu coparcener cannot separate himself from a lunatic brother who is not entitled to claim a share. In the translation of the Mitakshara by Macnaghten and Colebroke it is stated in Chap. 2, S. 10, placitum 6 : "They are debarred of their shares, if their disqualification arose before the division of the property." This shows that there can be a partition where a member of the family is a lunatic; and there is no apparent reason why this rule should not equally hold good in a family consisting of two brothers only, one of whom is sane and the other a lunatic. The lunatic will always be entitled to maintenance and there is nothing to prevent him from receiving a share of the property in lieu thereof. It is true that placitum 7 says that if the disability is removed after partition "the right of participation takes effect"; but presumably this means that if he is a son, he will be entitled to share with his father. Whatever right it will give to a brother to share in the divided estate, it will apply equally whether there are two brothers in the family or several. There does not appear to be any rule of Hindu law which precludes a sane person from separating himself from his insane brother.

The first matter which we have to consider is whether we can read into what Har Shankar Prasad Singh did and did not do and into his conduct and manner of life an intention to separate himself from his brother and an intention that his brother should have a half share of the ancestral estate. There are several witnesses for the respondents who say that the brothers were always joint. These are Bhan Prasad Singh, Darshan Tewari, Jageshwar Lal, Ganpat Singh, Ghasita, Lachhman Prasad, Lal Bahadur Singh and Hari Shankar. The learned Judge has not relied on Bhan Prasad Singh and Ganpat Singh, and as regards the other witnesses it is, I think, apparent from his judgment that he had no very high regard for their credibility and only accepted their evidence where he thought that there was good corroboration. Darshan Tewari says that he was in the service of Har Shankar Prasad Singh for five years and he and three other servants used to look after Gauri Shankar Prasad Singh. Jageshwar Lal was the patwari of village in the District of Ballia and he says that the two brothers used to mess jointly but he only saw them occasionally when he went to Benares for darshan and he admits that he himself never took food with them. He also admits that appellants 1 and 2 obtained a decree for arrears of rent against him. Ghasita says that he used to look after the birds which were kept by Har Shankar Prasad Singh and he was in the service of the family until the death of Gopal Saran Singh and throughout that period his pay was Rs. 8 a month. Lachhman Prasad was the second accountant of the Court of Wards; and so far as I can make out from his evidence, he only saw the two brothers taking food together on one occasion. Hari Shankar was head-clerk of the Court of Wards at Ghazipur from 1900 to 1902 and again from 1903 to 1904 and he says that he once saw the two brothers go off to take their food in the kitchen. He says that when the application of Babuain Jodha Kunwar for Rs. 5000 for the treatment of her brother-in-law's eyes was refused by the Court of Wards on the ground that the estate was in debt and that Har Shankar Prasad Singh was not their ward, she replied that she and her brother-in-law were "not two persons." Lal Bahadur Sigh says that he was in the service of Har Shankar Prasad Singh as a cook.

All the above witnesses depose that the two brothers were joint in board, lodging and worship; but there are many documents on the record to which the learned Judge's attention does not appear to have been drawn and which show that Har Shankar Prasad Singh lived at Benares and Gauri Shankar Prasad Singh at Anapur. These documents will be found at pp. 285, 327, 369, 373, 377, 383, 403, 409, 437, 443, 447, 463 and 477. There is also a death certificate which shows that Har Shankar Prasad Singh died at Benares; and Lal Bahadur Singh, one of the witnesses for the respondents, admits that Gauri Shankar Prasad Singh died at Anapur. And it is very natural that the lunatic should have lived separate from his brother, for the Court of Wards always takes a personal interest in its wards and it is highly improbable that, unless prevented by legal action on the part of Har Shankar Prasad Singh, it would have allowed the lunatic and his wife to live with the former's profligate brother. In the circumstances I am unable to accept the oral testimony on behalf of the respondents as regards joint board, lodging and worship. The learned Judge has relied strongly on the fact that the appellants did not produce their books of account. Defendant 1 has stated in cross-examination :

"During the life time of Gauri Shankar household expenses were noted in deorhi bahi. The accounts were kept on similar lines by Jodha Kunwar after the death of Gauri Shankar. I cannot say if puja expenses were noted in the bahi. I do not know what sort of expenses were noted therein."

Further on he says :

"I cannot say if Jodha Kunwar took pretty good care for the preservation of every paper. After her death all the estate papers in her office at Benares came into my hands. I had not taken the trouble to find out whether the deorhi bahis current or old, were in those papers."

On the following day he was again questioned about these papers and he said :

"The old papers produced by me were found in the record room of the Anapur Estate. This record room is at Anapur. I got these papers after the death of Jodha Kunwar when the estate came into my possession. I did not find any accounts either prior to 1874 or of subsequent period in the record room. I cannot say if Har Shankar was in possession of any estate papers."

From this statement, if true, it would appear that some accounts were filed by this defendant, but none of the learned counsel who have appeared in this appeal know anything about them. Learned counsel for the appellants has referred us to 37 All. 557[20] where their Lordships of the Privy Council say :

"But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appear

20. ('15) 2 A.I.R. 1915 P. C. 96 : 30 I. C. 299 : 37 All. 557 : 42 I. A. 202 (P. C.), Bilas Kunwar v. Desraj Ranjit Singh.

to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents."

Learned counsel for the respondents on the other hand has relied on three other decisions of the Privy Council. The first of these is 37 I. A. 1,[21] which was a case in which the plaintiff claimed as an adopted son. At page 7 we find the following dictum :

"Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book in which anything connected with this ceremony was entered covers the plaintiff's case with suspicion."

In 43 Cal. 707[22] at p. 721 their Lordships of the Privy Council say :

"As to the books, they have not been produced for any period which is critical in this case .... Had they been produced, the absence of entries in them would, if the defendants' case be true, have completely confounded the plaintiff's allegations."

Again in A.I.R. 1925 P. C. 93[23] the Privy Council held that the non-production of account books by a party when such account books would throw much light on the case raises an adverse presumption. At p. 96 their Lordships say :

"The books of account would have shown whether the accounts, which must have been kept, were the accounts of a joint family or of a partnership. The non-production of any of those books of account has not been satisfactorily explained by or on behalf of the plaintiffs, and their Lordships draw the inference that if they were produced, they would not support the case of the plaintiffs."

All these dicta must of course be read with reference to the facts of each particular case. It does appear to me that the appellants were in possession of household books of account after the death of Babuain Jodha Kunwar, and these books may well have had some relevance on the question whether the status was joint or separate. I therefore think that they should have been produced ; but, on the other hand, it was always open to the respondents to demand inspection, and any presumption which may arise by their non-production is of course rebuttable. Two witnesses for the respondents depose about a common fund which was operated on by Har Shankar Prasad Singh. Bhan Prasad Singh says, "money received from the Court of Wards was kept and spent by Har Shankar Prasad Singh. He used to sign when receiving money and used to make Mt. Jodha Kunwar also sign the receipts ;" but the testimony of this witness has not been otherwise accepted by the learned Judge. Darshan Tewari says :

"Payments used to be made before Har Shankar and in his immediate presence. He used to call the Karindas and then take money."

I do not believe for one moment that the Court of Wards would have knowingly allowed Har Shankar Prasad Singh to meddle with any part of the income of the lunatic's estate ; nor is it probable that Dalthaman Singh would have permitted this, for it is obvious that he dealt very strictly with the lunatic's half share as a separate estate and he instituted suits in which the title of Har Shankar Prasad Singh was challenged. Lachhman Prasad says :

"The entire money received from the Court of Wards by Mt. Jodha Kunwar used to be handed over to Mt. Ramkali Kunwar and she used to spend that money."

There is no other evidence to this effect, but, as we know, Babuain Jodha Kunwar received an allowance which varied from Rs. 700 to Rs. 2000 per mensem and possibly some of this may have gone to Har Shankar Prasad Singh. This may conveniently explain why the account books were not produced. What we have to decide is whether or not the acts, omissions, attitude and conduct of Har Shankar Prasad Singh can be interpreted as expressing an intention to separate himself from Gauri Shankar Prasad Singh and in such manner that the latter acquired a title in a half share of the estate. He allowed Dalthaman Singh to deal with his brother's share as a separate and independent estate. It is alleged in the plaint that it was he who inspired the application for the appointment of a manager with a view to save a moiety of the joint estate, and it was suggested that he inspired the institution of the various suits ; but as I have already mentioned and as will more clearly appear when I am dealing with the question of res judicata, his own title to the property was in issue in those suits. If, as is now conceded, his lunatic brother had during his disability no claimable interest in the estate at all, it was open to Har Shankar Prasad Singh to sue the manager for an injunction to restrain him from managing this property on the ground that it did not belong to the lunatic, but was ancestral property in which the lunatic had no right of participation.

Later on he allowed the Collector, as manager of the Court of Wards, to effect a partition of large portions of the zamindari property. In at least two of these applications for partition, one dated 3rd October 1891, and the other dated 2nd February 1892 : *vide* pages 463 and 467 of our paper-book—it was stated that each party, that is to say, Har Shankar Prasad Singh on the one hand and Gauri Shankar Prasad Singh on the other, was to be the exclusive owner of his share after partition, and the khasras and wajib-ul-arzes etc. were signed by the Karinda of Har Shankar Prasad Singh. There can be little doubt that Har Shankar Prasad Singh must have agreed to these partitions ; or if he did not, he at least acquiesced in them, and there was nothing in law to prevent him from objecting to the partitioning of the estate or from suing before partition for recovery of the lunatic's share on the ground that it belonged to himself and the lunatic had no legal interest in it. We have been referred to S. 203 of Act 19 of 1875, which provided as follows :

" The Court of Wards shall have power to give such leases or farms of the whole or parts of the property under its charge, and to mortgage or sell any part of such property, and to do all such other acts, as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors."

We are also referred to S. 47, Court of Wards Act, (3 of 1899) which provides :

" The exercise of any discretion conferred on the Local Government or the Court of Wards by this Act shall not be questioned in any civil Court."

Assuming that the Court of Wards had power to administer Har Shankar Prasad Singh's property

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21. ('10) 32 All. 104: 5 I. C. 549: 37 I. A. 1 (P.C.), Lal Kunwar v. Chiranji Lal.

22. ('16) 3 A. I. R. 1916 P. C. 256 : 33 I. C. 583 : 43 Cal. 707 : 43 I. A. 73 (P.C.), Ram Parkash Das v. Anand Das.

23. ('25) 12 A. I. R. 1925 P. C. 93 : 86 I. C. 122 (P. C.), Jag Prasad Rai v. Mt. Singari.

under S. 193 of Act 19 of 1873, neither the ward himself nor any person claiming the estate through the ward could question such acts, but this would not be applicable to a person who claimed that the property belonged to himself, that the ward had no existing interest in it at all and that the Court of Wards had therefore no authority to administer it. Another significant matter is the application of Babuain Jodha Kunwar dated 27th April 1884 in which she prayed that her husband's income be applied towards payment of her brother-in-law's debts and that the latter's property be mortgaged as security. According to the plaint, this application was inspired by Har Shankar Prasad Singh, and, if so, it is definitely suggestive of separation. Even if it was not so inspired, it would seem to indicate that Babuain Jodha Kunwar at least regarded the estate as separate. It might be said that in the circumstances in which he found himself Har Shankar Prasad Singh realised that he had no hope of obtaining any money from the property held by the Court of Wards as belonging to his brother unless he agreed to have a charge on his own property and that it would be useless for him to claim any such money as of right; but this contention has no force in view of the fact that Har Shankar Prasad Singh was perfectly free to claim this estate as his own and to take legal action to obtain it. The Court of Wards jealously protected the interests of the lunatic and it excluded Har Shankar Prasad Singh from all enjoyment of the lunatic's share except that it allowed him Rs. 50 a month out of it to eke out the allowance of Rs. 50 which was being allowed to him from the income of his own property; but if the plaintiffs case is true, the Court of Wards had no right to administer any of this estate at all as being the lunatic's half share.

Then we come to the testamentary deed of adoption of 1889. I have already set out the recitals which it contains and I have said that both parties rely upon this document. At that time Har Shankar Prasad Singh admittedly had 79 villages in his possession. It is true that he was very heavily in debt and all these villages were subsequently sold to liquidate his debts and, therefore, it is said on behalf of the respondents that Har Shankar Prasad Singh must have been contemplating the whole ancestral estate when this deed of adoption was drawn up. It is also argued that, if the lunatic had received a half share in severalty, Har Shankar Prasad Singh would not have bequeathed any of his own remaining property to his brother's potential son. The arguments are not without force; but on the other hand, if Har Shankar Prasad Singh regarded the estate as joint, what necessity was there for him to provide that his brother's son, if any were born should take half the property? He would be entitled to his share in any case if the estate were joint. It is also argued on behalf of the respondents that it is unlikely that any adoption would have taken place if Har Shankar Prasad Singh only owned sufficient property to cover his debts. But when a Hindu adopts a son, he is actuated by other considerations, which have no concern with property. Moreover, Har Shankar Prasad Singh, having apparently no appreciation of the value of money, may not have realized at that time that his outstanding debts would swallow up all his remaining property. In my opinion, this deed of adoption is more compatible with separation than with jointness.

Then comes the sale deed of 19th June 1897, by which time Har Shankar Prasad Singh's property had been released by the Court of Wards. He sold to Gauri Shankar Prasad Singh through the Court of Wards the 79 villages which remained to him, including ten villages which had gone to him at one of the partition suits, Suit No. 18 of 1892. He sold them for a sum of money sufficient to liquidate his debts and for an annuity to enure during the life time of himself, his wife and his adopted son, which was to be paid from the income of his brother's estate. The sale deed was executed both by Har Shankar Prasad Singh and by his adopted son, and they enjoyed this annuity until they died; and as I have already shown, Har Shankar Prasad Singh lived at Benares while he allowed his lunatic brother to live separately at Anapur.

Severance of status among coparceners is a matter of individual volition, and what we have to consider is whether we can read any such volition into the facts and events which I have set out above. There is no actual expression by Har Shankar Prasad Singh in any document of an intention to separate himself from his brother, but from 1874 upto the date of his death in 1903 he allowed his brother's share to be dealt with as a separate estate, although he was a perfectly free agent and was at liberty to recover it by suit on the ground that Gauri Shankar Prasad Singh was disqualified under Hindu law and that he himself was the owner. It is argued that it was not to the interest of Har Shankar Prasad Singh to deprive himself of his legal title in half the estate in this manner; but his object apparently was to save this moiety share from his creditors and he achieved this purpose by allowing the property to go completely out of his hands in such manner that he lost all legal title to it. In my opinion his acts and conduct indicate an unmistakable intention on his part that this should happen. Mr. Das concedes that there is nothing in Hindu law to preclude one coparcener from withdrawing from the coparcenary and renouncing his interest in favour of the other coparcener; and this, I think, is what Har Shankar Prasad Singh's conduct amounted to. As I have already shown, a person who suffers from supervening lunacy is not entitled to claim his share by partition or to claim it at partition, but admittedly there is nothing to prevent a lunatic coparcener from receiving a gift of property. In this case there was certainly not a gift, but I think there was a disclaimer or renunciation by Har Shankar Prasad Singh in favour of his lunatic brother. There is nothing to prohibit a lunatic coparcener from receiving property in lieu of maintenance and I can see no reason why he should not receive what would have amounted to his share if he were under no disability, if the other coparcener or coparceners choose to let him have it. In this case we find that Har Shankar Prasad Singh allowed without protest a manager to be appointed under the Lunacy Act in respect to his brother's property and to manage a half share of the ancestral estate as belonging to the lunatic when in law the latter had no right of participation in the ancestral estate. If the lunatic had no interest in the estate during his disability, the estate was liable for the debts of Har Shankar Prasad Singh; but the latter allowed the manager to institute suits the object and result of which were that half the estate was put out of reach of the creditors as constituting the proprietary interest of Gauri Shankar Prasad Singh. In the same manner he allowed the Court of Wards to buy at auction properties which were being put to sale in execution proceedings against himself. He allowed the Collector to have a perfect partition effected through the revenue Court in respect to zamindari property, thereby estopping himself — as I shall show hereafter—from claiming the half share which the Court

allotted to Gauri Shankar Prasad Singh. Without demur he accepted a trifling allowance of Rs. 50 from the income of his brother's estate, and he agreed to a charge being imposed upon his own property in consideration for the liquidation of his debts out of the income of his brother's estate; all this he accepted, although if there was no intention on his part to have a separation, he was entitled to claim that what was being managed by the Court of Wards was his estate and that his brother had no enforceable interest in it. Finally, by the sale deed of 19th June 1897 he sold his rights in the property remaining to him in consideration for the payment of his debts and an annuity. And all this while he was living at Benares while his brother was living separately at Anapur.

In my opinion this history of his acts and conduct manifests an intention on the part of Har Shankar Prasad Singh to renounce his title in favour of his brother in respect to the moiety of the estate in which his brother would have had an enjoyable interest if not under a disability, and it also manifests an intention to disrupt the status. "It is generally understood in law that a man must be presumed to intend the natural consequences of his own act" : *vide* 48 All. 529[24] at p. 541. As I have already said, the "scheme" which is alleged in the plaint was repudiated by Mr. Das, who argued on behalf of the respondents for many days, whereas Dr. Katju, who argued the connected appeal on behalf of the respondents, stood by this "scheme" but pleaded that there was no intention to defraud the creditors. The plea is irreconcilable with the allegation, for it is obvious that, if Har Shankar Prasad Singh intended to remain the owner, the effect of his scheme was to defraud the creditors ; and neither Har Shankar Prasad Singh nor those claiming under him are entitled to benefit by his own fraud. My opinion is that Har Shankar Prasad Singh agreed to save half the property by a severance of status and a renunciation of title in respect to a half share in the estate. He and other members of the family may well have thought in 1874 and subsequent years that so long as his brother had no existing interest in the estate at all, there would always be an apprehension of the creditors enforcing their claim against it and that a separation and renunciation of title was the only means of saving half the estate. I cannot accept the contention that there was nothing more than a temporary "freezing" of half the estate and that the descendants of Har Shankar Prasad Singh are now entitled to claim it on the ground that the legal title remained all along with their ancestor. It is true that at the trial the appellants pleaded an ordinary separation, that is to say, a separation such as might occur among sane coparceners, and issue 7 reads as follows :

"Did Har Shankar Prasad Singh and Gauri Shankar Prasad Singh continue to be members of a joint Hindu family upto the death of Gauri Shankar Prasad Singh, or had disruption of the joint status taken place in the life time of Gauri Shankar Prasad Singh and they had ceased to be members of a joint Hindu family ? "

This is explainable by the fact that in their written statement the appellants did not admit any disability on the part of Gauri Shankar Prasad Singh, but if we consider all the facts and circumstances which have come to light and which indicate a renunciation of title, I do not think that the plaintiffs can claim a decision in their favour on this part of the case on the ground that the appellants pleaded an ordinary disruption of status and division of title as between sane brothers. At this stage I may mention an argument which has been addressed to us with reference to the various decrees which were obtained against Har Shankar Prasad Singh and the suits whereby the lunatic's share was subsequently retrieved. A number of authorities have been discussed before us which bear the question whether, when the share of one coparcener has been sold at auction, there is or is not a severance of status between himself and the other coparceners ; but I do not think it is necessary to discuss this matter since I have already held upon a broad view of the acts and conduct of Har Shankar Prasad Singh, and particularly the sale deed of 19th June 1897, that there was an unmistakable volition on his part to effect a severance of status and a division of title. Even if a contrary view be held, I am of opinion, for reasons which I shall give hereafter, that his claim to the lunatic's moiety share in the ancestral property is barred by the rule of res judicata and by limitation and is also barred quoad certain properties by S. 233 (k), Land Revenue Act.

The result of my findings on this part of the case is that Har Shankar Prasad Singh renounced in his brother's favour his claim to the moiety share of the estate which was first taken over by the manager and then by the Court of Wards and that he disrupted the status of the family. The Court below has upheld the sale of 79 villages which was effected on 19th June 1897, and this is the subject of the cross-objection. In 3 Bom. 54,[25] it was held that the effect of a Hindu son relinquishing for a sum of money, his share in the property of his father and agreeing not to claim it during or after his father's life-time is to place him in the position of a separated son ; and in 53 Mad. 188[26] — which follows 3 Bom. 54[25]—it was held that if one of two members of a joint Hindu family sells his share to his coparcener brother, he becomes divided from the latter in respect to the said properties without any right of survivorship. Both these cases contemplate a transfer for consideration by one coparcener to another and they have been cited on behalf of the appellants to show that the sale by Har Shankar Prasad Singh of what remained to him of the joint ancestral estate was valid. In 1936 A. L. J. 680,[27] Sulaiman C. J., at page 681 says : ". . . the family being still joint a transfer of an undivided interest by one member of the family in favour of the other would be wholly invalid." At page 682 the learned Chief Justice observes :

"Unless there be circumstances which amount to a complete estoppel so as to prevent the person who has surrendered his interest from claiming it, such a surrender would not have the effect of preventing him from claiming the property again, particularly if there was no consideration for the surrender."

In that case the surrender was in respect to certain specific properties only and the coparcener had no intention to separate. This authority has been

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24. ('26) 13 A. I. R. 1926 P.C. 100 : 98 I.C. 1013 : 1 Luck. 389 : 48 All. 529 : 53 I. A. 220 (P. C.), Nirman Singh v. Rudra Partab Narain Singh.

25. ('78) 3 Bom. 54, Balkrishna Trimbak v. Savitribai.

26. ('30) 17 A.I.R. 1930 Mad. 51 : 124 I. C. 497 : 53 Mad. 188 : 57 M. L. J. 746, Lakshmi Achi v. Narayanasami Naiker.

27. ('36) 23 A. I. R. 1936 All. 452 : 163 I. C. 672 : 1936 A. L. J. 680, Shok Haran Prasad Singh v. Faqir Chand Sarju Prasad.

cited on behalf of the respondents, but learned counsel for the appellants pleads that he comes within the rule therein laid down inasmuch as this sale was for consideration. In 6 All. 560,[28] a Hindu had made a gift to his grandson in lieu of Rs. 5000 presumably paid out of the joint fund. The son, Udai Narain, attested the deed and his wife accepted the gift. It was held by the Privy Council that the gift was valid, though it would fail as regards unborn sons. At page 573 their Lordships say :

" . . . . what is the whole scheme of the parties ? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation."

Whether the particular sale deed now under discussion was valid in law or not, the transaction was acted upon and I am clearly of opinion that persons claiming through Har Shankar Prasad Singh cannot now be heard to repudiate it. Paragraph 15 of the plaint virtually amounts to an allegation that this transaction was entered into with the collusion of the Court of Wards and that there was in fact no transfer and none was intended; the purpose of the ostensible sale was solely to save the property. But it is not suggested before us that there was any such collusion; in fact Mr. Das, senior counsel for the respondents, definitely repudiated any such suggestion. The plea of estoppel was not taken in the written statement, but for the reasons which I have given, I am of opinion that the sale deed—whether valid or invalid in law and whatever effect such a deed might have as regards the status of the family, cannot now be impeached. In my judgment the view taken by the learned Judge was correct. The next question is whether the suit is barred by S. 233 (k), Land Revenue Act, quoad the properties of which a perfect partition was effected by the revenue Court. This plea was not taken at the trial, but it has been seriously argued before us. The applications for partition were preferred by the Collector on behalf of Har Shankar Prasad Singh against Gauri Shankar Prasad Singh; and the Collector was acting as representing the Court of Wards, as is clear from some of the applications. Learned counsel for the respondents pleads that it was only for purposes of management that the Collector sought partition and he relies on the last sentence of the application dated 16th June 1882 in which there is a mention of difficulties having arisen in the management of the property. In support of his plea, he has cited a number of cases where there has been a partition between two co-widows having a life interest in a joint estate. In particular, he relied on three decisions of the Privy Council, namely 11 M.I.A. 487,[29] 1 Mad. 290[30] and 26 A. L. J. 1174.[31] It will suffice to state what their Lordships said in the last mentioned case. It was there observed :

"If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life-interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner."

Further on their Lordships say :

"The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her life-time."

These decisions afford authority for the proposition that co-widows may partition the estate so that each may remain in peaceful occupation of a half share without prejudice to the rights of the survivor or of the reversioners; but what is partitioned in such a case is merely the life interest of each widow, not an absolute title. There is nothing in the Land Revenue Act to authorise a partition for the purposes of convenient administration; what is contemplated under that Act is not only a division of property, but also a division of title. In these partition suits the Collector represented Har Shankar Prasad Singh and he also represented the lunatic, each being a recorded cosharer in the village registers, which is the basis upon which a partition in the revenue Court can be sought. It is contended that the Collector had no intention of bringing about any particular legal result; his object was merely to safeguard the lunatic's interest by having his half share separated. But assuming that this was so, it does not necessarily follow that no legal result ensued. Section 113 of Act 19 of 1873 provided for the determination of questions of title and S. 241 (f) enacted :

"241. No civil Court shall exercise jurisdiction over any of the following matters :

. . . . . (f) The distribution of the land or allotment of the revenue of a mahal by partition ; or, the determination of the rent to be paid by a cosharer for land held by him after the partition in the mahal of another cosharer".

In 23 All. 291,[32] a Full Bench of this Court held that if a party to a partition which was being conducted by the revenue authorities under Chap. 4 of Act 19 of 1873 desired to raise any question of title affecting the partition, he had to do so according to the procedure laid down in Ss. 112 to 115 of the Act ; and if a question of title affecting the partition, which might have been raised under Ss. 112 and 113 of the Act during the partition proceedings, was not so raised and the partition was completed, S. 241 (f) of the Act debarred the parties to the partition from subsequently raising in a civil Court any such question of title. This decision was approved by the Privy Council in 1938 A. L. J. 786.[33] At p. 792 their Lordships say :

"Upon an independent examination of the provisions of the Act of 1901 their Lordships have arrived at the same construction as was put upon the previous Act 19 of 1873 by the Full Bench of the High Court at Allahabad in 23 All. 291[32] and upon the present Act by Banerji and Tudball JJ. in 39

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28. ('84) 6 All. 560 : 11 I. A. 164 : 4 Sar. 512 (P. C.), Rai Bishan Chand v. Mt. Asmaida Koer.

29. ('68) 11 M. I. A. 487 : 9 W. R. 23 : 2 Suther 124 : 2 Sar. 327 (P. C.), Bhugwandeen Doobey v. Myna Baee.

30. ('78) 1 Mad. 290 : 4 I. A. 212 : 3 Sar. 753 : 3 Suther 447 (P. C.), Gajapathi Nilamani v. Gajapathi Radhamani.

31. ('28) 15 A.I.R. 1928 P.C. 251 : 111 I. C. 485 : 26 A.L.J. 1174 : 55 I.A. 399 (P.C.), Gauri Nath v. Mt. Gaya Kuar.

32. ('01) 23 All. 291 : 1901 A. W. N. 86 (F. B.), Muhammad Sadiq v. Laute Ram.

33. ('38) 25 A.I.R. 1938 P. C. 210 : 175 I. C. 775 : 13 Luck 508 : 65 I. A. 314 : 32 S. L. R. 845 : 1938 A. L. J. 786 (P. C.), Bajrang Bahadur Singh v. Beni Madho Baksh Singh.

a All. 469.[34] If a question of title affecting the partition which might have been raised in the partition proceedings is not so raised and the partition is completed, S. 233 (k) in their Lordships' opinion debars parties to the partition from raising the question subsequently in a civil Court."

At p. 793 they say :

"For the purpose of the Act, it is not possible to say on the strength of the definition that 'partition' means nothing more than the re-arrangement of the land into units of area. It imports and includes that rights in these units are distributed among the sharers."

Thus it is clear that the Privy Council made no distinction between S. 233 (k) of the Act of 1901 and S. 241 (f) of the Act of 1873 ; and the reason why I mention this is that an argument was advanced with reference to the language which was b used in each of the two Acts. Learned counsel for the respondents pleads that the Collector was not competent to sue for partition under the power with which he was invested under S. 322 of Act 10 of 1877 or S. 323 (3) of Act 14 of 1882. This contention, as I have already said, is based on the language of S. 193 of Act 19 of 1873 which mentioned the "person and property" of the disqualified person. The section was apparently interpreted as empowering the Court of Wards to control the actions of the Collector when property had been transferred to him under the provisions of the Code of Civil Procedure ; and there can be no doubt that the Court of Wards in fact did take over the estate of Har Shankar Prasad Singh, and, as I have already shown, there are good reasons for supposing that the applications for partition were preferred with c his knowledge and approval inasmuch as the entries in the record of rights and the khasras were signed by his own agent. Admittedly, Har Shankar Prasad Singh was himself not a ward ; he was a free agent and he was at liberty to object to these partitions on his own behalf if he had so desired, but he did nothing of the sort. In all the circumstances, having regard to the decision of the Privy Council, I do not see how any question of title in respect to the properties which were the subject of partition can now be raised. In my opinion the plea based on S. 233 (k), Land Revenue Act, must prevail. The next question to be decided is whether the judgments and decrees in the suits which Dalthaman Singh instituted and in the two suits in which Har Shankar Prasad Singh and his brother were co-defendants operate as res judicata. This plea also was not taken in the suit.

d The plaint in Suit No. 714 of 1876 shows that that was a suit for declaration of proprietary title on behalf of the lunatic as well as for possession of his moiety though it is true that it was there said on behalf of the lunatic that the property formed part of an ancestral estate which was held jointly with Har Shankar Prasad Singh "who is in charge of the management of the entire estate, as the plaintiff is a lunatic," and it was only the creditor whose dispossession was sought. The same appears from the decree dated 18th December 1877 in Suit No. 33 of 1877, in the plaint dated 8th December 1876 in Suit No. 55 of 1877 and in the consolidated judgment dated 11th September 1877 in respect to this and eight other suits. In all these suits the lunatic's claim for a declaration of his proprietary rights and for possession of his half share was decreed. It is true that no relief was claimed against Har Shankar Prasad Singh ; it was the creditor who was to be dispossessed, and therefore it is argued that there was no necessity for Har Shankar Prasad Singh to put in an appearance. But if, as is a fact, a lunatic coparcener has no existing interest in the joint family estate, it seems to me that the decrees must operate as res judicata of the fact that the lunatic's proprietary interest in the property concerned was recognised by the Court to the extent of a half share. It can of course be said, and with reason, that it was not to the personal interest of Har Shankar Prasad Singh that he should contest these suits; otherwise the whole property would go to the creditors. But his personal interest in the matter cannot be taken into consideration. If he was the owner of the whole estate, his claim thereto is a matter which might and ought in law to have been made a ground of defence within the meaning f of Expln. 4 to S. 11, Civil P. C. Having failed to set up in those suits what is now said to be the true legal position, the respondents are now, in my opinion, estopped from claiming the property. The suit is therefore barred by the plea of res judicata at least quoad the property which was concerned in the aforesaid suits.

The larger question now remains whether the suits also operated as res judicata in respect to the lunatic's half share in the whole of what had been the joint ancestral estate. In 20 A. L. J. 684[35] a certain widow took some property under her husband's will. A piece of land forming a small portion, amounting to 1 acre and 74 cents, of this property was subsequently acquired under the provisions of the Land Acquisition Act and at the proceedings a question arose as between the adopted son and the g widow as to the character and extent of the estate which the latter had taken under the will. The District Judge held that the widow had an absolute estate, but the High Court of Madras found that she had only a widow's estate. At a later date the two sons of the adopted son of the testator instituted a suit in which it was alleged that the widow had only received a limited estate and that she had no power to dispose of the properties by will. The trial Court found for the plaintiffs, but that decision was reversed by the High Court. In appeal to the Privy Council it was held that the suit was barred by the rule of res judicata by reason of the land acquisition proceedings. At p. 691 their Lordships say :

"If the decision was wrong, it ought to have been appealed from in due time. Nor, in such circumstances, can the interested parties be heard to say that the value of the subject-matter on which the h former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute."

Having regard to this authority of the Privy Council, I am of opinion that this suit is barred by the rule of res judicata not only quoad the properties which were in dispute in the various suits instituted in 1876 and 1877, but also in respect to the whole estate. We now come to the plea of limitation—which arises on the assumption of jointness. This has been argued in respect to (1) the period before the death of the lunatic in 1902 and

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34. ('17) 4 A. I. R. 1917 All. 258 : 41 I. C. 912 : 39 All 469 : 15 A. L. J. 496 (F. B.), Bijai Misir v. Kali Prasad.

35. ('22) 9 A.I.R. 1922 P. C. 80 : 67 I. C. 408 : 49 I. A. 129 : 45 Mad. 320 : 20 A. L. J. 684 (P. C.), T. B. Ramchandra Rao v. A. N. S. Ramchandra Rao.

(2) the period after his death. As regards the period before the death of Gauri Shankar Prasad Singh, I think I have already made it clear that in my opinion Har Shankar Prasad Singh was to his knowledge completely excluded from any enjoyment of a moiety share in the estate and that he was equally excluded by the Court of Wards after it had taken over the moiety of Gauri Shankar Prasad Singh. It is true that the Court of Wards allowed Har Shankar Prasad Singh to receive a paltry sum of Rs. 50 a month from the income of the lunatic's estate, but in this the Court of Wards was no doubt actuated by compassion. The exclusion or ouster of Har Shankar Prasad Singh was open and continuous and I am of opinion that his claim was already barred at the time of his brother's death under Art. 127, Limitation Act.

As regards the period after the death of the lunatic, there can be no doubt whatever that the Court of Wards recognized his widow, Babuain Jodha Kunwar, as proprietor : *vide* the plaint of 29th June 1903 at p. 497, the decree of 31st March 1904 at p. 509, the lease of 5th January 1915 at p. 525 and the mutation order dated 19th September 1903 in favour of Babuain Jodha Kunwar. After the death of her husband her name was substituted in the khewats : *vide* pp. 699, 709 and 834. The fact of her name being recorded in the registers was, according to the plaint itself, known to Har Shankar Prasad Singh, as is clear from paras. 17 and 18 of the plaint, in which it is alleged that Har Shankar Prasad Singh had her name entered for consolation and "out of policy" by which is presumably meant that he was still pursuing his original scheme for the preservation of a moiety in the ancestral estate. But I have not the slightest doubt that the entries were made at the instance of the Collector, acting under the Court of Wards, for it is manifest, as I have already shown, that the Court of Wards regarded Babuain Jodha Kunwar as the proprietor. Apart from the various documents which I have already mentioned, this fact appears very clearly from the report of the Court of Wards for the year ending 30th September 1920 at p. 531 in which it is stated that Babuain Jodha Kunwar had succeeded the lunatic with a life interest and that the estate was released on 1st October 1920—obviously meaning that it was released in favour of Babuain Jodha Kunwar. Learned counsel for the respondents contends that after the death of the lunatic the Court of Wards while retaining the property under S. 42, Court of Wards Act (3 of 1899) was holding it, not on behalf of the lunatic's widow, but on behalf of whoever might be the rightful owner; his plea is that the estate was being held in trust or in custodia legis. He has referred to certain authorities in this connexion, including 8 Bom. 585.[36] In that case it appears that the Peshwas attached certain vatan lands belonging to the family of the plaintiffs. In 1806 the British Government resumed it. The defendant meanwhile entered upon it as a tenant to Government. In 1871 the plaintiffs sued to eject the defendant and to obtain possession. It was held that the Peshwas and afterwards the British Government held as trustees for the real owners and that prescription did not begin to run till 1871 before which date the plaintiffs had no right of suit. Learned counsel for the respondents relies on the maxim *contra non valentem agere nulla currit præscriptio*, but I do not think that this maxim is applicable in the circumstances of the case which is now before us. The Court of Wards openly retained the estate on behalf of Babuain Jodha Kunwar and so far as I can see there was nothing to preclude Har Shankar Prasad Singh from suing the Court of Wards for possession; but no steps were taken either before the death of the lunatic in 1902 or after his death and during the life-time of Har Shankar Prasad Singh and of Gopal Saran Singh. In my judgment the suit is barred by limitation both in respect to the period prior to the death of the lunatic and also to the period subsequent to his death. As regards the latter period Art. 144, Limitation Act, is applicable.

The last matter which falls for consideration is whether Gauri Shankar Prasad Singh and Babuain Jodha Kunwar were validly married. The learned Judge has upheld the validity of the marriage; and I am in agreement with his view. Mr. Das has conceded that all the rites and observances necessary for a Hindu marriage were performed, but he contends that the marriage was invalid for the reason that among Hindus a marriage is not only a sacrament, but is also a contract, for which consent is necessary and a lunatic is incapable of giving his consent. In Mayne's Hindu Law, Edn. 10. pp. 143 and 144 we read :

"While marriage is according to Hindu law a sacrament, it is also a civil contract, which takes the form of a gift in the Brahma, a sale in the Asura, and an agreement in the Ghandarva."

From pp. 150 to 153 the learned commentator expresses the view that the marriage of a Hindu lunatic is invalid. At p. 150 he says :

"The marriage of a lunatic, an idiot or an impotent person is invalid under the Hindu law."

At page 151 he says :

"Medhatithi inclines to the view that impotent persons and lunatics are not entitled to marry, as they are not entitled to the performance of any religious rites."

At page 153 we read :

"Where archaic rules of Hindu law very plainly transgress the rules of justice, equity and good conscience, they cannot be enforced. The marriage of an impotent person not being merely sterile, or of a lunatic or of an idiot clearly tends to promote immorality and may also be regarded as contrary to public policy."

The view that such a marriage is invalid does not appear to be the view which was originally held by Mr. Mayne at least as regards females for in 5 All. 509,[37] Stuart C. J. observed :

"It is not suggested that the insane person who is a woman was so from her birth, and even if she was, such insanity of a Hindu woman does not appear to disqualify her for marriage. On this subject Mr. Mayne, basing his opinion on the Institutes of Manu, Ch. 2, Ss. 66 and 67 says: 'A Hindu marriage is the performance of a religious duty, not a contract ; adding therefore the consenting mind is not necessary, and its absence, whether from infancy or incapacity, is immaterial."

In Macnaghten's Hindu Law, p. 57 the learned author says :

"Marriage among the Hindus is not merely a civil contract, but a sacrament, forming the last of the ceremonies prescribed to the three regenerate classes and the only one for Sudras."

In Strange's Hindu Law at p. 44 there is the following passage :

"The essence of the rite (of marriage) consists in the consent of the parties . . . that is of the man on

36. ('84) 8 Bom. 585, Tukaram v. Sujangir Guru.

37. ('83) 5 All. 509 : 1883 A. W. N. 105 (F.B.), Deo Kishen v. Budh Prakash.

the one hand, and on the other, of the father or whoever else gives away the bride."

In Vyavastha Chandrika, Vol. 2, p. 432 it is said :

"Marriage amongst us, Hindus, though essentially a religious sacrament (being the last of the initiatory rites prescribed for men of the regenerate classes, and the only one for women and Shudras), partakes also of the nature of a civil contract."

In 33 Mad. 342,[38] Sankaran Nair J. says :

" A marriage, whatever else it is, i.e., a sacrament, an institution, is undoubtedly a contract entered into for consideration with correlative rights and duties."

Mr. Das also relies on the "Laws of Manu" in the "Sacred Books of the East" series Vol. 25, Ch. 9, placitum 88, which reads :

" To a distinguished handsome suitor of equal caste should a father give his daughter in accordance with the prescribed rule, though she have not attained the proper age."

Mr. Das argues that this implies a prohibition of the marriage of a girl to a lunatic; but placitum 203 of the same chapter reads :

" If the eunuch and the rest should somehow or other desire to take wives, the offspring of such among them as have children is worthy of a share."

Dr. Maxmuller notices that notwithstanding this placitum, Medhatithi is of opinion that a mad man cannot marry; and from his introduction to Vol. 25 it would appear that Dr. Muller had considerable respect for Medhatithi. He says, however, that his extant text is "more or less corrupt" : *vide* p. 126.

It seems to me that in placitum 203 the words "and the rest" must refer back to placitum 201, which includes insane persons and idiots. In the translation of the Mitakshara by Macnaghten and Colebrooke, Ch. 2, S. 10, Sloka 141 reads as follows:

" But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects."

The word "their" refers back to Sloka 140, which states inter alia that a mad man and an idiot are excluded from participation in property. Placitum 10, which comes immediately after Sloka 141 says :

" The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares ; provided they be faultless or free from defects which should bar their participation such as impotency and the like."

It seems to me, therefore, that the Mitakshara contemplates that a Hindu lunatic may take a wife and that such marriage will be valid. In Gooroodas Banerjee's "Hindu Law of Marriage and Stridhana," Edn. 5, at p. 37 the learned author says :

" I shall consider first the question, who are incompetent to marry? Here you will bear in mind, that marriage is regarded in Hindu law not only as a civil contract, but also as a sacrament, being one of the ten sanskaras or regenerating ceremonies necessary for men of the twice-born classes, and the only one necessary for Sudras ; and that in consequence of this religious necessity, the grounds of disqualification for marriage are fewer in the Hindu law than in any other polished system of law."

At p. 39, after stating that the consent of the father or other guardian of a minor boy is necessary, the learned author says :

" The want of a guardian's consent would not, however, invalidate a marriage otherwise legally contracted."

At page 40 we read :

" Persons of unsound mind—that is idiots and lunatics—though disqualified for civil purposes generally have not been declared incompetent to marry.

"On the contrary, there are indications in the law from which it would appear that they are considered to be competent to marry."

The author then refers to certain ancient texts and also to a decision of the High Court at Calcutta in 2 Morley's Digest 99[39] to which I shall have occasion to refer later on. He then goes on to say at page 41:

"But, on the other hand, it should be noticed that the idiot and the lunatic being, where the loss of reason is complete, imcompetent to accept the gift of the bride, which is a necessary part of the ceremony of marriage, it is not easy to understand how their marriage in such cases can be regarded as marriage at all. And I may add here that Hindu law permits the wife to neglect a mad husband."

He then says : "It needs hardly to be pointed out that such marriages are exceedingly improper" and he quotes the following sloka of Manu :

"But it is better that the damsel, though marriageable should stay at home till her death than that he (the father) should ever give her in marriage to a bridegroom void of excellent qualities : *vide* the Laws of Manu, Chap. 9, placitum 89."

After observing that the authorities on the Hindu law clearly discountenance such marriages the learned author says :

"Marriages of idiots and other naturally disqualified persons must obviously be of rare occurrence, and the rule which declares them valid and legal can be justified only on the ground that the opposite rule would be hard against the unfortunate offspring, and would deprive the unhappy wife of her legitimate conjugal status without giving her any compensating advantage."

In Mandlik's Hindu Law, at p. 426 there is the following observation :

"Outsiders can hardly form a correct notion of how present usage has so changed the old structure that but little remains of the old texts ; and this change must in each case be carefully ascertained from practice. Even in matter most dear to the Brahmanas and the other twice-born classes, usage has fearfully twisted the smritis. Thus, in marriages, the bridegroom should, it is laid down, be free from defect of limb; he should not be patita (fallen into sin), nor kliba (impotent), and he should be free from the ten doshas (blemishes). Usage has, however, made a clean sweep of this. Even the marriage of an impotent person in the higher classes is held good and binding ; and the wife can get no divorce. Again a man born deaf and dumb can get married."

At p. 427 in footnote 2 the author says :

"But how can an idiot be capable of accepting a bride ? And yet the marriages of such idiots appear to have been contemplated by Yajnavalkya when he declares that the blameless sons of idiots are qualified for inheritance."

In connexion with deaf and dumb persons the learned author says :

"The answers which the bridgroom is supposed to give are in this case repeated by the priest. Beyond animal instinct, there is no other element in such a marriage, and yet, according to usage, such marriages are reckoned quite proper, and sanctioned by the community, although they are opposed to the old text laws."

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38. ('10) 33 Mad. 342 : 5 I. C. 42 : 20 M. L. J. 49, Muthusami Mudaliar v. Masilamani.

39. 2 Morley's Digest 99, Dabychurn Mitter v. Radhachurn Mitter.

In Halhed's Code of the Gentoo Laws" at p. 74 it is stated in S. 5 that the son of an idiot, if totally free from certain named blemishes, shall receive his share of the property left for inheritance. One of the recognized blemishes is of course insanity. In support of the contention that a Hindu marriage is essentially a sacrament, even though it may contain an element of contract, Sir Tej Bahadur Sapru has referred us to certain observations in Gooroodas Banerji's book. At p. 107 the learned author, quoting from Yama says :

". . . . the marital contract is complete after the ceremony of joining hands on the 7th step of the married pair."

At p. 109 quoting Colebrooks "Asiatic Researches," he says that "the marriage is complete and irrevocable as soon as she (the bride) has taken the seventh step and not sooner." The earliest reported case on the subject is to be found in 2 Morley's Digest 99.[39] In that case a man named Collychurn was a lunatic at the time when he married and the question before the High Court at Calcutta was whether the marriage was valid. The following questions were put to the Pandits : (1) By the Hindu law, is the marriage of a lunatic, by consent of his family, binding? (2) Is the marriage in this latter case valid without the consent of parents if living, or, if dead, of the family? The answer to both questions was in the affirmative. As regards the first question the answer was: "The marriage of a lunatic, a nativitate, is immoral, but valid with the consent of parents. The marriage of one who becomes a lunatic after his birth and during his lunacy is valid." The answer to the second question was : "Under every circumstance, if such a marriage be contracted, it is valid."

In Siromani's Commentary on the Hindu Law at p. 65 the correctness of this view is doubted. The learned author says that it is "fairly open to question, according to the letter of the law, though in actual practice the marriage of idiots and lunatics does take place." Mr. Das objects that the Pandits quoted no authority, and in this connection he has referred us to 8 M.I.A. 400[40] and 13 M.I.A. 141.[41] In the former case at p. 422 their Lordships say :

"When the opinion given is apparently irreconcilable with the opinions of proved text-writers, those who give the opinion should be asked further to explain that which appears prima facie thus irreconcilable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter."

In the other case the Privy Council did not accept the opinion of the Pandits because it was not satisfactory; it was a matter of their own reasoning and there was no reference to any authority relevant to Sudras, with which class of persons the case was concerned. In 12 M.I.A. 397[42] at p. 438 there is the following dictum :

"The evidence that the doctrine for which the respondents contend has been sanctioned by usage in the South of India consists partly of the opinions of Pandits, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, and long directed to be taken by the Courts, were official and could not be shaken without weakening the foundation of much that is now received as the Hindu law in various parts of British India. Upon such materials, the earlier works of European writers on the Hindu law, and the earlier decisions of our Courts, were mainly founded. The opinion of a Pandit which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country."

The Pandits were "law officers" and they were required to take an oath to state only what is in the Shastras — *vide* Regulation 12 of 1793 which was extended to Benares by Regulation, 11 of 1795—and it is clear from the observations of the Privy Council that the opinion of the Pandits could not be lightly discarded; the only ground for discarding such an opinion would be that it was irreconcilable with the opinions of proved text-writers and the translated works of authority. In *Collychurn's case*, 2 Morley's Digest 99,[39] the opinions which were given by the Pandits do not appear to be in conflict with the ancient text-writers. We are referred on behalf of the respondents to 38 Cal. 700.[43] In an appeal arising out of an application for letters of administration, an issue before the High Court at Calcutta was whether the marriage of a certain individual was invalid by reason of insanity. The order was passed by Pargiter and Woodroffe JJ. and they held that the man's unsoundness of mind was not such as would render the marriage invalid by reason of his being incapable of accepting the bride during the ceremony and of understanding what was going on. Pargiter J. said :

"Upon this finding, it is not necessary for me to consider the elaborate arguments which have been addressed to us by both parties whether a marriage contracted by a really insane person is or is not invalid according to Hindu law."

The Privy Council agreed with the order passed. At p. 706 their Lordships say :

"In the judgment of Pargiter J. it is clearly and concisely shown that from the time of the alleged marriage Ishri Pershad and Cirjabati were recognised by all persons concerned as man and wife and so described in important documents and on important occasions. Their daughters were respectably married, as would be natural in the case of legitimate children and these facts, following upon a ceremony of marriage which undoubtedly took place though its validity is attacked, afford an extremely strong presumption in favour of the validity of the marriage and the legitimacy of its offspring."

At p. 706 there is the following observation :

"Their Lordships agree with the learned Judges of the High Court in thinking that, to put it at the highest, the objection to a marriage on the ground of mental incapacity must depend on a question of degree, and that in the present case the evidence of mental infirmity is wholly insufficient to establish such a degree of that defect as to rebut the extremely strong presumption in favour of the validity of marriage."

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40. (1859-61) 8 M. I. A. 400 : 2 W. R. 4 (P. C.), Myna Boyee v. Ootaram.

41. ('69) 13 M.I.A. 141 : 3 Beng.L.R. 1 : 12 W.R. 41 : 2 Suther 267 : 2 Sar. 498 (P. C.), Inderun Valungypooly Taver v. Ramaswamy Pandia Talaver.

42. ('68) 12 M.I.A. 397 : 1 Beng.L.R. 1 : 10 W.R. 17 : 2 Suther 135 : 2 Sar. 361 (P.C.), Collector of Madura v. Moottoo Ramalinga Sathupathy.

43. ('11) 38 Cal. 700 : 11 I. C. 502 : 38 I. A. 122 : 14 C.L.J. 72 : 15 C.W.N. 790 (P.C.), Mouji Lal v. Chandrabati Kumari.

Thus, the Privy Council did not consider the question whether a Hindu lunatic is competent to marry: their decision rested on the fact that the person concerned was not proved to have suffered from such a degree of unsoundness of mind as would rebut the presumption of the validity of the marriage. It is true that in *Collychurn's case*, 2 Morley's Digest 99[39] the Pandits do not appear to have quoted authority, but their opinion has never been dissented from in any reported case and, as I have already said, it does not appear to be in conflict with the ancient text-writers. In 14 Mad. 316[44] at p. 318 the learned Judges say :

"There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a samskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecrated fire creates a religious tie; and a religious tie when once created cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage."

At page 319 they say :

"As a religious ceremony it becomes complete when the saptapadi is performed, and there are several smritis to that effect.

Manu says : 'The relation of wife is created by the texts pronounced when the girl is taken by the hand. Be it known that those texts end, according to the learned with the texts prescribed for walking seven steps.'

Vasishta says : 'In connexion with the formation of the relation of husband and wife, agreement is first prescribed. Then taking by the hand is prescribed. It is said that mere agreement is defective, and that of the two, taking by the hand is indispensable.'

Yama says : 'Not by the pouring of water nor by the words of gift is the relation of husband and wife formed, but it is formed by the rite of taking the bride by the hand and when they walk together the seventh step'."

At page 320 the learned Judges say :

"Hence two propositions of law may be taken to be established beyond controversy, viz., (1) where there is a gift by a legal guardian and the marriage rite is duly solemnized, the marriage is irrevocable, and (2) where the girl is abducted by fraud or force and married, and there is no gift either by a natural or legal guardian, there is a fraud upon the policy of the religious ceremony and there is, therefore, no valid religious ceremony."

In 22 Bom. 812[45] and again in 19 All. 515[46] it was held that among Hindus a duly solemnized marriage cannot be set aside in the absence of force or fraud on the ground that consent had not been given by the person entitled to give it on behalf of the bride. A Hindu marriage entails a gift of the bride and it is a matter of admission that a gift may be made in favour of a lunatic. In Marshall's Rep. 357,[47] it was held that there is no prohibition in the Hindu law against a gift to an idiot; such person is deemed capable of possessing property. It was held that assent may be presumed where the gift is for his benefit, and in the case of a minor idiot the assent of his guardian is sufficient. In the case with which we are dealing there is no suggestion that the gift of the bride was not accepted on behalf of Gauri Shankar Prasad Singh; in fact, as I shall show the marriage has all along been recognized and accepted. There is no actual prohibition of such a marriage in the ancient text books and, having regard to the various authorities which I have mentioned, I am of opinion that the marriage of Hindu lunatic, though improper and immoral and discouraged by Hindu law, is not invalid if duly solemnized. Whatever injunction against such a marriage may be read into the ancient commentaries, it would appear to be of a directory rather than of a mandatory character. In 20 All. 267[48] at page 285 their Lordships of the Privy Council observe :

"All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law, Sir W. Macnaghten says : 'It by no means follows that because an act has been prohibited it should, therefore, be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible'."

In 22 Mad. 398,[49] their Lordships at p. 415, after referring to the last mentioned case, say :

". . . . the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers, accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers."

In the present case Babuain Jodha Kunwar was throughout recognized as the married wife of Gauri Shankar Prasad Singh. Bhan Prasad Singh, a witness for the respondents, says :

"Jodha Kunwar was regarded as a wife of Gauri Shankar from the time of the marriage. Since she was regarded as the wife of Gauri Shankar, people of the biradari used to take food there with Gauri Shankar and Mt. Jodha Kunwar also."

Similarly, Ganpat Singh, another witness for the respondents, states :

"Jodha Kunwar was not regarded as a mistress or a maid servant, but as a wife of Gauri Shankar Prasad Singh."

In official documents Babuain Jodha Kunwar was described as the wife or widow of Gauri Shankar Prasad Singh, and in the adoption deed Har Shankar Prasad Singh himself contemplated the possibility of a son being born to his brother. In 33 Mad. 342[38] at p. 355, Sankaran Nair J. says :

"Where therefore a caste accept a marriage as valid and treat the parties as members of the caste, it would be, it appears to me, an unjustifiable interference for the Courts to declare those marriages null and void."

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44. ('91) 14 Mad. 316 : 1 M. L. J. 85, Venkatacharyulu v. Rangacharyulu.
45. ('98) 22 Bom. 812, Mulchand Kuber v. Bhudhia.
46. ('97) 19 All. 515 : 1897 A. W. N. 139, Ghazi v. Sukru.
47. Marshall's Rep. 357 : 2 Hay 370, Kooldebnarain v. Wooma Coomari.
48. ('98) 20 All. 267: 25 I.A. 54: 7 Sar. 279 (P.C.), Balwant Singh v. Rani Kishori.
49. ('99) 22 Mad. 398 : 26 I. A. 113 : 21 All. 460 : 7 Sar. 330: 9 M. L. J. 67 (P.C.), Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma.

In 26 I. A. 113,[49] it was held by the Privy Council that the adoption of an only son having taken place in fact, is not null and void. At p. 149 their Lordships say:

"The adoption was 20 years old, and no caste penalties had followed it. These things do not prove a custom, but they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as sin by their teachers as to excite abhorrence or social hostility, such as we know to follow from other breaches of their religious laws."

There is always a presumption in favour of the validity of a marriage. In 3 Beng. L. R. 1,[41] their Lordships of the Privy Council say:

"When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law."

I do not think that the degree of unsoundness of mind from which Gauri Shankar Prasad Singh was suffering is very important in this part of the case, but I may say that, although he was found by inquisition to be a lunatic, the observations in the judgment in Suit No. 714 of 1876 at p. 323 of our paper-book show that he was capable of understanding and complying with simple instructions.

Babuain Jodha Kunwar was admittedly married in or about 1875, and in 1936 for the first time the validity of her marriage was impeached by this suit. Its validity was never questioned by the lady herself or by anyone on her behalf, it is being questioned now by persons interested in the property whose predecessors-in-interest recognized Babuain Jodha Kunwar as the married wife of the lunatic. Learned counsel for the respondents has sought to rebut the presumption of validity by relying upon certain authorities of Hindu law which I have already discussed, but for the reasons which I have stated I am of opinion that, whatever element of contract there may be in a Hindu marriage and however much the marriage of a lunatic may be discountenanced by the Hindu law, the marriage of Gauri Shankar Prasad Singh with Babuain Jodha Kunwar was not invalid. Although I have disagreed with the learned Judge of the Court below on most of the points arising in this appeal, I appreciate his very careful and thorough judgment.

ALLSOP J.—I have had the advantage of seeing my learned brother's judgment and, as I agree with the conclusion which he has reached, it is not necessary for me to discuss the case in detail, but I would like to make some observations about the main issue, namely, whether there was a partition between Babu Har Shankar Prasad Singh and Gauri Shankar Prasad Singh. There seems to be no doubt after a consideration of the history of the family from the time when Dalthaman Singh was appointed to manage the property of Gauri Shankar Prasad Singh that the estates of the two brothers were treated as entirely separate by all concerned. If this had been a normal family of two brothers who were both in full possession of their senses, it would surely not have been open to the plaintiffs-respondents to argue that there had been no partition or disruption of the family. The learned Judge of the Court below seems to have been influenced in his decision by two main considerations, namely, (1) that it is not possible in law to have a partition between two brothers one of whom is of sound and the other of unsound mind and (2) that it is possible to make a distinction between a partition of property and a disruption in the status of a joint Hindu family and in the circumstances of this case, although there may have been a partition, there is nothing to justify the conclusion that there was a disruption.

There is no doubt that the rule set forth in the Mitakshara is that a member of a joint family who is of unsound mind is not entitled to claim a share by partition, but it seems to me that this does not necessarily imply that he may not be given a share by the other members if they choose to give him one. The rule gives the members who are of sound mind a right to exclude a member who is not of sound mind, but no person is bound to stand upon his rights. Where exclusion depends upon unsoundness of mind it is clear that there can be no absolute criterion by which to judge whether a person is liable to be excluded. In each case it would be necessary to decide whether unsoundness of mind was of such a character as would justify exclusion. It is a question of degree and the members of a family who were of sound mind at the time of a partition might well in some circumstances hesitate whether the person of unsound mind was in such a condition that exclusion was justifiable. It would surely not be right, if they gave him a share, afterwards to allow them to resile from their position and to allege that the share should not have been given and that the partition was liable to be avoided. There might also be cases where the members of sound mind might consider it more convenient to allow the person of unsound mind a share rather than to render themselves liable for his maintenance after the partition. I do not think therefore that it can be laid down as an absolute rule that there can be no partition between a brother of sound mind and one of unsound mind.

The learned Judge of the Court below has considered that it would be unjust in such circumstances to allow the brother of sound mind to disrupt the family because the result would be that he would get the whole property and it is conceivable that he might by doing so deprive the brother of unsound mind of his right to maintenance. I do not think there is any force in this argument because the rule in the Mitakshara is that the person of unsound mind is entitled to proper maintenance and the rule undoubtedly contemplates a state of affairs where there is a partition between persons of sound mind to the exclusion of one unsound mind. If there can be a partition, as undoubtedly there can be, between several members of a joint family who are of sound mind when one of the other members is of unsound mind, in which case the latter would be entitled to maintenance, it seems to follow that there is no reason why there should not be a partition between two members of a joint family one of whom is of sound and the other of unsound mind. The latter would certainly be entitled to maintenance in these circumstances just as he would, if there had been more than two members of the family and there had been a partition between those who were of sound mind.

There is, of course, the argument that it is absurd to regard as a partition a transaction by which one of two members of a joint family obtains the whole of the joint family property, but this argument as put forward by the plaintiffs-respondents involved an inconsistency upon their part. Their whole case depends upon a fine but comprehensible distinction between a partition of joint family property and a disruption of the personal status of the members of a joint family. It depends upon the contention that there may be a partition of property without a disruption of the joint family and that a partition of this kind might operate to enable various members of the family to possess and

enjoy various parts of the property but would not sever the title of the various members of the family because there was no disruption of status. If the two questions of partition and disruption can be treated apart from each other, then it is surely inconsistent to argue on the one hand that there can be a partition without a disruption and on the other to argue that there cannot be a disruption in law because there can be no partition of the property. It is true that the rules of Hindu law are not absolutely logical and consistent, but I see no justification for the proposition that a member of a joint Hindu family who is ordinarily entitled to disrupt the family at will should be deprived of that right merely because the result would be that he could take the whole family property as a result of the disruption and leave to the other member only a right to be maintained.

In my judgment the learned Judge of the Court below was misled when he thought that there could be no partition because Har Shankar Prasad Singh was of sound mind and Gauri Shankar Prasad Singh was of unsound mind. With reference to the other consideration which seems to have influenced the learned Judge there can be no doubt that it is possible for members of a joint family to divide the property up among themselves for the purpose of more convenient enjoyment or management without the intention of making a partition which would sever the title so that some might be full proprietors of certain of the original properties and some absolute proprietors of others. That would, of course, be a matter of intention, but the intention can only be gathered from the conduct of the members of the family. No Court can consider alleged mental reservations. The argument upon which the plaintiffs-respondents rely is that Gauri Shankar Prasad Singh could not have had any intention to disrupt the family because he was not of sufficiently sound mind to have any intention at all about a matter of this kind and that there is nothing to show that Har Shankar Prasad Singh ever had such an intention. I will repeat that we can judge of Har Shankar Prasad Singh's intention only by his conduct and his conduct was that of a man who intended that the estate of Gauri Shankar Prasad Singh should be entirely separate from his own estate. He never acted as though he believed that he still had a title to a share in the property which was the estate of Gauri Shankar Prasad Singh. The suggestion at one time was that the alleged partition was merely a device on the part of Har Shankar Prasad Singh to defeat his creditors and that the appointment of guardians for the person and property of Gauri Shankar Prasad Singh, the suits instituted by Dalthaman Singh, the proceedings under which the Court of Wards took over the estate of Gauri Shankar Prasad Singh as the latter's separate property and the Collector under the law for the time being in force took over the estate of Har Shankar Prasad Singh himself and alienated it in order to discharge his liabilities were all part of a carefully conceived plan on the part of Har Shankar Prasad Singh to save half the property belonging to the family.

It seems to me that it is inconceivable that an extravagant profligate as Har Shankar Prasad Singh undoubtedly was, would ever have thought out or executed a plan of this kind and I think that Mr. P. R. Das on behalf of the plaintiffs-respondents was very wise in abandoning that position. It seems to me very much more probable that the ladies of the family and their advisers were alarmed at the extravagances of Har Shankar Prasad Singh and that they brought pressure to bear upon him and induced him to agree to a partition of the family property between himself and his brother. It was argued that Har Shankar Prasad Singh would have been much better situated if he had intended to maintain the jointness of the family because he would ultimately have been entitled to the property which was preserved to the family. The answer to my mind is that he never at any time claimed as of right any share in Gauri Shankar Prasad Singh's estate or secured any benefit from this elaborate scheme which he is supposed to have engineered. I am satisfied that we can judge of his intentions only by his conduct and that his conduct clearly points to an intention on his part absolutely to sever the two estates.

The learned Judge in considering this aspect of the matter has been impressed by his conclusion that the family in spite of the alleged disruption continued to live together as members of a normal joint Hindu family. In my judgment the conclusion of the learned Judge upon the facts is not justified by the evidence. He has found that Har Shankar Prasad Singh, Gauri Shankar Prasad Singh, Mt. Jodha Kunwar and the other ladies of the family all lived together in the same house and that the allowance which was given to Mt. Jodha Kunwar from Gauri Shankar Prasad Singh's estate was really used for the purposes of the whole family. The evidence upon which he has relied is unworthy of credence. He has not discussed the evidence of the witnesses in any detail and has drawn an inference adverse to the defendants-appellants from the fact that they produced no accounts to show that Mt. Jodha Kunwar's allowance was spent by herself and was not spent by Har Shankar Prasad Singh as the head of the family.

In the first place, I should like to make some observations about the argument based on the absence of these accounts. It may be true that zamindars of some position and members of Hindu families who carry on business keep detailed accounts of their income and expenditure and that items of domestic expenditure, such as the payment of doctor's fees and the purchase of grain and foodstuffs, are mentioned in these accounts, but it must be remembered in the case with which we are dealing that the accounts of the properties which belonged to Gauri Shankar Prasad Singh and Har Shankar Prasad Singh were kept by the Court of Wards and that they had nothing to do with the expenditure of the allowance of Mt. Jodha Kunwar. I do not think that we are entitled to assume in the circumstances of this case that Mt. Jodha Kunwar or Har Shankar Prasad Singh would have kept a clerk or an accountant merely to maintain accounts of the former's personal expenditure out of her own allowance. In the second place, even if they did do so, it is not fair to assume that these accounts were still in existence thirty or forty years after the relevant period. It is true that Babu Bindeshari Prasad Singh when he was in the witness-box said that the accounts of Mt. Jodha Kunwar had come into his possession, but he was faced with an unexpected question in cross-examination and I am extemely doubtful whether a zamindar in his position would be likely to know anything about the details of these accounts. He no doubt knew that certain books of account had come into the possession of his employees when he took over the estate from Mt. Jodha Kunwar, but to conclude from his evidence that these accounts included the details of her domestic expenditure at the time when Har Shankar Prasad Singh was alive would be most

unfair. I have no doubt that an inference may be made against a party where he deliberately fails to produce documentary evidence which has a direct bearing upon an issue arising between him and the other party or which would be conclusive evidence of facts which he has alleged, but in this case these domestic accounts were not such, even if they existed, that it could necessarily be supposed when the suit was instituted that they would rebut any allegation made on the other side. I do not think that it can be inferred that these domestic accounts exist or ever existed or that the failure to produce them raised a presumption that Mt. Jodha Kunwar's allowance was really spent by Har Shankar Prasad Singh as the head of the family. It also appears from the evidence that Gauri Shankar Prasad Singh and Mt. Jodha Kunwar lived on the family estate at Anapur and that Har Shankar Prasad Singh lived quite separately in the town house (if I may so describe it) at Benares. It is a notorious fact of which we can take judicial cognizance that the Court of Wards is much concerned with the welfare of its wards, and it is impossible to believe that the manager of the estate would have been under the impression, as he obviously was that Gauri Shankar Prasad Singh was living at Anapur if he had been living with Har Shankar Prasad Singh at Benares. From the circumstances of the case the inference is that the two families of Har Shankar Prasad Singh and Gauri Shankar Prasad Singh were living separately and not as members of a joint Hindu family.

The evidence of the witnesses does not seem to me to be of much value. Bhan Prasad Singh has deposed that his cousin was married to B. Har Shankar Prasad Singh and that Jodha Kunwar used to reside with B. Har Shankar Prasad Singh and that the money received from the Court of Wards used to be spent by the latter. This witness is obviously interested on behalf of the plaintiffs because what he said on the other question of the marriage of Mt. Jodha Kunwar that no ceremonies had taken place is now conceded to be absolutely untrue. The witness alleged that he lived with Har Shankar Prasad Singh and was educated by him, but in cross-examination he showed little knowledge of the affairs of the family. Darshan Tewari alleged that he had been in the service of Gauri Shankar Prasad Singh for five years. He said that Har Shankar and Gauri Shankar used to live jointly all their lives. He said he used to get Rs. 10 a month as his pay. I do not think that this witness is a person on whom much reliance can be placed.

Jageshwar Lal is a patwari of a circle in which some of Har Shankar Prasad Singh's zamindari was situated. He alleged that he had often been to see Har Shankar Prasad Singh and Gauri Shankar Prasad Singh and that they lived together as members of a joint Hindu family. There was no particular reason why he should go and see Har Shankar Prasad Singh or Gauri Shankar Prasad Singh when the Court of Wards was in charge of both their estates. He said that he used to visit these gentlemen at Benares and not at Anapur. The next witness, Ganpat Singh, was a resident of the same mohalla in Benares in which Har Shankar Prasad Singh's house was situated. He said that the lady married to Gauri Shankar Prasad Singh used to reside with Har Shankar Prasad Singh as Gauri Shankar Prasad Singh and Har Shankar Prasad Singh used to live together. The suggestion is that they lived together at Benares. Bhan Prasad has also said that these people never resided at Anapur permanently.

It is extremely improbable, as I have already remarked, that this statement is true. Ghulam Mustafa said that he went to Anapur with a Hakim and that he saw Gauri Shankar Prasad Singh there. Har Shankar Prasad Singh was also there and was being treated by the Hakim for two and a half months. He also said that he visited the village six or seven times during the life-time of the Hakim and that Gauri Shankar Prasad Singh and Har Shankar Prasad Singh lived jointly and their messing was also joint. This would seem to suggest that the two families lived at Anapur. The witness is not a man in whom much confidence could be placed. Ghasita states that he was employed on a salary of Rs. 8 a month by Har Shankar Prasad Singh to look after the latter's birds. His statement that Gauri Shankar Prasad Singh and Har Shankar Prasad Singh lived together jointly is not of much importance. Lachhman Prasad stated that he was an accountant in the service of the Court of Wards. The witness was called to prove some facts about the execution of a deed of sale by Har Shankar Prasad Singh and his adopted son in favour of the Court of Wards. His statement that the special manager of the Court of Wards, Mr. Fox, was prevented from seeing the Collector about this matter because he had taken a purgative shows considerable ignorance of English manners and customs and is obviously untrue. He said he went to see Har Shankar Prasad Singh and Gauri Shankar Prasad Singh on two occasions once at Anapur and the other time at Benares, and that they lived together jointly.

The evidence of a man who saw them twice even if he was otherwise truthful would not be of much assistance to the plaintiff-appellants. Lal Bahadur Singh alleged that he was Har Shankar Prasad Singh's cook and left his service 34 years before he gave evidence. He admitted that Gauri Shankar Prasad Singh died at Anapur and that Har Shankar Prasad Singh died at Benares. Hari Shankar has deposed that he was a head clerk in the Court of Ward's Office. His evidence is that he once went to Benares to see Mt. Jodha Kunwar and that he found Har Shankar Prasad Singh and Gauri Shankar Prasad Singh having their dinner together. If it is true that these two men were together at Benares on one occasion, that would not establish that the family all lived together as a rule. Adit Narain Singh was a man who said that he was getting Rs. 7 a month as salary from Har Shankar Prasad Singh. I do not think much reliance can be placed on his evidence. Sheo Bahadur Singh is a witness of the same kind. He was a cook, if his statement is true. The learned Judge has said generally that there is the evidence of the plaintiffs' numerous witnesses that after the appointment of the guardian and the various other incidents as to which he was about to refer the two brothers and their families did live jointly and there was a common fund, a common mess and a common residence. He said that he had already expressed his reluctance to put implicit faith in the oral evidence but he thought that there were apparently no good reasons to rule out the plaintiffs' evidence regarding commensality between the two brothers. There is no doubt that the evidence is quite unreliable, and I think does not in any way establish that the members of the family continued to live jointly after the estates were separated. I am satisfied that there was a partition between the two brothers and that the family was disrupted. Upon the other points which have been fully discussed by my learned brother I have nothing to add. I concur in the decree which he proposes to pass.

BY THE COURT. — For the reasons given we allow this appeal. We set aside the decree of the Court below and we dismiss the suit of the respondents with costs in both Courts. We also dismiss the cross-objection with costs.

R.K. *Appeal allowed.*

A. I. R. (29) 1942 Allahabad 295

COLLISTER AND BAJPAI JJ.

Kunwar Bishwanath Singh—Applicant

v.

Commissioner of Income-tax, Central and United Provinces—

Opposite Party.

Misc. Case No. 1015 of 1939, Decided on 10th February 1942.

(a) Income-tax Act (1922), S. 34—In view of Income-tax Officer income escaping assessment — Notice can be issued under S. 34 without holding preliminary enquiry.

If for any reason the Income-tax Officer holds the view that some income has escaped assessment a notice under S. 34 can be issued. It is not necessary for the Income-tax Officer before issuing such notice to hold a preliminary enquiry and to give the result of that enquiry (after convening, and in the presence of the assessee) on the question in the shape of a finding that the income has escaped assessment: ('40) 27 A. I. R. 1940 P.C. 124, *Rel. on.* [P 297 C 1]

(b) Income-tax Act (1922), Ss. 34, 42, 43 and 22 (2) — Notice under S. 22 (2) direct on non-resident assessee is illegal — Whole procedure upon such notice culminating in assessment is illegal — Income must be deemed to have escaped assessment within S. 34.

In the case of a person residing out of British India who has property or business connexions in British India, the income-tax authorities are not competent to serve notices upon him direct; such notices must be served upon his agent in British India or upon such person as may be deemed to be his agent within the meaning of S. 43 and who will be treated as such. The proviso to S. 42 does not militate against this view and does not authorise the Income-tax Officer to address notices direct to the non-resident assessee : ('38) 25 A.I.R. 1938 All. 310, *Rel. on.* [P 298 C 2]

A notice under S. 22 (2) served upon the non-resident assessee direct being illegal the whole procedure upon such notice culminating in the assessment order is illegal and the income must be deemed to have escaped assessment within S. 34 so as to entitle the income-tax authorities to issue notice under S. 34 : ('34) 21 A. I. R. 1934 P. C. 30 and ('38) 25 A. I. R. 1938 P. C. 175, *Rel. on; Case law discussed.* [P 298 C 2]

(c) Income-tax Act (1922), S. 2 (1) — Income from zar-i-chaharum is not agricultural income.

Income derived from zar-i-chaharum, that is, one fourth of the sale price of houses to which the zemindar is entitled by custom when houses are sold in his zemindari, is not agricultural income within the meaning of S. 2 (1). [P 298 C 2]

(d) Income-tax Act (1922), S. 2 (1)—Nazarana received by assessee zemindar for granting permission to person to build on assessee's land is not agricultural income.

The nazarana received by the assessee zemindar in consideration for granting permission to a person to build a house on a plot of land owned by the assessee is not agricultural income. [P 299 C 1]

(e) Income-tax—His Highness late Maharaja of Benares was ruler as defined in S. 311 (1), Government of India Act—His Highness could not claim same immunity from taxation as might be claimed by independent sovereign — Income derived by His Highness from property in British India is not exempt under Income-tax Act.

Although His Majesty's Government did not regard or treat His late Highness the Maharaja of Benares or his subjects as subjects of His Majesty and although they did not regard or treat Benares State as being part of British India or of His Majesty's dominions, yet his status was that of a sovereign ruler under the Suzerainty of His Majesty and His Majesty's Representative exercised certain rights including the conduct of international relations, the exercise of jurisdiction over Europeans and Americans, interference to settle disputes as to succession to the state, the suppression of gross misrule in the state, and the regulation of armaments and the strength of military forces, and it was specifically recognized that His late Highness was "not independent." His Highness was a ruler as defined in S. 311 (1), Government of India Act. The exercise of rights mentioned above by the suzerain state is inconsistent with the idea of sovereignty in the state over which the suzerainty is exercised. His Highness therefore could not claim the immunity from taxation which an independent sovereign might claim. Therefore His Highness the late Maharaja of Benares was not exempt from taxation under the Income-tax Act in respect of income from property owned by him in British India : *Case law discussed.* [P 301 C 1]

(f) Income-tax Act (1922), S. 66 (5) — Under S. 66 (5) High Court should answer question as referred by Commissioner and should not itself formulate question — But it can alter question referred so as only to give effect to question raised by assessee throughout.

No doubt under S. 66 (5) the High Court should content itself by answering the questions as referred by the Commissioner and should not frame the questions itself : ('33) 20 A. I. R. 1933 P. C. 108, *Rel. on.* [P 296 C 2]

But the High Court can make such alterations in the questions referred as only give effect to the questions raised by the assessee throughout. [P 297 C 1]

P. L. Banerji and B. Malik—for Applicant.

N. P. Asthana—for Opposite Party.

BAJPAI J. — This is a reference under S. 66 (2) of the Income-tax Act and has been made by the Commissioner, Central and United Provinces, at the instance of Kunwar Bishwanath Singh, the assessee in the present case. It appears that the income-tax authorities hold the view that the income of His Highness the Maharajah of Benares who is "a person residing out of British India", if it has any connection, direct or indirect. with any business or property in British India, can be chargeable to income-tax on the ground that it shall be deemed to be income accruing or arising within British India and they, therefore, started certain proceedings for the assessment year 1934-1935. The income-tax officer of Benares issued a notice directly on His Highness the late Maharajah and on a re-

turn being filed made an asssessment. After an appeal, which was unsuccessful, to the Assistant Commissioner there was a reference to this Court, and this very Bench decided the reference, which is reported in 1938 A.L.J. 341.[1] The contention advanced then on behalf of His Highness was that the entire proceedings taken by the income-tax authorities in the case were in direct violation of the mandatory procedure prescribed by the Act inasmuch as the income-tax authorities had not, before proceeding to assessment, fixed upon an agent of the non-resident principal under S. 42 of the Act. We acceded to the contention advanced on behalf of His Highness and held that, granting that the assessee was a non-resident, the Income-tax Officer was precluded by certain provisions of the Income-tax Act from serving a notice on him without appointing an agent within the meaning of S. 43 of the Act.

On receipt of a copy of our judgment the Commissioner of Income-tax forwarded it to the Assistant Commissioner, and he on 14th February 1938 set aside the assessment in connection with the assessment year 1936-1937, regarding which an appeal had been filed earlier before him, and directed a fresh assessment to be made after the appointment of an agent under S. 43 of the Act. We do not know exactly how the situation stood regarding the assessment year 1934-1935 about which reference had been made to us. The Income-tax Officer of Benares then after entering into correspondence with the Chief Secretary of the Benares State and getting a reply from him to the effect that the proper person to be appointed as agent was not the Chief Secretary, but Diwan Nizamat Kunwar Bishwanath Singh, issued a notice to the latter intimating to him the intention of the Income-tax Officer to appoint him as agent to Captain His Highness the Maharajah Sir Aditya Narain Singh Bahadur, K.C.S.I.,D.Litt. within the meaning of S. 43, Income-tax Act. In spite of proper service of the aforesaid notice Kunwar Bishwanath Singh failed to appear, nor was any communication received from him by post. The Income-tax Officer then passed an order treating Kunwar Bishwanath Singh as the agent of His Highness the Maharajah of Benares for the assessment year 1936-1937, and in this reference we are concerned with that assessment year alone. It is conceded on all hands that a notice under S. 22 (2) of the Act calling for a return must be issued within the assessment year, that is before 31st March 1937 in the present case. The Income-tax Officer, however, could not issue an ordinary notice under S. 22 (2) because by the time the record came to him from the Assistant Commissioner the financial year 1936-1937 was over and he, therefore, issued notice under S. 34 read with S. 22 on the agent on 23rd February 1938, that is within one year of the end of the year 1936-1937.

In response to these notices the late Maharajah's agent filed a return of income and in response to further notices under Ss. 23 (2) and 22 (4) made an appearance by counsel before the Income-tax Officer, who on 1st August 1938 passed an order assessing Kunwar Bishwanath Singh, agent to His Highness the Maharajah of Benares, on an income of Rs. 40,908, which consisted of Rs. 19,618 as income from property and Rs. 21,290 as income from "other sources." This latter income was made up among other things of a sum of Rs. 2702 on account of zar-i-chaharam and Rs. 3033 on account of nazrana. An appeal against this order was preferred before the Assistant Commissioner of Income-tax, who dismissed it on 22nd September 1938. The assessee Kunwar Bishwanath Singh then applied to the Commissioner for reference to this Court under S. 66 (2) of the Act. Five questions of law were formulated in the application which are mentioned at page 11 of the printed statement of the case. Questions Nos. 2 and 3 were not referred to us and a separate application under S. 66 (3) was filed before us and it was prayed that we should require the Commissioner to state a case on those two questions as well, but we have rejected that application. The Commissioner, however, referred questions Nos. 1, 4 and 5 with some verbal alterations to us. The first question which the assessee wanted to be referred to us was: "Whether the notice dated 23rd February 1938 alleged to have been issued under S. 34, Income-tax Act, was invalid." When the matter was before the Assistant Commissioner, a plea was taken there to the effect that the notice purporting to have been issued under S. 22 and S. 34 was invalid, illegal and ultra vires. These two pleas challenged the validity of the notices on all possible grounds on which it could be challenged, but the learned Commissioner has referred the question of law arising out of this plea in the following terms:

"Whether the notice dated 23rd February 1938 issued to Kumar Bishwanath Singh was valid in law in view of the decision of the Calcutta High Court in *In the matter of Messrs. Mahaliram Ramjidas*?[2] "

Learned counsel for the assessee contended at the very outset that the learned Commissioner ought not to have limited the scope of the first question inasmuch as the notice was challenged not only on the basis of the decision of the Calcutta High Court just referred to but on other grounds as well. Learned counsel for the referor has drawn our attention to the appellate order of the Assistant Commissioner and has said that the only contention which was advanced before the Assistant Commissioner was a contention based on the Calcutta case in 1938 I. T. R. 265,[2] and he has drawn our attention to certain observations of their Lordships of the Privy Council in 1933 A. L. J. 527[3] at p. 537, where it is said:

"The duty of the High Court under S. 66 (5) is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being: . . . . whether the interest (i. e., the sum of Rs. 6,09,571 due as interest by the debtor) can be considered to have been received and assessable? Their Lordships deprecate this departure from regular procedure, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented."

The contention of the learned counsel for the department, therefore, is that we should content ourselves by answering the question as referred by the Commissioner and should not frame the ques-

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1. ('38) 25 A.I.R. 1938 All. 310 : 176 I.C. 167 : I.L.R. (1938) All. 432 : 1938 A.L.J. 341, Maharajah of Benares v. Commissioner of Income-tax.

2. ('38) 25 A.I.R. 1938 Cal. 557 : 177 I.C. 255 : 1938 I.T.R. 265 (S.B.).

3. ('33) 20 A. I. R. 1933 P. C. 108 : 142 I. C. 437 : 12 Pat. 318 : 60 I.A. 146 : 1933 A.L.J. 527 (P.C.), Commissioner of Income-tax B. & O. v. Kameshwar Singh of Darbhanga.

tion ourselves. We think that, if we make the alteration as suggested by learned counsel for the assessee, we shall not be formulating any question ourselves, but only giving effect to the question that was raised by the assessee throughout and to which effect was also given by the learned Commissioner in a limited manner. The Assistant Commissioner had before him the plea that the notice issued under S. 22 read with S. 34 was invalid, illegal and ultra vires, and when he proceeded to decide that plea he thought that the learned counsel for the assessee meant by that plea that the Income-tax Officer had failed to make a preliminary enquiry as laid down by their Lordships of the High Court of Judicature of Calcutta in 1938 I. T. R. 265[2] and it was only on that ground that the Assistant Commissioner repelled the general plea of the assessee and he was of the opinion that the "income altogether escaped assessment." Mr. Banerji on behalf of the assessee has contended that no income escaped assessment, and it is on that ground also that the notice is being attacked. We think we are not attempting to do anything which might, even within the scope of the observations of their Lordships of the Privy Council, be considered to be irregular, but we are answering the question referred to us by the learned Commissioner without the imposition of the limitation contained in the phrase "in view of the decision of the Calcutta High Court in 1938 I. T. R. 265.[2]"

The question that we propose to decide is whether the notice dated 23rd February 1938, issued to Kunwar Bishwanath Singh was valid in law in view of the decision of the Calcutta High Court in 1938 I. T. R. 265[2] or otherwise. We feel that the contention of the assessee was general all along and the Assistant Commissioner noticed only the main argument advanced in this connexion and might have ignored other arguments as being without substance.

It has been conceded by learned counsel for the assessee that in view of the decision of their Lordships of the Privy Council in A. I. R. 1940 P. C. 124,[4] it is not necessary for the Income-tax Officer to hold a preliminary enquiry and to give the result of that enquiry (after convening, and in the presence of the assessee) on the question in the shape of a finding that the income has escaped assessment, but that if for any reason the Income-tax Officer holds the view that some income has escaped assessment a notice under S. 34 can be issued. What is, however, contended is that income in the present case has not escaped assessment and reliance in the main is placed on the case in 61 Cal. 285,[5] more particularly on the passage which occurs at p. 290 *et seq*. The facts of the Privy Council case may be stated. There were two firms, Burn & Co., and Martin & Co. The partners of Martin & Co., as individuals purchased the shares of the partners of Burn & Co., and thus became owners of Burn & Co., but the partners had not purchased the business of Burn & Co., with funds belonging to Martin & Co., but with other funds belonging to themselves as individuals. A notice was issued to Burn & Co., calling for a return of their total income and a notice was also issued to Martin & Co. The returns were made by both firms, but Burn & Co., made a note that they should not be assessed but their income should be included in the income of Martin & Co. The Income-tax Officer combined the incomes of Burn & Co., and Martin & Co., and assessed them as one on the return made by Martin & Co. The return made by Burn & Co., was not made the subject of any assessment order. The High Court held that this was illegal and therefore the assessment order passed on Martin & Co., was revised by the income-tax authorities and the income of Burn & Co., was omitted. The income-tax authorities then proceeded to assess the income of Burn Co., without taking any action under S. 34, merely treating the assessment as not having been completed and proceeded therefore under S. 23. When the assessment had been made on Burn & Co., they appealed to the Assistant Commissioner, who rejected the appeal and confirmed the assessment. They then asked for a reference under S. 66 (2). The High Court held that the Income-tax Officer could proceed under S. 23 (1) and it was not correct that the income had escaped assessment and that therefore the only remedy left to the income-tax authorities was to proceed under S. 34. The assessee, Burn & Co., then appealed to their Lordships of the Privy Council and the passage to which we have referred to above summarizes the argument of the assessee and the view of their Lordships. Their Lordships say :

"The appellants, however, submit that this is a case of income escaping assessment within the meaning of S. 34. Assessment, they argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under S. 34 with its time limitation. This involves reading the expression 'has escaped assessment' as equivalent to 'has not been assessed.' Their Lordships cannot assent to this reading. It gives too narrow a meaning to the word 'assessment' and too wide a meaning to ths word 'escaped'. That the word 'assessment' is not confined in the statute to the definite act of making an order of assessment appears from S. 66 which refers to 'the course of any assessment.' To say that the income of Burn & Co., which in January 1928 was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Co., has 'escaped' assessment in 1927-28 seems to their Lordships an inadmissible reading. The fact that S. 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income, which has already been *duly* returned for assessment, cannot be said to have 'escaped' assessment within the statutory meaning."

We have for ourselves italicised the word 'duly' and we think some importance is to be attached to that word. We think it was argued for the assessee Burn & Co., that, since there had been no assessment order in respect to that income during the year of assessment, their income had 'escaped' assessment and then assessment under S. 34 alone could be made subsequently, subject to its time limit. The Privy Council repelled that argument. They held that since Burn & Co., had duly made a return of their income in response to a notice it could not be said that their income had escaped assessment within the statutory meaning. Their Lordships then went on to say that they found "themselves in agreement with the view expressed

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4. ('40) 27 A. I. R. 1940 P. C. 124 : 189 I. C. 154 : 67 I. A. 239 : I. L. R. (1940) 2 Cal. 215 : I. L. R. (1940) Kar. P. C. 242 (P. C.), Commissioner of Income-tax, Bengal v. Mahaliram Ramjidas.

5. ('34) 21 A. I. R. 1934 P. C. 30 : 147 I. C. 663 : 61 I. A. 10 : 61 Cal. 285 (P. C.), Rajendra Nath Mukherji v. Commissioner of Income-tax, Bengal.

in 58 Cal. 909[6] by the learned Chief Justice (Rankin): 'Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof.'" It will thus appear that their Lordships were of the opinion that the assessment of Burn & Co., was pending all along and there was no necessity to issue a notice under S. 34. They further observed :

"It may be that, if no notice, calling for a return under S. 22, is issued within the tax year, then S. 34 provides the only means available to the Crown of remedying the omission, but that is a different matter."

Learned counsel for the department has argued that in the present case no notice had been issued to the assessee, but a notice had been issued to the Maharaja, who was not the assessee and on whom notice could not be issued by reason of Ss. 42 and 43, Income-tax Act, and the return that was filed by the late Maharaja was not a due return, that the notice was invalid and the assessment, if any, was invalid—which assessment was of course set aside by the assistant commissioner — and the position, therefore, is that there had been no notice, no return and no assessment, and the case comes within the observations of their Lordships when they say that "if no notice calling for a return under S. 22 is issued within the tax year, then S. 34 provides the only means available to the Crown of remedying the omission." It was argued on behalf of the assessee, relying on the case in 14 Lah. 255,[7] that it was impossible to hold, on the facts of the present case, that the income had escaped assessment. We might mention that this case has been overruled by the Full Bench case of the Lahore High Court itself in A. I. R. 1935 Lah. 742,[8] where the entire case law on the subject has been reviewed and where the two learned Judges of the Court who formed the majority had expressed their opinion as to the true scope of the meaning of the passage which we have quoted.

It is not necessary for us to say anything more than what we have already said in this connexion except to point out emphatically that in the present case we hold the view, a view supported by our decision in an earlier case, to which we shall refer presently, that the former notice issued to His Highness the Maharaja was not a notice within the meaning of S. 22 (2) and the return filed by the Maharaja was not a due return and the assessment proceedings were started in illegality and conducted in illegality and irregularity and the entire proceedings were void from start to finish; and, as their Lordships point out in 1938 A. L. J. 754[9] the word 'assessment' is used in Income-tax Acts of other countries and in the Indian Income-tax Act as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable, and sometimes the whole procedure laid down in the Act for imposing liability upon the tax-payer. In our judgment, the whole procedure adopted by the Income-tax Officer on the former occasion was illegal and irregular and income had escaped assessment so far as the assessee was concerned. We might at this stage quote usefully from what we said when the earlier reference came to us at the instance of His Highness the Maharaja of Banares in the case reported in 1938 A. L. J. 341[1] at p. 345. We said :

"It will be seen that the word 'agent' for the purpose of S. 42 has a wider scope than it had in ordinary use .... When the agent in British India is invested with the character of assessee in the mandatory terms which we find in S. 42 (1) and to the apparent exclusion of the principal it would seem to follow that the non-resident principal is divested of that character .... "It appears to us that in the case of a person residing out of British India who has property or business connexions in British India, the income-tax authorities are not competent to serve notices upon him; such notices must be served upon his agent in British India or upon such person as may be deemed to be his agent within the meaning of S. 43 and who will be treated as such. The proviso to S. 42 does not, to our minds, militate against the view that we have taken and does not support the opinion of the Commissioner that 'it is open to the Income-tax Officer to address notices direct to the assessee even though he be a non-resident'. "

We differed in this respect from the view taken by the learned Judges of the Madras High Court in 44 Mad. 773.[10] At the instance of His Highness and invited by him we took the view that the notice issued to him was wholly illegal, and it comes with ill grace from the mouth of this agent that the former notice and the former proceedings which culminated in the assessment order could be considered for any purposes whatsoever and that the income of the assessee did not escape assessment within the meaning of that expression in S. 34 of the Act. We are, therefore, of the opinion that the notice dated 23rd February 1938 issued to Kunwar Bishwanath Singh was valid in law, and we answer the first question in the affirmative. The second question is :

"Whether the income from nazrana and from zar-i-chaharum was 'agricultural income' within the meaning of S. 2 (1) of the Act?"

Learned counsel for the assessee had to concede, and indeed it is not open to argument, that the income derived from zar-i-chaharum was not agricultural income. Zar-i-chaharum is one-fourth of the sale price of houses when houses are transferred by one person to another, and according to custom His Highness is entitled to this one-fourth of the sale price. This can in no sense be called agricultural income and would not therefore be exempt. This settles the matter so far as the sum of Rs. 2702 is concerned. There is however, another sum, namely Rs. 3033 on account of nazrana and it was contended on behalf of the assessee that this nazrana represented not only sums received from persons to whom building permission had been accorded by the State but sums from cultivatory tenants to whom land had been let out. We, however, find that

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6. ('31) 18 A. I. R. 1931 Cal. 545 : 133 I. C. 187 : 58 Cal. 909 : 35 C.W.N. 310 (S. B.), In re Lachhiram Basant Lal.

7. ('33) 20 A. I. R. 1933 Lah. 284 : 141 I. C. 415 : 14 Lah. 255 : 34 P. L. R. 560, Krishan Kishore v. Commissioner of Income-tax.

8. ('35) 22 A. I. R. 1935 Lah. 742: 158 I. C. 718: 16 Lah. 937: 38 P. L. R. 52 (F. B.), Madan Mohan Lal v. Commissioner of Income-tax, Punjab.

9. ('38) 25 A. I. R. 1938 P. C. 175: 175 I.C. 1: 65 I. A. 236: 1938 A. L. J. 754: 32 S. L. R. 549: I. L. R. (1938) Bom. 487 (P. C.), Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas.

10. ('21) 8 A. I. R. 1921 Mad. 212: 64 I. C. 239: 44 Mad. 773; 41 M. L. J. 191 (S. B.), Deputy Commissioner and Secretary to the Chief Commissioner of Income-tax, Madras v. Bhanjee Ramjee & Co.

nowhere was it pleaded on behalf of the assessee that the sum of Rs. 3033 included the nazrana received from cultivatory tenants. The Assistant Commissioner held that the nazrana in the present case meant the consideration received for granting permission to a person to build a house on a plot of land, and the Commissioner also said in the statement of the case that this was a customary fee taken by the Maharaja for permission to build houses on lands owned by him. None of these sources of income can therefore be said to come under agricultural income, and they were therefore rightly taxed by the Department. Our answer to question No. 2 is in the negative. We now propose to consider question No. 3. It runs as follows :

"Whether the fact that the late His Highness the Maharaja of Benares was a Ruling Chief of an Indian State exempted him from taxation under the Act in respect of income from property owned by him in British India ?"

When this case was before us on 4th October 1940 we passed the following order :

"One of the questions that has been referred to us in this case by the learned Commissioner of Income-tax, Central and United Provinces, for our decision is whether the fact that the late His Highness the Maharaja of Benares was a Ruling Chief of an Indian State exempted him from taxation under the Act in respect of income from property owned by him in British India, and learned counsel for the assessee at the very threshold of the discussion on this point drew our attention to the case in (1924) A. C. 797[11] and pointed out that in matters like these there was a well established practice and we should follow the same."

In that case Viscount Cave, after stating the facts, observed as follows :

"First, it was argued that the Government of Kelantan was not an independent sovereign State, so as to be entitled by international law to the immunity against legal process which was defined in (1880) 5 P.D. 197.[12] It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to be questioned by the parties. Information of this character was obtained from a Secretary of State and accepted without question in (1828) 2 Sim. 213[13] and (1894) 1 Q.B. 149;[14] and those cases were followed in (1900) 1 Ch. 811[15] and in (1919) L. R. P. 95.[16] In the present case, the requisite inquiry was addressed by Master Jelf (while the summons to enforce the award was pending before him) to the Secretary of State for the Colonies (and an answer was received from the Under Secretary)."

It is submitted before us that we should also enquire from the Political Department about the exact status of His Highness the late Maharaja of Benares and after taking judicial notice of the fact determine the question as to how far under international law certain privileges can be extended to His Highness the Maharaja of Benares. We, therefore, direct the Registrar of this Court to write a letter to the Political Secretary to the Government of India to let us have an answer to the following question: Was His Highness the late Maharaja of Benares recognised by the Government of India as the ruler of a sovereign State? While answering the question the Political Secretary may care to study the English case to which reference has already been made and more particularly what has been said at p. 814 of the reports. The case will be listed before us on receipt of the reply. In reply to the letter sent by the Registrar of this Court the Secretary to His Excellency the Crown Representative has sent the following certificate in connexion with the status of Captain His late Highness Maharaja Sir Aditya Narayan Singh Bahadur, K. C. S. I., Maharaja of Benares :

"Captain His late Highness Maharaja Sir Aditya Narayan Singh Bahadur, K. C. S. I., Maharaja of Benares, has been recognised by His Majesty as the Ruler of the Indian State of Benares. His Majesty's Government did not regard or treat His Highness or his subjects as subjects of His Majesty and they did not regard or treat Benares State as being part of British India or of His Majesty's dominions. Benares is an Indian State and the late Maharaja was a Ruler as defined in sub-s. (1) of S. 311, Government of India Act, 1935. But, though His late Highness was thus not independent, His Majesty's Government accorded to him the status of a sovereign Ruler under the Suzerainty of His Majesty exercised through His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States. As such he possessed various attributes of sovereignty, including internal sovereignty which was not derived from British law, but was inherent in the Ruler; subject, however, to the suzerainty of His Majesty and to the exercise by His Majesty's Representative of such rights, authority and jurisdiction as had by treaty, grant, usage, sufferance, or otherwise, passed to and were exercisable by His Majesty. These included the conduct of international relations, the exercise of jurisdiction over Europeans and Americans, interference to settle disputes as to succession to the State, the suppression of gross mis-rule in the State, and the regulation of armaments and the strength of military forces. The late Maharaja was, in regard to proceedings in the civil Courts in India, covered by the provisions of Ss. 85 and 86, Civil P. C."

Our attention has also been drawn by the learned Advocate-General to the Instrument of Transfer dated 1st April 1911, by which certain powers were conferred on the Maharaja (this Instrument of Transfer is to be found at p. 89 in Vol. 2 of Aitchison's Treaties, Engagements and Sanads). By this Instrument of Transfer, Parganas Bhadohi and Kera Mangraur of the Family Domains of the Rajas of Benares at present administered by the British Government, as well as the tract (comprising the Fort of Ramnagar and its appurtenances) defined in the Schedule to the Instrument, were constituted as a State under the suzerainty of His Majesty and granted in that condition to the Rajas of Benares under such restrictions and conditions as may be necessary for safeguarding to the residents of those territories the rights and privileges they had enjoyed

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11. (1924) 1924 A.C.797 : 93 L.J.Ch.343 : 131 L.T. 676 : 68 S. J. 559 : 40 T. L. R. 566, Duff Development Co. Ltd. v. Government of Kelantan.

12. (1880) 5 P. D. 197 : 42 L. T. 273 : 28 W. R. 642 : 4 Asp. Mc. 234, The Parlement Belge.

13. (1828) 2 Sim. 213 : 7 L. J. Ch. 65 : 29 R. R. 82, Taylor v. Barclay.

14. (1894) 1 Q. B. 149 : 63 L. J. Q. B. 593 : 9 R. 447 : 70 L T 64 : 58 J. P. 244, Mighell v. Sultan of Johore.

15. (1900) 1 Ch. 811 : 69 L. J. Ch. 375 : 82 L. T. 253, Foster v. Globe Venture Syndicate.

16. (1919) L. R. 1919 P. 95 : 88 L. J. P. 101 : 122 L. T. 498 : 14 Asp. M. C. 547 : 63 S. J. 301 : 35 T. L. R. 259, The Gagara.

under the British administration, and whereas the said Maharaja was established as a Ruling Chief with full powers in the said territories subject to the suzerainty of His Majesty it was declared by para. 26 of the Instrument:

" Within the other estates now in posseesion of His Highness Sir Prabhu Narayan Singh, G.C.I.E. which are outside the State of Benares, he shall continue to have the status and responsibilities of a landholder under the ordinary law and within the pargana of Kaswar Raja he shall assume that status and those responsibilities."

When an earlier reference which is reported in 1938 A. L. J. 341[1] was before us, it was conceded before the Assistant Commissioner of Income-tax that the property and the sources of income which formed the subject-matter of the contested assessment belonged personally to His Highness the Maharaja and were not part of the State of which he was the Ruler. Mr. Banerji on behalf of the assessee submitted that any concession made on the former occasion could not be made applicable to the present assessment because the assessment year is different and the property may be different, and further because the proceedings relating to assessment were not initiated properly on the former occasion. We have not thought fit to remit an issue as to the nature of the property and it is not necessary to get a clear finding on the question as to whether the property from which income is derived and which is sought to be assessed belongs personally to His Highness or is a part of the State. It is conceded on behalf of the Department that income derived from properties owned by the State would be exempt, but it is said that in the present case the income was derived by His Highness in his personal capacity. We shall, therefore, answer the question referred to us on the assumption that the property which yields income in the present case is property belonging to the Maharaja in his personal capacity and is not property belonging to the State. Mr. Banerji then proceeded with his argument on the main question and drew our attention to Maxwell's Interpretation of Statutes, Edn. 7. p. 127, where the learned author says :

" Under the same general presumption that the Legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law. If, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it, for if any other construction is possible, it would be adopted to avoid imputing such an intention to the Legislature .... For instance, although foreigners are subject to the criminal law of the country in which they commit any breach of it, and also, for most purposes, to its civil jurisdiction, a foreign sovereign, an ambassador, the troops of a foreign nation, and its public property are, by the law of nations, not subject to them, and statutes would be read as tacitly embodying this rule."

He also quoted the case in (1937) A. C. 260[17] where it was laid down at p. 268 that an income-tax was the most typical form of direct taxation, and submitted that sovereigns had immunity from direct taxation. To support the latter submission several books on International law written by eminent authors were cited. In Hall's International law, 8th Edn., at p. 220 it is written that "a sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subject to police or other administrative regulations, his house cannot be entered by the authorities of the state, and the members of his suite enjoy the same personal immunity as himself."

Holland in his lectures on International Law observes at p. 201 :

"An Ambassador is exempt from taxation and also from customs dues; by right as to property held in his representative capacity, and by courtesy as to property held otherwise."

It is contended that if an ambassador is exempt from taxation not only with respect to property held in his representative capacity but also with respect to property held otherwise, a sovereign is all the more so exempt. The passage in Holland is based upon another passage in Hall's International Law at p. 235 where the learned author says :

"The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy, however, most, if not all, nations permit the entry free of duty of goods intended for his private use."

Oppenheim in his book on International law, Vol. I, 5th Edn., at p. 590 says :

"He (meaning a sovereign) must be granted so-called exterritoriality conformably with the principle, *par in parem non habet imperium*, according to which one sovereign cannot have any power over another sovereign. He must therefore in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff."

Later on where the various privileges of diplomatic envoys are discussed, at page 626 the fifth privilege of an envoy in reference to his exterritoriality is said to be exemption from taxes and the like. Our attention is also drawn to the case in (1880) 5 P. D. 197[12] where it was held that "as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory."

The point and force of the above principle was explained at p. 210 and it was said :

"..... that the public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such state, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, by international comity, which acknowledges the equality of states, if such immunity grounded on such reasons, exist in each state with regard to its own public property, the same immunity must be granted by each state to similar

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17. (1937) 1937 A.C. 260 : 106 L.J.P.C. 17 : 156 L.T. 201: 81 S.J. 77: 53 T.L.R. 211: (1937) 1 All. E.R. 249, Forbes v. Attorney General for Manitoba.

property of all other states. The dignity and independence of each state require this reciprocity."

It was contended on behalf of the assessee that no privilege was being claimed for the property, in which case the question whether the property was the property of the state or the personal property of the ruler might be relevant, but the privilege was being claimed for the person of the ruler who was claiming immunity from the procedure by which an attempt was made to levy direct taxation on him. We are not called upon to give a decision on the question of what would happen in the case of an independent sovereign ruler when the authorities cited on behalf of the assessee and the argument of the learned Advocate-General that under S. 3 and S. 4, Income-tax Act, income and not the person is taxed might have to be seriously considered, but we have to deal with the income which the Maharaja of Benares receives from property in British India, and the letter from the Secretary to His Excellency the Crown Representative and the Instrument of Transfer to which reference has been made in an earlier portion of our judgment make it clear that His Highness cannot claim the immunity which an independent sovereign might claim. Although His Majesty's Government did not regard or treat His Highness or his subjects as subjects of His Majesty and although they did not regard or treat Benares State as being part of British India or of His Majesty's dominions, yet his status was that of a sovereign ruler under the suzerainty of His Majesty and His Majesty's Representative exercised certain rights including the conduct of international relations, the exercise of jurisdiction over Europeans and Americans, interference to settle disputes as to succession to the state, the suppression of gross mis-rule in the State, and the regulation of armaments and the strength of military forces, and it was specifically recognized that His late Highness was "not independent." The exercise of rights mentioned above by the suzerain state is inconsistent with the idea of sovereignty in the state over which the Suzerainty is exercised. As Oppenheim at p. 165 in his book says :

"Suzerainty is a term which was originally used for the relation between the feudal lord and his vassal; the lord was said to be the suzerain of the vassal. . . ."

But although such suzerainty has disappeared, modern suzerainty involves only a few rights of the suzerain state over the vassal state and such rights are principally international rights, it being a kind of international guardianship. A distinction is drawn by Oppenheim between vassal states and protected states and Oppenheim says that when "a weak state surrenders itself by treaty into the protection of a strong and mighty state in such a way that it transfers the management of all its more important international affairs to the protecting state then an international union is called into existence between the two states, and the relation between them is called protectorate" and that learned author is of the opinion that the position of the Indian States to Great Britain is like that of vassal states which have no international relations whatever either between themselves or with foreign states (pp. 165 & 166). Hall, however, is of the opinion that the states in the Indian Empire of Great Britain are protected states, but even then, according to him, "they are not subjects of international law." He says at p. 28:

"Indian Native States are theoretically in possession of internal sovereignty, and their relations to the British Empire are in all cases more or less defined by treaty; but in matters not provided for by treaty a 'residuary jurisdiction' on the part of the Imperial Government is considered to exist, and the treaties themselves are subject to the reservation that they may be disregarded when the supreme interests of the Empire are involved, or even when the interests of the subjects of the native princes are gravely affected. The treaties really amount to little more than statements of limitations which the Imperial Government, except in very exceptional circumstances, places on its own action. No doubt this was not the original intention of many of the treaties, but the conditions of English sovereignty in India have greatly changed since these were concluded, and the modifications of their effect which the changed conditions have rendered necessary are thoroughly well understood and acknowledged."

In S. 26, of the Instrument of Transfer it is distinctly mentioned that in the other estates in possession of His Highness which are outside the state of Benares—and presumably the income derived in the present case which is sought to be assessed is from such estates — he shall continue to have the status and responsibilities of a landholder under the ordinary law, and this implies that for such estates he shall be subject to the payment of land revenue, etc. It is, therefore, not possible to give to His Highness the same immunity from taxation which might be possessed by other independent sovereign Rulers. It was mentioned in the certificate of the Secretary in the Political Department that His Highness was a Ruler as defined in sub-s. (1) of S. 311, Government of India Act, 1935, and although Federation has not come in yet, some indication of the status and rights of His Highness is afforded from S. 155, Government of India Act. Sub-section (1), cl. (b) provides that a ruler shall not be exempt from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

Under S. 60, Income-tax Act, the Central Government may, by notification in the Gazette of India, make an exemption, reduction in rate or other modification, in respect of income-tax in favour of any class of income, or in regard to the whole or any part of the income of any class of persons, and the Finance Department Notification No. 878-F (Income-tax), dated 21st March 1922, as amended or added to from time to time, does not exempt the income derived by Ruling Chiefs and Princes of India from their private property. Nothing would have been easier than to make a provision to that effect just as the interest on Government securities held by, or on behalf of, Ruling Chiefs and Princes of India as their private property has been exempted at No. 8 of the various exemptions. In striking contrast we have No. 1 where the official salaries and fees which a representative or consular employee of a foreign state receives are exempt. In our view question No. 3 ought to be answered in the negative and we answer accordingly. The assessee will have to pay the costs of this reference. The Advocate-General is entitled to a fee of Rs. 200. Let a copy of our judgment be sent to the Commissioner of Income-tax under the seal of the Court and the signature of the Registrar.

G.N./R.K. *Answer accordingly.*

A. I. R. (29) 1942 Allahabad 302

ALLSOP AND VERMA JJ.

Basdevanand Gir — Plaintiff — Appellant

v.

Shantanand alias Makhu Mahto — Defendant — Respondent.

First Appeal No. 441 of 1935, Decided on 13th March 1942, from decision of Judge, Small Causes, Allahabad, D/- 29th August 1935.

(a) Hindu law—Religious endowment—Math —Person of twice-born caste can become sanyasi and mahant of math — Bhumihars belong to twice-born caste.

Any member of a twice-born caste can be a sanyasi and a mahant of a math. Bhumihars generally regard themselves as brahmans and certainly are members of a twice-born caste. [P 304 C 2]

Hindu law —

('40) Mulla, Page 481, S. 414 (2).

('38) Gour, Page 61, N. 214, page 987, N. 2344.

(b) Evidence Act (1872), Ss. 155 and 145 — Previous statements of person can be used only to contradict him and not his witnesses.

Previous statements of a person can be used only to contradict him and not to contradict the witnesses whom he has called in his defence. [P 305 C 1]

(c) Decree—Perjured evidence—Decree cannot be set aside merely because it was obtained by perjured evidence.

The rule that a title once settled by a decision should not be questioned again between the same parties is intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question. A decree cannot be set aside merely because it was obtained by perjured evidence because, if the contrary were held, it would be necessary to hold new investigations again and again into the same question. It would be most unsafe to hold that a decree can be set aside on the ground that the defendant did not raise a plea which was open to him, but which he did not raise because he did know all the necessary facts, or on the ground that the plea set up was false to the knowledge of the plaintiff : 21 Cal. 612 and (1879) 10 Ch. D. 327, *Rel. on* ; ('21) 8 A.I.R. 1921 Cal. 298, *Dissent.*; *Case law discussed.* [P 305 C 2]

C. P. C. —

('40) Chitaley, S. 11, N. 98.

('41) Mulla, Page 78, pt. (k).

(d) Precedent — English decisions are not binding on Indian Courts — English decision when should be preferred. *(Per Verma J.)*

The decisions of the English Courts are not binding upon the Courts in India. The views expressed in the judgments of English Courts are referred to and adopted by the Court in India only when it appears that those views are fundamentally sound and are based on immutable principles. [P 307 C 1]

C. P. C. —

('40) Chitaley, Preamble N. 16, pts. 1 and 3.

P. L. Banerji, L. P. Zutshi and P. M. Verma — for Appellant.

K. N. Katju, S. C. Das, G. S. Pathak, N. C. Tewari and N. R. Sharma — for Respondent.

ALLSOP J.—This appeal arises out of a suit in which the plaintiff-appellant, Basdevanand Gir, sought the following relief, namely :

"That it may be declared that the decree in suit No. 172 of 1921 was tainted and affected by the fraudulent conduct of the defendant and is null, void and ineffectual against the present plaintiff and thus the said suit has not been concluded by a valid decree and that the said suit is to be retried de novo from the stage at which fraud was perpetrated by the defendant."

Suit No. 172 of 1921 was instituted by the defendant respondent, Shantanand, against the plaintiff-appellant, Basdevanand, in order to obtain, in his capacity as mahant, possession over a sanyasi math in Allahabad called the Baghambari Gaddi. A decree for possession was passed in favour of Shantanand, that decree was maintained, after some difference of opinion, by this Court in the year 1927 and the decree of this Court was upheld by their Lordships of the Privy Council in 1929. I may mention that it is now admitted that Gyananand Gir became mahant of this math in 1916 and that he initiated Shantanand as his disciple at Soron on the banks of the Ganges in 1917 or 1918 and that he relinquished the mahantship in favour of Shantanand and installed him as the mahant on 16th August 1918. A couple of months later, on 9th October 1918, Shantanand executed a document in which he recited that he was temporarily unfitted to manage the math on account of want of experience and sufficient education and that he intended to go away for a time to pursue his studies. He then said that he reconveyed his powers as mahant to Gyananand until such time as he had acquired sufficient literary and administrative ability. After executing this document Shantanand apparently left Allahabad and while he was away Gyananand appointed the plaintiff-appellant, Basdevanand, as the mahant on 15th September 1919. A little later there was apparently a dispute between Gyananand and Basdevanand because it was necessary for a Magistrate to take proceedings under S. 145, Criminal P. C., in order to prevent a breach of the peace. The result of these proceedings was that it was held on 27th April 1920 that Basdevanand was in possession of the math.

It was then that Shantanand filed a Suit No. 172 of 1921 in order to obtain possession over the math from Basdevanand. The defence put up by Basdevanand was that Shantanand could not be a disciple of Gyananand because he was already a disciple of another man and that the document executed by Shantanand on 9th October 1918 amounted to an absolute relinquishment of his rights as the mahant of the math. The defence, as I have already said, failed and it was finally decided in the year 1929 that Shantanand was entitled to possession of the property. He had already been put into possession in 1927. Gyananand then made an attempt to acquire possession of the math himself. He issued a notice to all whom it might concern on 1st October 1929 in which he said that Shantanand had told him that he was a Brahman from the Azamgarh District and had afterwards said in the course of Suit No. 172 of 1921 that he was a Pandey Brahman from the Gorakhpur District and that he had ascertained that both these statements were false. He also stated that he had discovered that Shantanand was already a disciple of one Munishanand of Jhusi when he became or purported to become Gyananand's disciple. He stated further that Basdevanand had not been living in accordance with the traditions of the math and that consequently he was

himself entitled to become the mahant again. He followed this notice up with a suit which he instituted against Shantanand in the beginning of the year 1930. In that suit he said that Shantanand had told him that he was Brahman from the Azamgarh District, which was untrue, and he reiterated the statement about his having been a disciple of Munishanand's, an allegation which had also been made by Basdevanand in his defence in Suit No. 172 of 1921. This suit of Gyananand was dismissed and it was held as a fact that it had not been proved that Shantanand was not a Brahman. The learned Judge remarked in the course of his judgment that no evidence had been produced upon the point and that the allegations that Shantanand had made false statements about his caste and residence had not been established.

When that suit was dismissed, Basdevanand instituted the suit which has given rise to this appeal. In the plaint he said that Shantanand, with the object of substantiating his allegation that he was initiated as a chela of the late Mahant Gyananand Gir according to the custom of the math, had stated before the Court in Suit No. 172 of 1921 that on the eve of his initiation as chela he had satisfied the said Gyananand Gir, the then mahant, on the question of his caste by telling him that he was a Brahman of Pandeypur, District Gorakhpur, that Gyananand had stated in his notice issued on 1st October 1929, that he was extremely suspicious about Shantanand's true caste and that this notice had aroused Basdevanand's suspicions and set him on an enquiry which resulted in his discovery in the last week of October 1930 that the defendant was a Sudra, Kurmi by caste, and was known by the name of Makho Mahto of village Narwara, District Muzaffarpur, that his father's name was Ramlal Mahto deceased, the name of his elder brother was Daroga Mahto deceased and the names of his other two brothers were Jagdish Mahto and Pradip Mahto and that they were still living in their native village of Narwara. The plaint went on to say that the concealment of his true caste by the defendant was done with a fraudulent intent to deceive and mislead the plaintiff and the Court into a course of action which was injurious to the plaintiff, that in fact they were actually deceived and misled, that the defendant's fraudulent conduct in concealing his real caste was a premeditated and intentional contrivance to keep the then defendant, that is, Basdevanand, and the Court in ignorance of the real facts of the case and, inasmuch as his imposition had succeeded upon the ex-Mahant Gyananand Gir at the time of his initiation as chela, nobody could have doubted his caste and so the question of his caste was not in issue and not decided in the previous Suit No. 172 of 1921 and that he obtained the decree in that suit by that contrivance. The plaint also alleged that the custom of the math was that only a Brahman by birth could be appointed a mahant and also according to Hindu law a Shudra by birth would always have the status of a house-holder and never of a sanyasi.

The defendant-respondent, Shantanand, in his written statement said that he was a Pandey Brahman before he became a sanyasi and that he was not a Shudra but in answer to interrogatories at a later stage he said that his name before he became a sanyasi was Satyanarain alias Sant Sewak and his father was Har Sewak Sharma alias Bechan, that he was born at the village of Amla in the district of Azamgarh and that he was a Brahman by caste. He produced evidence in support of his allegations from which it became apparent that he was, if the statements were true, the son of Har Sewak Sharma, a Bhumihar of the village of Amla. The plaintiff-appellant also produced evidence to prove that Shantanand was really Makho Mahto from the village of Narwara in the Muzaffarpur district. The learned Judge held that the plaintiff-appellant's evidence was untrue, that the balance was in favour of the evidence of the defendant-respondent and that the defendant-respondent was really a Bhumihar Brahman from the village of Amla as he said he was. The learned Judge also went into the question whether it was only a Brahman who could be a sanyasi and a mahant of a sanyasi math and he came to the conclusion that the allegation was not true and that any member of any of the twice-born castes could be a sanyasi and a mahant. Besides these findings, mainly of fact, in favour of the defendant-respondent, the learned Judge came to the conclusion that the allegations of fraud made even if true, were not such as would justify him in setting aside the decree in Suit No. 172 of 1921.

The first question which arises is whether the findings of fact of the learned Judge are correct. The first five of the plaintiff's witnesses were called to prove that Shantanand was not a Pandey Sarjupari Brahman from the district of Gorakhpur and as the contention of Shantanand himself now is that he was a Bhumihar Brahman from the district of Azamgarh, their evidence is of no value. There are seven witnesses to prove that Shantanand was really Makho Mahto, that is, a Kurmi by caste, before he became or pretended to become a sanyasi. The first witness whose evidence may be considered is one Rama Kant. He set himself up as a learned man who had been appointed a preacher by the Sanatan Dharma Society of the Hindu University of Benares but it does not appear that he is a person of such respectability as he would pretend. He admitted that a register was kept of preachers sent out by the Sanatan Dharma Society and that his name was not in the register. His explanation was that he was a preacher of many years' standing and consequently it was not necessary for his name to be entered in the register. It is doubtful whether he is an accredited preacher, but even if he is, I do not think that necessarily establishes that he is a truthful witness. His story is not by any means convincing. He said that he was at the Kumbh Mela at Allahabad one day with Shantanand when they casually met two men, one of whom greeted Shantanand as Makho Mahto. Shantanand is supposed to have acknowledged his acquaintance with this man and to have discussed the affairs of his family with him. It is extremely improbable, as the learned Judge says, that Shantanand, who had just been established as the mahant of this math after a litigation extending over several years, would have acknowledged his acquaintanceship with a man who could prove that he was a Kurmi, that is, a Shudra, by caste and would obviously be in a position to shake his claim to be the mahant. Rama Kant says that he went and told Basdevanand about this incident and from the evidence it would appear that this was the occasion for an enquiry made by Basdevanand. I have already mentioned that it was stated in the plaint that Basdevanand was put upon enquiry by the notice issued by Gyananand in October 1929 and it is impossible to avoid the conclusion that the evidence of Rama Kant was introduced afterwards because it was difficult to explain how Basdevanand in the course of his enquiries managed to discover that Shantanand had been born in the Muzaffarpur District in Bihar. I agree with the learned Judge that the statement of

Rama Kant is so improbable that it is impossible to believe it.

The next witness is one Sripat Singh of Pipra in the District of Muzaffarpur. He has been called to prove that he and his uncle, Daroga Singh, were the two men who met Shantanand at the Kumbh Mela and that it was Daroga Singh who recognised him as Makho. The witness himself clearly does not suggest that he knew Makho himself and Daroga Singh was dead at the time when the evidence was recorded. He says that Makho asked Daroga Singh who he was and Daroga Singh said that he was his nephew. Another witness is Sripat Singh's father, Bhagwat Singh. He was employed as an Assistant Accountant in the Collector's office at Muzaffarpur. His story was that thirty years before one Gokul Singh fram Narwara had been staying with him and his brother, Dargo Singh, at Muzaffarpur because he was studying there for a time and that Makho Mahto was Gokul Singh's servant. Makho is supposed to have run away after he had been working with Gokul Singh for some time and the witness did not see him till several years later when he and Daroga Singh happened to meet him by chance at a religious fair at Benares. He did not see him again till a short time before the suit was instituted. The story is that Makho, that is, Shantanand, went to Muzaffarpur at that time to persuade witnesses not to give evidence against him. It seems to me extremely improbable that Shantanand, if he had been Makho, would have been so foolish as to go himself to Muzaffarpur and show himself to the witnesses so that they would be able to recognize him. The story seems to me to be incredible. Singhashwar Singh, Ram Autar Kunwar and Bhujawan Singh all of Narwara have given similar evidence. They also say that they recognized Shantanand as Makho Mahto and that he had also been to see them to persuade them not to give evidence. It does not appear how Shantanand would have known 30 years after he left Narwara that these were the people who would be induced by Basdevanand to give evidence about his identity so that he found it necessary to go and dissuade them from doing so. The last witness, Sheo Dhari Mahto, said that he was the brother-in-law of Makho Mahto and had seen him twice about 30 or more years before he gave evidence—once on the occasion when Makho married his sister and once at the time of gauna ceremony, that is, the ceremony on the occasion when the wife goes to live with her husband. He admitted that he was only ten years of age at the time of his sister's marriage when Makho was also about ten and that he had some difficulty in recognizing him when he came to see him in order to persuade him not to give evidence against him. It seems to me that the whole of this evidence is worthless and that it would be quite impossible for us to say that the learned Judge was wrong in his conclusion that it had not been established that Shantanand was really Makho Mahto of Narwara.

The second question is whether there is any custom or any rule of Hindu law by which nobody can become a sanyasi unless he is a Brahman or be appointed a mahant of a sanyasi math unless he was a Brahman before he became a sanyasi. The plaintiff-appellant produced a number of witnesses, but it seems to me that they have failed to establish either the custom or the rule of law. All except one are themselves Brahmans and they may very well be interested in setting up a rule which would give an advantage to men of their caste. One of them, Inderdeo Prasad, is the Secretary of the All India Sarjupari Brahman Conference and himself tried to eject the defendant from this math by instituting a suit under S. 92, Civil P. C. Sheo Chaitanya Bharti has based his allegation on the statement that he heard a talk between Ram Krishnaji and his own guru that only a Brahman could become a mahant of the disputed math. He admitted that any member of a twice-born caste could become a sanyasi though not a mahant. In the course of their evidence the witnesses were asked about the caste of previous mahants. The witness, Sheo Nandan Prasad, said that Gyananand was a Bengali Brahman. Inderdeo Prasad said that he was an Oriya Brahman and Shri Kant said that he was a Bengali Oriya Brahman, the fact being apparently that they had no knowledge about the matter. The witness, Ganpat Bharti, really gave away the plaintiff's case because he said that a Mahant should be a Brahman as far as possible, which seemed to indicate that persons other than Brahmans could be mahants although it was desirable that they should not be. The one non-Brahman witness was Mahadeo Prasad Kayastha. He was a witness in a criminal case on behalf of the plaintiff against the defendant and he admitted that he had never inquired about the caste of any of the mahants of this math.

On the other side, there are a number of witnesses who said that any member of a twice-born caste could be a sanyasi and a mahant. One of them was Raghubar Methoo Lal Shastri, who is a lecturer in Sanskrit at the Allahabad University and is a person upon whose statement some reliance can be placed. Another is a man called Jungoo, who is certainly not a man of any great position because he is a servant of the math and says that he is holding some small area of land rent free besides getting a salary of Rs. 2 a month with food and clothes, but his statement seems to bear the stamp of truth because he has mentioned definite facts about one Nepal Gir who was the mahant of this math some years ago. He said that Nepal Gir was a Thakur before becoming a sanyasi and he was a resident of Manda Bijaipur and that his brother, Bijai Bahadur Singh, used to visit him when he was mahant. There are two other witnesses, Nityanand Gir and Poornanand, who are themselves sanyasis. I am satisfied that the decision of the learned Judge upon this point is correct and that any member of a twice-born caste can be a sanyasi and a mahant. The question is of importance only because there may be some doubt whether a Bhumihar is really a Brahman. There can be no doubt that Bhumihars generally regard themselves as Brahmans and I may mention that one of the witnesses for the defendants, Poorenand, who said that he had been a sanyasi for 36 years admitted that he was a Bhumihar Brahman himself before he became a sanyasi. It is admitted that Bhumihars are certainly members of a twice-born caste.

This brings us to the question whether it has been established by the defendant's evidence that he is a Bhumihar Brahman. He was attacked very strongly upon the ground that he had himself made inconsistent statements upon this point. In suit No. 172 of 1921 the question of his caste was not raised in the pleadings, but questions were put to him in cross-examination when he appeared as a witness and he then undoubtedly said that he was a pandey Sarjupari Brahman from the district of Gorakhpur. He made a similar statement when he contested the suit instituted by Gyananand in 1930 and he has now put up the case that he is really a Bhumihar Brahman from the District of Azamgarh. Undoubtedly these contradictory statements

may give rise to some suspicion, as the learned Judge of the Court below has remarked, but it must be observed that these previous statements of Shantanand can be used only to contradict him and not to contradict the witnesses whom he was called in his defence. The learned Judge had the advantage of seeing these witnessess, although he did not see the plaintiff's witnesses who were examined on commission, and he has said that their demeanour did not suggest to him that they were not speaking the truth. Some of them at least are men of some standing. One is a Deputy Superintendent of Police, that is, an officer of the Provincial Police Service, who has no apparent reason for supporting Shantanand's case, if it is not true. Then there are also a Sub-Inspector of Police, a Post Master and several landed proprietors. The strong point in the evidence of many of these witnesses, who are themselves Bhumihar Brahmans, is that they have stated that they are quite willing to have meals with Shantanand which they would not do if they had any reason for believing that he was not a Bhumihar Brahman.

It has been argued, on the other hand, that there has been correspondence, which there undoubtedly has been between Shantanand and one of the witnessses, Gajadhar, who has deposed that he is Shantanand's brother and the correspondence does not appear to be that between two brothers, but on an examination of the letters I do not think that there is anything in them to show positively that the men were not two brothers. There is also a reference to the fact that the name of Sant Sewak continued to be recorded in the register of proprietors with the name of Gajadhar and this would not have happened if Sant Sewak had become a sanyasi. I do not think, however, that this is a matter of any importance. Nobody might have taken the trouble to have Sant Sewak's name removed from the registers merely because he became a sanyasi and would have no claim to the property in the village. It is true that Shantanand executed a deed of relinquishment of the property before the witnesses gave evidence and this may give rise to a certain suspicion that the witnesses were not willing to support him if he was likely to lay claim to any of the property, but this after all is a mere matter of suspicion and does not necessarily establish that the allegations made by the witnesses are untrue. On a consideration of the evidence, I have come to the conclusion that Shantanand may possibly have pretended that he was a Sarjupari Pandey Brahman when he was really a Bhumihar because he thought that a Sarjupari might have a higher position in the scale of castes but that he was afterwards faced with the prospect that his allegation might be proved to be untrue and he therefore ultimately told the real truth. It does not appear that his being a Bhumihar rather than a Sarjupari Pandey Brahman would have made any effect upon his eligibility as sanyasi or that Gyananand would not have accepted him as his disciple if he had known that he was a Bhumihar. In this connexion I may point out that Gyananand's own allegation from the very beginning was not that Shantanand set himself up as a resident of Gorakhpur but that he stated that he was a resident of Azamgarh which he now alleges is true. I am satisfied that the findings of the learned Judge of the Court below are correct and that the allegations upon which the plaint was based are not established. On those findings the suit obviously failed and the appeal must be dismissed.

I may, however, discuss shortly the other point, whether the allegations, even if true, would justify a Court of law in setting aside the decree in suit No. 172 of 1921. The real allegation was that the defendant-respondent had made a false statement about his caste and had thereby deceived Gyananand Gir and Basdevanand about his eligibility to be accepted as a sanyasi and to be appointed as a mahant.

I think it would be very dangerous to hold that an allegation of this nature, even if it were true, would justify the setting aside the decree between the parties in which it was decided that the defendant-respondent was the rightful mahant of this math. There must be some finality to litigation and the rule that a title once settled by a decision should not be questioned again between the same parties is intended not only to prevent a new decision but also to prevent a new investigation so that the same person cannot be harassed again and again in various proceedings upon the same question. It is, I think, clear that a decree cannot be set aside merely because it is obtained by perjured evidence because, if the contrary were held, it would be necessary to hold new investigations again and again into the same question. The principle has been laid down quite clearly in 21 Cal. 612.[1] We have been referred to some cases on the other side. I may refer to the case in 48 Cal. 298[2] in which the learned Judges say that although a decree cannot be set aside upon the ground that it had been obtained by perjured evidence, still it can be set aside if it is established that the plea set up was false to the knowledge of the plaintiff.

With the greatest respect for the opinion of the Hon'ble Judges it seems to me that it would not be possible to discover whether a case was false or not unless a new investigation was made and the making of a new investigation would destroy the value of the rule that a question once decided cannot be reopened. It would also be quite valueless to say that a decree could not be set aside on the ground that it was obtained by perjured evidence if at the same time it was the law that it could be set aside on the ground that the case of the plaintiff was not a true case to his knowledge. It seems to me that it would be most unsafe to hold that a decree can be set aside on the ground that the defendant did not raise a plea which was open to him, but which he did not raise because he did not know all the necessary facts. It is, however, unnecessary to express any definite opinion in this case because it has been found as a fact that the defendant-respondent did not deceive either Gyananand Gir or the Court upon any essential point which could have affected the result of the previous suit. My conclusion is that the appeal must fail and I would dismiss it with costs.

VERMA J.—I have had the advantage of reading the judgment which my learned brother has prepared. I am in complete agreement with all that he has said and have very little to add. With regard to the first question of fact—whether the plaintiff's allegation, that the defendant was, before he became a sanyasi, a Kurmi by caste, has been established—I shall content myself by saying that it has seldom been my lot to go through the depositions of more worthless and more obviously tutored witnesses than those produced by the plaintiff-appellant. The allegation of fact that the defendant was a Kurmi by caste before he became a sanyasi is the real founda-

1. ('94) 21 Cal. 612, Mahomed Golab v. Mahomed Sulliman.
2. ('21) 8 A. I. R. 1921 Cal. 298: 63 I. C. 712: 48 Cal. 298, Rajani Kanta Das v. Purna Chandra.

a tion on which the whole edifice of this suit rests, and the decision on that point being against the plaintiff, it is really not necessary to go into any other question. I may say, however, that I entirely agree with my learned brother in holding that the findings of the Court below on the other two questions of fact are also indubitably correct. When dealing with the second question, my learned brother has pointed out that the plaintiff's witness, Ganpat Bharti, really gave away the plaintiff's case when he stated that, as far as possible, that sanyasi is installed as a mahanth who had been a Brahman before entering the order of sanyasis. I would only add that Ganpat Bharti, being the Secretary of Nirvani Akhara, is about the most important witness produced by the plaintiff. On the third question of fact I am at one with my learned brother in holding that the defendant's case, that he was a Bhumihar b before he became the chela of Gyananand and joined the order of sanyasis, is true. The evidence and the circumstances lead me to the conclusion that this suit is nothing more than a continuation of the attempt made by Gyananand to set at naught the decree passed in Shantanand's favour in Suit No. 172 of 1921, and that it is based on allegations which are not true.

As has been pointed out by my learned brother, in view of the findings on the questions of fact, no question of law need be considered. I consider it proper, however, to say a few words as the point has been argued at length by learned counsel for the appellant, and also because I am clearly of the opinion that this suit was not maintainable even if all the allegations made in the plaint had been true, and that it should never have gone to trial but the c plaint should have been rejected on the ground that it did not disclose a cause of action. Learned counsel for the plaintiff-appellant agreed when it was put to him that his case as to fraud, stated in plain language, amounted to this: "Shantanand was guilty of fraud as he did not disclose to Gyananand when he became the latter's chela at Soron in 1917 or 1918 that he was a Shudra, being a Kurmi by caste, and he committed a fraud upon the Court inasmuch as he did not, when he instituted his Suit No. 172 of 1921, tell the Court that he had deceived Gyananand at the time of his initiation into sanyas." This to my mind is an untenable proposition. At its highest, the plaintiff's case amounts to no more than this that Shantanand obtained the decree in Suit No. 172 of 1921 by giving evidence which was not true. It is settled law that a suit to set aside a decree does not lie on such a ground.

d Learned counsel for the appellant has cited a number of rulings. I do not consider it necessary to refer to all of them. If I may say so with great respect, the true rule, in my judgment, was laid down by Sir Comer Petheram in 21 Cal. 612,[1] to which my learned brother has referred. It would be sufficient to quote one passage from the judgment in that case. In considering the question whether a suit will lie to set aside a decree of a Court of justice on the ground that it was obtained by fraud, the learned Chief Justice dealt with a number of cases bearing on the subject, and observed: "The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed, but e I am not aware that it has ever been suggested in any decided case, and in my opinion it is not the law, that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party — which is, of course, fraud of the worst kind — that he can obtain a rehearing of the question in dispute in a fresh action by merely changing the form in which he placed it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to res judicata as well."

It is true that, although this case was followed in f a number of cases in the Calcutta High Court, the salutary principles there laid down were departed from in certain cases in that Court, for example, 38 Cal. 936[3] and 18 C. W. N. 447.[4] The principles laid down by Sir Comer Petheram were, however, re-affirmed by Sir Lawrence Jenkins in 41 Cal. 990[5] and have since been consistently followed in that Court. Reference may usefully be made to the case in 31 C. W. N. 258,[6] in which most of the Calcutta cases have been dealt with. So far as this Court is concerned, only two cases have been brought to our notice, namely, 37 All. 535[7] and 38 All. 7.[8] In both of them the principles laid down by Sir Comer Petheram and by Sir Lawrence Jenkins in the Calcutta cases mentioned above — 21 Cal. 612[1] and 41 Cal. 990[5]—were followed. It is not necessary to do more than refer to the judgment of the Bench in 37 All. 535[7] and to the judgment of the learned g Chief Justice in 38 All. 7[8] the other member of the Bench—Rafiq J. —having found it unnecessary to deal with the question as in his opinion it did not arise on the facts. It may be pointed out, however, that Rafiq J. was a party to the decision in 37 All. 535.[7] Lastly, I am in entire agreement with the observations made by James L. J., which were concurred in by Thesiger L. J. in (1879) 10 Ch. D. 327.[9] As those observations embody principles which in my judgment are of universal application and which in my opinion must ever be borne in mind by all Courts that have to deal with cases of this character, I consider it desirable to quote them:

"We have thought it right and due to the defendants to go through the allegations made against them; and their counsel, in fact, scarcely asked for any judgment except one based on their acquittal h of the fraud charged against them. But we must not forget that there is a very grave general question of far more importance than the question

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3. ('11) 38 Cal. 936 : 11 I. C. 626 : 15 C. W. N. 1010, Lakshmi Charan v. Nur Ali.

4. ('15) 2 A. I. R. 1915 Cal. 69 : 22 I. C. 709 : 18 C. W. N. 447, Kedarnath v. Hemanta Kumari.

5. ('14) 1 A. I. R. 1914 Cal. 232 : 23 I. C. 337 : 41 Cal. 990 : 19 C.L.J. 457 : 18 C.W.N. 681, Nanda Kumar v. Ram Jiban.

6. ('27) 14 A. I. R. 1927 Cal. 84 : 97 I. C. 879 : 31 C.W.N. 258, Muktamala Dasi v. Ram Chandra Dey.

7. ('15) 2 A. I. R, 1915 All. 400 : 30 I. C. 789 : 37 All. 535 : 13 A. L. J. 753, Janki Kuar v. Lachmi Narain.

8. ('15) 2 A. I. R. 1915 Ail. 397 : 30 I. C. 792 : 38 All. 7 : 13 A. L. J. 901, Ram Ratan Lal v. Bhuri Begam.

9. (1879) 10 Ch. D. 327 : 39 L. T. 613 : 27 W. R. 496, Flower v. Lloyd.

between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arms length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum. There is no distinction in principle between the old common law action and the old chancery suit, and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely; but, in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds."

The criticism, that, in view of the facts found in that case, these observations were obiter, appears to me to be pointless. The decisions of the English Courts are not binding upon the Courts in India. The views expressed in the judgments of English Courts are referred to and adopted by the Court in India only when it appears that those views are fundamentally sound and are based on immutable principles. It is on these grounds that I respectfully adopt the observations of the learned Lord Justice quoted above. It only remains to mention one fact. The appellant had at first sued in forma pauperis. The application for leave to sue in that manner was rejected by the trial Court on 16th June 1931 on the ground that "the allegations of fraud as made in the plaint show that the suit is not maintainable" and "there is thus no cause of action for the suit" (Ex. A-7). Against that order the appellant came to the Court in revision and his petition was dismissed on 3rd May 1932 by Sulaiman C. J. and Young J. with the following observations (*vide* Ex. A-8) :

"Allegations in a plaint are not meant to be a representation to a defendant with a view that he may act upon them. It is always open to a defendant to dispute the correctness of the allegations contained in the plaint and to find out whether they are true or not, and if untrue, to produce evidence to rebut the plaintiff's case. The mere fact that a plaintiff makes false allegations in a plaint or that he produced perjured or false evidence before the Court on which the Court acted does not necessarily amount to a fraud perpetrated upon the defendant. The fraud which would entitle the avoidance of a decree must be a fraud which was extraneous to the litigation and which the Court had no opportunity to consider at all. If any fraud has been practised upon the Court itself by a concealment of true facts, it may be possible to apply to that Court for a review of its judgment on the discovery of new and important matter."

The appellant thereupon made a few changes—which do not affect the real nature of the case—in the plaint, paid court-fee on it, and instituted, on 11th October 1932, the suit which has given rise to this appeal. As I have already said, this plaint also should have been rejected on the ground that it did not disclose a cause of action. I agree that the appeal has no merits and that it should be dismissed with costs.

BY THE COURT. — The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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* A. I. R. (29) 1942 Allahabad 307

COLLISTER AND BAJPAI JJ.

Pearey Lal Shukla — Applicant

v.

Commissioner of Income-tax, Central and United Provinces —

Opposite Party.

Case No. 465 of 1938, Decided on 17th February 1942.

* Income-tax Act (1922), Ss. 13, Proviso and 31, 32 — Assessment under S. 13, Proviso — Higher authorities have power to change manner and basis of assessment.

There is nothing in the Act to restrict in respect of an assessment made under the proviso to S. 13, the powers which the higher authorities of the Department have under S. 31 and S. 32 in respect to assessments generally. Therefore the Assistant Commissioner of Income-tax and the Commissioner of Income-tax have authority under the law to change the manner and basis of assessment : ('33) 20 A.I.R. 1933 P. C. 108, *Rel. on*; ('41) 28 A.I.R. 1941 All. 24, *Ref.* [P 308 C 1]

B. Malik, Gopi Nath Kunzru and J. N. Chatterji — for Applicant.

N. P. Asthana — for Opposite Party.

COLLISTER J. — This is a reference under S. 66 (3), Income-tax Act. In 1935 notice was issued to the assessee by the Income-tax Officer directing him to furnish a return of his income for the year from Dewali 1933 to Dewali 1934 for assessment in the year 1935-1936. The assessee accordingly furnished a return, which showed a total income of Rs. 22,975 under three heads, namely (1) property, (2) business and (3) money-lending. On 11th February 1936 the Income-tax Officer made an assessment upon a total income of Rs. 31,760. In respect to income from business he calculated profits at a flat rate of 16 per cent. on sales under the proviso to S. 13 of the Act.

The assessee appealed against the assessment order, but only in respect to the income from property which had been assessed by the Income-tax Officer. Thereupon the Assistant Commissioner issued notice to the assessee requiring him to show cause why his assessment under the head of business should not be enhanced under S. 31 (3) of the Act. The assessee appeared and showed cause, but the Assistant Commissioner dismissed his appeal in respect to the assessment of income from property and enhanced the assessment in respect to income from business Rs. 18,870 to Rs. 31,500. In comput-

ing this amount, the Assistant Commissioner applied a rate of 26.7 per cent. upon sales, calculated upon an average for six years. The assessee then appealed to the Commissioner of Income-tax, and in the result that officer reduced the rate from 26.7 per cent. to 18 per cent. The assessee then applied to the Income-tax Commissioner under S. 66 (2) of the Act requiring him to refer certain questions of law to this Court, but that application was rejected. Thereafter the assessee applied to this Court under S. 66 (3), and a bench of this Court, of which one of us was a member, called upon the Commissioner to state a case and refer the following question of law :

"Whether under the circumstances of the case the Assistant Commissioner of Income-tax and the Commissioner of Income-tax had authority under the law to change the basis of profit from 16 per cent. as calculated by the Income-tax Officer to any higher percentage?"

The Commissioner is of opinion that the question should be answered in the affirmative. Learned counsel for the assessee pleads that under the proviso to S. 13 of the Act the Income-tax Officer is the sole arbiter as regards the basis and the manner of assessment and his discretion cannot be interfered with so long as it was reasonably and arbitrarily exercised. In 9 I. T. R. 81,[1] this Bench held that where the Income-tax Officer has exercised his judgment and has not acted arbitrarily in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of account, then having regard to the language of the provision, his discretion in this matter cannot be interfered with; but we do not think the language of the proviso affords support for the contention that his basis or his method of computation is not liable to interference by the higher authorities of the Department. There are no reported decisions exactly in point, but we may refer to the case in A. I. R. 1933 P. C. 108.[2] There the asseseee had kept his books on what was described as a 'hybrid system'; it was his practice to enter sums of money, as he received them, in a deposit register which was not made available to the revenue authorities and he did this without discriminating between interest and capital payments and thereafter he allocated and treated as income certain portions of these sums of money which he attributed to interest. The Income-tax Officer discarded the assessee's method of accounting and adopted a method which he thought proper. At page 111 their Lordships of the Privy Council say :

"There can be no question that in the circumstances the Income-tax Officer was entitled to disregard the assessee's method of accounting and adopt a method of computation of his own. But the fact that the Income-tax Officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income, profits and gains does not of course exempt his computation from examination on appeal and, if it appears that he has adopted a wrong method, the assessment may be set aside."

This is clear authority for the proposition that the basis and manner of assessment adopted by the Income-tax Officer can be set aside in appeal by the Assistant Commissioner under S. 31 (3) (b) of the Act. Section 31 (3) (a) empowers the Assistant Commissioner inter alia to enhance the assessment; and one of the obvious ways of enhancing an assessment which has been made under the proviso to S. 13 is to raise the percentage rate where that is the method which the Income-tax Officer has adopted. Section 31 (3) of the Act gives wide powers to the Assistant Commissioner in respect to any order of assessment; and S. 32 (3) of the Act gives even wider powers to the Commissioner, for it provides that "in disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit." We do not think that there is anything in the Act to restrict, in respect to an assessment made under the proviso to S. 13, the powers which the higher authorities of the Department have under Ss. 31 and 32 in respect to assessments generally. In our opinion the question which has been referred to us should be answered in the affirmative. The assessee will pay the costs of this reference. The Advocate-General is entitled to a fee of Rs. 200. A copy of our judgment under the signature of the Registrar and the seal of the Court will be sent to the Commissioner of Income-tax.

K.S./R.K. *Question answered.*

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1. ('41) 28 A. I. R. 1941 All. 24 : 193 I. C. 606 : I.L.R. (1940) All. 805 : (1941) 9 I.T.R. 81 : 1941 A. L. J. 79, Ganeshi Lal v. Commissioner of Income-tax, C. P. & U. P.

2. ('33) 20 A. I. R. 1933 P. C. 108 : 142 I. C. 437 : 12 Pat. 318 : 60 I. A. 146 (P.C.), Commissioner of Income-tax, B. & O. v. Kameshwar Singh of Darbhanga.

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YORKE AND BRAUND JJ.

Mt. Siddiqa Begam — Plaintiff — Appellant

v.

Abdul Jabbar Khan and others — Defendants — Respondents.

First Appeal No. 420 of 1935, Decided on 24th February 1942, from decision of Sub-Judge, Azamgarh, D-/ 25th March 1935.

(a) Practice—Pleadings—Defendant can take contradictory alternative pleas—Defendant alleging to have himself directly or indirectly provided money for purchase of house — Contrary plea taken as after thought in amended written statement that when his father negotiated purchase and took it in his name he intended purchase for benefit of defendant is weak plea.

It is no doubt open to a defendant to take contradictory alternative pleas. Where the defendant who had come forward with a firm allegation that he was the person who either directly or indirectly had provided the money for the purchase of the house and for its reconstruction raises the alternative contradictory plea as an after thought in the amended written statement that despite the general presumption against advancement in India, nonetheless it should be taken that when his father negotiated the purchase of the house and took it in the name of his son (defendant), he intended the purchase to be for the benefit of the son and not that the son should be mere benamidar, and that any monies subsequently expended upon the reconstruction of the house by the father were intended for the benefit of the defendant is from the very beginning a weak plea. [P 310 C 2]

C. P. C.—
('40) Chitaley, O. 6 R. 2 N. 5 Pts. 4, 18.
('41) Mulla, Page 575 Pt. (p).

(b) Benami — Finding as to source of purchase money is of fact.

In the case of a benami transaction the finding that the purchase money was provided by a particular person is a finding of fact. [P 310 C 2]

C. P. C.—
('40) Chitaley, Ss. 100 & 101 N. 28 Pt. 3.
('41) Mulla Page 367 N. "No second appeal lies on the ground of an erroneous finding of fact."

(c) Benami — Test—English doctrine of advancement does not apply in India—Onus is on person alleging benami to prove that purchase money belonged to person other than nominal transferee—S. 82, Trusts Act, does not affect question of onus.

The English equitable doctrine of advancement is not applicable in India. No exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money such as has by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in case of benami purchases in the name of third persons or members of the same family : F. A. No. 163 of 1935 and ('28) 15 A. I. R. 1928 P. C. 172, *Rel. on.* [P 311 C 2]

One of the primary tests of a benami transaction, though not possibly the only test, has always been to establish the source of the purchase money: ('28) 15 A. I. R. 1928 P. C. 172, *Rel. on.* [P 311 C 2]

The burden of proof that a transfer is benami lies in the first instance upon the person asserting it to be so, but that burden is discharged upon the said person showing that the purchase money was provided by him or by some one other than the person in whose name the purchase was taken. Section 82, Trusts Act, has no bearing on the burden of proof and does not make it necessary for a person who alleges that the consideration for a transfer was paid or provided by someone other than the nominal transferee to show further that there was no intention upon the part of the person providing the money to pay or provide it for the benefit of the transferee. Consequently, when it is proved that the purchase money was provided by someone other than the transferee, the Court has to consider whether that person intended it as a gift or not. It is at that point that the established doctrine of the resulting trust at once comes into full and immediate play, and, if there is no other evidence in the case, that doctrine must apply. In order to displace it, it becomes necessary, therefore, for the actual transferee to prove, if he can, that the money was intended as a gift. The position is, therefore, wholly unaltered by S. 82, Trusts Act : ('21) 8 A. I. R. 1921 P. C. 56, *Rel. on*; ('41) 28 A. I. R. 1941 Oudh 288, *Not foll.* [P 312 C 1; P 314 C 1]

T. P. Act—
('36) Mulla, Page 168 Pt. (w).

(d) Benami — Mahomedan Government servant purchasing house with his money in name of only son—Evidence held insufficient to prove that purchase was for benefit of son.

A Mahomedan Government employee getting a low rate of pay purchased a house with his own money in the name of his son though in the sale deed it was stated that the purchase money was obtained from a relative. Money for the reconstruction of the house also was provided by the father. The house was first let by the father and the kerayanama was executed in his favour. Subsequently the father gifted half the portion of the house to his wife, and handed over the original title deed to her. It was stated in the gift deed that the house was self-acquired property of the donor and the donee was put in proprietary possession and it was in evidence that he had handed over the key of a certain room containing his property to her. In the suit by the donee against the son for partition of the house on the basis of the gift deed the plea of advancement was raised by the defendant only as an afterthought in the amended written statement. The defendant also strongly relied upon the inscription of his name on a tablet affixed to the house :

Held that the fact that the father felt particular love for his son, did not by itself prove that when he took a purchase of property in the name of the son he intended thereby that that property should be the property of his son. The evidence was not sufficient to establish that the father intended the purchase of the house to be for the benefit of the son. [P 313 C 1, 2]

(e) Benami — Whether transaction was intended to be real and for benamidar's benefit is pure question of fact.

The question whether the sale transaction was intended to be real and for the benefit of the person in whose name the purchase was taken is question of pure fact. [P 314 C 1]

C. P. C. —
('40) Chitaley, Ss. 100 and 101, N. 28, Pt. 3.
('41) Mulla, Page 367 Note "No second appeal lies on the ground of an erroneous finding of fact."

(f) Practice — Relief — Mahomedan widow suing son of her deceased husband for partition of her share in house of her deceased husband — Widow's claim established on basis of gift deed in her favour by her husband — House found vested in defendant as benamidar for his father—Form of relief to be embodied in decree in plaintiff's favour indicated.

A Mahomedan widow instituted a suit against the son of her deceased husband for partition of her half share in the house of her deceased husband. She established her claim on the basis of a gift deed in her favour by her husband. But the house was found to be vested in the defendant as benamidar for his father. In the matter of form of relief to which the plaintiff was entitled :

Held that in the decree to be passed in plaintiff's favour first, there must be a declaration that the house and site more particularly described in the plaint were vested in the defendant as "benamidar" on trust for the persons claiming through the widow's deceased husband and in the several shares to which they were respectively entitled. This must be followed by a declaration that the plaintiff was beneficially entitled under the said trust to one half of the said house and site under and by virtue of the transfer to her and to a further one-eighth of the said house and site as an heir of her deceased husband making together an undivided five-eighths of the said house and site. There should then be a further declaration that "the trusts of the said house and site ought to be carried into effect," followed by an order and decree that "in execution of the aforesaid trust as herein before declared" the

property shall be partitioned between the parties entitled thereto. The decree should from that point follow the appropriate form of a partition decree.

[P 315 C 1]

Sir Syed Wazir Hasan and B. N. Misra — for Appellant.

P. L. Banerji, Mushtaq Ahmad and Mahbub Alam — for Respondents.

YORKE J. — This is a first appeal in a suit decided as far back as 25th March 1935. The plaintiff Mt. Siddiqa Begum is the second wife of one Abdul Razzaq Khan deceased and was married to him in September 1931. Abdul Razzaq Khan had by his first wife a son Abdul Jabbar Khan born about 1906, who is defendant 1 of this case, and two daughters Mt. Zubeda Bibi and Mt. Habib-un-nisa Bibi born about 1910 and 1902, who are defendants 2 and 3. The plaintiff sued for partition of a 5/40 share in a residential house situated in village Dagdagwa in the Azamgarh District, and also for partition of a house in mahalla Motbarganj of Azamgarh town in which she claimed a half share, as also a 5/40 share, upon the ground of "hiba-bil-ewaz" and inheritance respectively. The plaintiff subsequently gave up her suit in regard to the house in village Dagdagwa stating a separate suit would be instituted in regard to that property. The claim under which the plaintiff sought partition of the half share in the house No. 2 now in suit was founded upon her dower debt, it being alleged that the amount of the dower debt was Rs. 15,000 and that in part satisfaction of the dower debt Abdul Razzak Khan on 22nd July 1932 executed a deed of transfer, nominally a deed of gift in respect of the half share in this house. Abdul Razzak Khan died on 6th August 1932. It appears that he was suffering from a carbuncle and that this was operated upon and he did not recover from the operation. The suit was defended by defendant 1 Abdul Jabbar Khan only. In the original written statement filed on 18th August 1934 the defence put forward was that the house No. 2 in suit in Azamgarh town was purchased in the year 1918 with money gifted to the contesting defendant by his mother Mt. Najib-un-nisa. It was further said that the contesting defendant started business in 1924 and he got the house reconstructed with the income which he derived from his business and with money which he had received from his mother. That is to say, the defendant pleaded that Abdul Razzak Khan was not the person who provided the money either for the purchase of the house or for its admitted reconstruction in the years 1928 to 1929. Three and a half months after the filing of this written statement an application was made for amendment of the written statement and this amendment was permitted and the defendant then added the pleadings Nos. 15 and 16. We are concerned only with No. 15 which runs as follows :

"Assuming that Abdul Razzak Khan deceased spent anything in the purchase of the house No. 2 in dispute (which is not a fact), even then, since at the time of the purchase and construction of the house, all his affection and heartfelt care and attention was centred in this defendant alone and he was his prospective heir, therefore, the fact that the purchase, construction and the naming of the house was in the name of the defendant, clearly affirms that the house was purchased and constructed for the benefit of this defendant and whatever money he is supposed to have spent on the purchase and construction was gifted to this defendant by him. For the same reason all the proceedings were taken in the name of this defendant. This defendant named the house as "Jabbar Manzil" within his (i. e., Abdul Razzak Khan's) knowledge and this name is engraved on the marka (marked portion or tablet) and to which he did not object in spite of his knowledge."

The written statement was of course in Urdu and the translation is rather clumsy. The effect of this amendment is that the contesting defendant, who had come forward with a firm allegation that he was the person who either directly or indirectly had provided the money for the purchase of the house and for its reconstruction, fell back on the contention that despite the general presumption against advancement in India, nonetheless it should be taken in the present case that when Abdul Razzak Khan negotiated the purchase and took it in the name of his son, he intended the purchase to be for the benefit of the son and not that the son should be mere benamidar, and it should be further taken that any moneys subsequently expended upon the reconstruction of the house by Abdul Razzak Khan were intended for the benefit of the contesting defendant. I do not think it would be correct to say that it is not open to a defendant to take contradictory alternative pleas in this manner, but I cannot but think that a plea, taken as an after-thought in the alternative like this one, is from the very beginning a weak plea. The learned civil Judge framed three issues but only two of them had any importance after the withdrawal of the suit with reference to house No. 1. The issues framed are as follows :

"1. (a) Whether the house situate in Azamgarh city belonged to Abdul Razzak Khan and the plaintiff is entitled to any share, and if so, to what extent therein ? (b) Whether Abdul Razzak Khan had made a gift of money, if any spent by him in the purchase and repairs of the house in favour of the contesting defendant, and if so, how does it affect the case ?

3. Whether Abdul Razzak Khan executed the deed of hiba-bil-ewaz in suit, and if so, was it executed in 'marzul maut' and is it fictitious and legally invalid and inoperative ?"

I need not waste any time on issue 3. It was found by the learned civil Judge that the deed of gift which was really 'hiba-bil-ewaz' and therefore in the nature of a sale deed in favour of the plaintiff, was not executed in 'marzul maut' and that even if it had been so executed, not being really a gift, it was nonetheless valid. Coming now to issue 1, the learned civil Judge has held that the purchase money for the purchase of the house in suit in the year 1918 was provided by Abdul Razzak Khan and the moneys required for the repairs and reconstruction of the house in the years 1928 to 1929 were also provided by Abdul Razzak Khan. He has entirely rejected the story that the money for the purchase came from Abdul Razzak Khan's first wife Mt. Najib-un-nisa and the money for reconstruction came from income derived by the contesting defendant from his alleged business and from his mother. Learned counsel for the respondent Abdul Jabbar Khan has not sought to argue that these findings of fact can be in any way disputed. The learned civil Judge has, however, gone on, on p. 44 of the record, to hold that Abdul Razzak Khan took the sale deed of the house in dispute in the name of his son out of love and affection and with the intention that the beneficial interest should vest in his son. In this connexion his reasoning is not very convincing because he speaks of two points and about the second point he says that this "also" confirms him in his opinion that the

sale transaction was intended to be real and for the benefit of defendant 1. This particular remark is made with reference to the existence of the name 'Jabbar Manzil' upon the house in dispute engraved upon a tablet along with some other words, namely 'plan made and supervised by Abdul Razzak Khan Overseer'. The wording suggests that the point mentioned immediately previously is supposed to be an argument leading to the same conclusion. The fact referred to is stated as follows :

"It is true that in this sale deed there is a recital to the effect that it was executed for Rs. 800 which Abdul Jabbar Khan (the contesting defendant) had got from a relation of his. It is really very unusual to find a recital like this in a sale deed and the very fact that it is there goes to suggest that Abdul Razzak Khan got it made therein in order to avert the possibility of any suspicion being raised against him as to the source from which the purchase money came, he then being in Government service."

But this if it is anything, is quite clearly an argument in favour of the purchase having been benami. It is the case that Abdul Razzak Khan, who admittedly negotiated this purchase and must have done so as Abdul Jabbar Khan in 1918 was only 12 or 13, got an entry made in the sale deed executed by his vendors : "We, the executants, have received the entire amount of consideration from the vendee, who got it from some relation of his." It seems to me quite clear that all Abdul Razzak Khan was doing was concealing the fact that the money came from him, so that in case a charge was made against him of purchasing house property while he was in Government service or of such value that he clearly could not have been able to purchase it if he was not deriving some illegal income in addition to his ordinary pay, he might be able to say that it was not he who had provided the purchase money but some other relative of his son. The result is that the only evidence upon which the finding is based is the piece of evidence mentioned by the defendant in the amended written statement. Founding upon this the learned civil Judge found that the house in suit was the property of the defendant Abdul Jabbar and that when Abdul Razzak Khan purported to execute a deed of gift in respect of one-half of it in favour of the plaintiff he was not competent to make such a transfer. Before I deal with the arguments it will be convenient to deal with the legal aspect of purchases made in the name of third persons particularly members of the same family. The point has been before us in a very recent First Appeal No. 163 of 1935[1] and in that case we said :

"We can take it as now established by a long line of cases of the highest authority in India starting with the well-known case in 6 M. I. A. 53[2] in the Privy Council that the English equitable doctrine of advancement is not applicable in India. The position has many times been explained by the Judicial Committee and nowhere better, as we respectfully think, than in 55 I. A. 235[3] at pp. 240 and 241 in which the principle is laid down in these words :

"The general rule and principle of the Indian law as to resulting trusts differs but little, if at all, from the general rule of English law upon the same subject, but in their Lordships' view it has been established by the decisions in 6 M.I.A. 53[2] and 13 M.I.A. 232,[4] that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase-money such as has by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England."

"It has, however, at the same time been clearly recognized that one of the primary tests of a benami transaction, though not possibly the only test, has always been to establish the source of the purchase-money. Before that has been ascertained, it follows of course that no question of advancement can even be considered and, so far as the allegation made be one of a benami transaction it is naturally the most material piece of evidence that there can be to find where the purchase money came from."

In this connexion learned counsel for the respondent to this appeal has laid some stress upon a decision of their Lordships of the Privy Council in 26 Cal. 227,[5] where it was said :

"In many, it may be said in most, cases of alleged benami this (to ascertain from whose funds the purchase money proceeded) is a very important fact. But it is not the only criterion."

The particular case in which the remark was made however was one of a purchase in the name of a defendant who pleaded that the purchase had been designed for his benefit as a gift from his employer in consideration of his faithful and important services extending over some 40 years, and it was shown that the defendant had been in actual possession of this property and receipt of the rents therefrom over a period of some nine years after the purchase and had never been called upon to account for those rents. Learned counsel for the respondent has also sought to place some reliance on a case decided by a Bench of the Chief Court of Oudh, of which I was a member, namely 16 Luck 341.[6] His contention is that S. 82, Trusts Act, has altered the burden of proof in this matter and it is no longer sufficient merely to show that the fund from which the purchase money proceeded belonged to someone other than the person in whose name the purchase was taken in order to lead to an inference that that person is only a benamidar. In that case the result of our examination of S. 82, Trusts Act, and its effect upon the question of the burden of proof in connection with alleged benami transaction

1. First Appeal No. 163 of 1935, decided on 10th February 1942, Hasan Raza v. Ashfaqunnissa.
2. (1854-57) 6 M.I.A. 53 : 4 W. R. 46 : 1 Sar 493 : 2 Suther 13 (P.C.), Gopeekrist Gosain v. Gungapersaud Gosain.
3. ('28) 15 A. I. R. 1928 P. C. 172 : 109 I. C. 723 : 55 Cal. 944 : 55 I. A. 235 (P.C.), Guran Ditta v. Ram Ditta.
4. ('69-70) 13 M.I.A. 232 : 13 W.R. 1 : 4 Beng.L.R. 1 : 2 Sar 522 (P.C.), Uzhur Ali v. Bebee Ulfat Fatima.
5. ('99) 26 Cal. 227 : 26 I.A. 38 : 3 C.W.N. 113 : 7 Sar 425 (P.C.), Ram Narain v. Muhammad Hadi.
6. ('41) 28 A. I. R. 1941 Oudh 288 : 192 I. C. 873 : 16 Luck 341 : 1941 O.W.N. 208, Mt. Sardar Jehan v. Mt. Afzal Begum.

was stated in the following terms. Referring to a quotation from the headnote of 1 O. W. N. 710[7] which ran as follows :

"A party cannot be relieved from the burden of proving the benami nature of the transaction by merely showing that a large proportion of the consideration was paid by the real purchaser . . . S. 82, Trusts Act, appears to throw the burden of proving that a transaction is benami on the party alleging it, whereas previously to that enactment the position may well have been that plaintiff who came into Court with the proof that he had paid the consideration money himself would have been able to throw the burden of proving that the transaction was not benami on the other side,"

we said :

"With great respect we are in full agreement that S. 82, Trusts Act, though it may not really have altered the burden of proof, has made it much clearer than it was before that the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so."

In point of fact it has been laid down by their Lordships in earlier cases that the burden of proof that a transfer is benami does lie in the first instance upon the person asserting it to be so, but that burden is discharged upon the said person showing that the purchase money was provided by him. Section 82, Trusts Act, is in the following terms :

"Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration."

This section puts in statutory form the proposition laid down many years earlier in 6 M. I. A. 53[2] and the only question was whether cl. (2) made any difference to the legal position as it stood before the enactment of this section. I do not think that I should have felt myself in any way embarrassed by the proposition which was laid down in the Oudh case to which I was a party in view of the circumstances of the present case, but in any case in view of a subsequent decision of their Lordships of the Privy Council which was not brought to the notice of the Bench before whom 16 Luck 341[6] was argued, I am satisfied that in so far as we felt that S. 82, Trusts Act, had in any way altered the legal position we were under a misapprehension. The question whether S. 82, Trusts Act, affected the matter was considered by their Lordships in 47 I.A. 275.[8] In argument it was said about S. 82 that it did not affect the matter as it left open the question of intention, and their Lordships remarked at p. 280 : "The provisions of Ss. 81 and 82, Trusts Act, do not appear to affect this case." I therefore take it that cl. (2) of the section does not have any bearing on the burden of proof and does not make it necessary for a person who alleges that the consideration for a transfer was paid or provided by someone other than the nominal transferee to show further that there was no intention upon the part of the person providing the money to pay or provide it for the benefit of the transferee.

With these preliminary remarks I come to the very narrow point which is really for decision, namely whether on the evidence the finding of the learned Civil Judge that Abdul Razzak Khan when purchasing this property in the name of his only son, intended the purchase to be for the benefit of that son or not, and that his subsequent expenditure upon the house was also intended for the benefit of his son, the contesting defendant, can be maintained. The first point which is clear and not in dispute is that the purchase money was provided by Abdul Razzak Khan and prima facie although he took the purchase in the name of his son, that does not lead to any inference that he intended to benefit the son. We have it next that Abdul Razzak Khan did not go to live in Azamgarh town but proceeded at once to let the house to a third person, one Anandi, who executed a rent deed or kerayanama (Ex. 31) in his favour on 9th September 1918. The learned Civil Judge has given this document no weight saying that as the house was purchased for the benefit of the son it must be taken that Abdul Razzak Khan was merely representing his son when he got the rent deed executed in his own favour. Thirdly we have it that the money for rebuilding this house in the years 1928 and 1929 was provided by Abdul Razzak Khan and not by the contesting defendant. Next there is the fact that Abdul Razzak Khan himself in the document which is the foundation of the plaintiff's suit, the deed of gift Ex. 7, dated 22nd July 1932, stated that he, the executant, had acquired with his own money this piece of land with a kucha built house and had built thereon a pucca double-storeyed house by spending a considerable amount of money, and he said about it, "It is the self acquired property of this executant." He went on to say that he had put the donee in proprietary possession of the house, and it is in evidence that he had handed over the key of a certain room containing his property to her. Fifthly it is shown that the original title deed of this house was in the possession of the plaintiff and not of the defendant. This fact is consistent with Abdul Razzak Khan's having continued to be the owner of the house from the beginning up to the date on which he made over his title deed to his donee. In this connexion there is the statement of the plaintiff that her husband was the exclusive owner of the gifted house before the gift and that the papers connected with the gifted house were handed over to her just after the execution of the deed. She also made a statement with regard to the delivery of possession and handing over of the key. Lastly we have the very significant fact that it did not originally occur to the defendant to plead advancement. On the contrary he set out to prove that he himself had directly or indirectly provided the money for purchase and reconstruction. In support of the finding of the learned Civil Judge there is one and only one solid fact, namely the inscription on the tablet affixed to the house which at the date of the hearing of evidence in the trial Court (27th February 1935) ran as follows : "Jabbar Manzil" (inscribed in Urdu). Below it "plan made and supervised by Abdul Razzak Khan" and again below it "Jabbar Manzil" (written in English).

It is sought to support this piece of evidence by the contention that Abdul Razzak Khan had considerable motive for making the purchase for the benefit of his son and an attempt is made to rely upon the remark in the sale deed that the purchase money was obtained from a relative. I have already

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7. ('25) 12 A. I. R. 1925 Oudh 243 : 82 I. C. 832 : 1 O. W. N. 710, Mt. Raj Kunwari v. Mt. Rani Mahraj Kunwar.

8. ('21) 8 A.I.R. 1921 P. C. 56 : 57 I. C. 834 : 48 Cal. 260 : 47 I. A. 275 : 10 L. B. R. 335 (P. C.), Kerwick v. Kerwick.

dealt with the latter point and as to the former I feel considerable doubt whether the existence of a possible motive is by itself any proof of intention. Doubtless Abdul Jabbar was the only son and the first born son of Abdul Razzak and it is quite reasonable to suppose that Abdul Razzak felt particular love for that son, but that does not by itself prove that when he took a purchase of property in the name of the son he intended thereby that that property should be the property of his son. It is not disputed that the practice of taking transfers of property in the name of members of the family is widespread and by itself almost meaningless. In the present case there is further to be considered the fact that Abdul Razzak would have had a motive for taking the purchase in the name of someone other than himself. He was at that time in Government service and would not have cared to take the transfer in his own name with the risk that awkward enquiries might be made by his superior officers as to the source from which he derived the money with which he purchased the house, he being an employee on a low rate of pay.

As regards the inscription on the tablet, for my own part I would not be inclined to attach much weight to the mere naming of the house as Jabbar Manzil. I do not think that if an Englishman having a son called Alfred, chose, having built a house, to call his house "Alfred Hall," it would be considered that that was much evidence of an intention to make a gift of the house to the son Alfred. One may like to name places after the persons for whom one has love and affection. Moreover, there are evident signs of improvement of the defendant's case in this connexion. In his written statement he said that it was he who had got his name inscribed on the tablet "within his father's knowledge and without any objection on the part of the father," and he made no mention of any inscription on this tablet other than the two words Jabbar Manzil. He himself has been in occupation of the house which is at Azamgarh, while the plaintiff was living in Allahabad. It now appears that the tablet does not merely bear the inscription "Jabbar Manzil" but also has engraved upon it further words. The name Jabbar Manzil originally inscribed in Urdu is repeated in English and a further entry is found "Plan made and supervised by Abdul Razzak Khan." It seems to me quite clear that the defendant has been improving his case as he went along. Another improvement which he has made is more clearly inconsistent with the statement in the written statement. He now says: "This inscription is in the handwriting of my father. He made this inscription as he used to supervise the construction, lest there should be any dispute in future about the ownership of the house."

Further on he says: "My father wrote out letters on a paper which was affixed to a piece of stone." That is to say, according to the present story Abdul Razzak Khan himself got the inscription made and drew out the design on a piece of paper. This is not what the defendant has said in the written statement, which implies only that his father had knowledge of what he, the defendant, was doing and made no objection to it. Moreover the defendant himself called a witness Nasir Ahmad who deposed that he once had a talk with Abdul Razzak Khan about this inscription and Abdul Razzak Khan told him that to avoid dispute and to avert suspicion he had this inscription made. Now it is perfectly true that in so far as this purports to prove a statement of Abdul Razzak Khan deceased the statement of Abdul Razzak Khan is not admissible in evidence, but the effect of the statement is that the defendant has himself led evidence to the effect that the inscription was made not in order to show the ownership of the defendant but in order to avoid dispute and avert suspicion and the only suspicion which could be averted would be the suspicion that Abdul Razzak Khan had been making illicit income out of his duties as a sub-overseer. In my judgment it is quite impossible to support the finding of the learned Civil Judge that the evidence on the record proves the intention of Abdul Razzak to purchase this house for the benefit of his son Abdul Jabbar and further to reconstruct it for his benefit. I would accordingly allow this appeal with costs, set aside the decree of the learned Civil Judge and order that the plaintiff's claim be decreed with costs. As regards the proper form which the decree should take, in view of the position of the respondent as a benamidar, this point has been considered by my learned brother in his separate judgment and I agree with the view which he takes.

BRAUND J.—It is not necessary for me to set out the facts which are fully related in the judgment of my learned brother. The site of the property in question, with the house then on it, can for the purpose of this appeal be taken to have been purchased in 1918 in the name of defendant 1 Abdul Jabbar Khan for Rs. 800 provided by Abdur Razaq Khan, his father. The new house which was built on the site and completed in 1929 can also for the purpose of this appeal be taken to have been wholly provided by Abdur Razaq Khan. In those circumstances the issue is whether the plaintiff, who is the appellant, can succeed in her claim that defendant 1 was a mere benamidar holding the property on trust for his father, Abdur Razaq Khan, and his assignee, the plaintiff herself, under the assignment to her dated 22nd July 1932 of a moiety of the property.

This is a case in which the evidence of any positive intention on the part of Abdur Razaq Khan first in purchasing the site in his son's name and then in providing the cost of the new building, is meagre, and it becomes, therefore, of consequence to appreciate on whose shoulders lay the burden of establishing that injunction. Sir Wazir Hasan on the plaintiff's behalf has very properly relied on that long line of authorities of the Judicial Committee, starting with 6 M.I.A. 53[2] and continuing upto and beyond 47 I. A. 275[8] in which their Lordships have held that in the case of a 'benami' transaction, in the sense of a real transaction (as the present one admittedly is), the 'benamidar' becomes a trustee holding on a resulting trust which "differs but little, if at all, from the general rule of English law upon the same subject," with the exception that the English equitable doctrine of the presumption of advancement has never been admitted into the law of India. The law, therefore, is, in my view, too well settled by the highest authority now to be challenged, that, in the case of a real, as opposed to a purely fictitious, purchase by a father in the name of a son in which the father admittedly provided the purchase money, a resulting trust in all cases arises in the father's favour, unless there is positive evidence of an advancement or gift. And, if a gift is alleged by the son in whose name the transaction stands, it is for him to prove it. But Mr. Banerji, on the defendants' behalf has referred us to S. 82, Trusts Act of 1882, which he says, has entirely altered the law, whatever it may have been prior to 1882. He contends that, inasmuch as that section provides that the Court not only has to be satisfied that the purchase money was provided by

a a third party, but also that the third party had no intention of making a gift of it to the actual transferee, the burden of proving the latter negative fact has been thrown on to the person who seeks to deny that the actual transferee is also the beneficial owner. This at first sight is alarming, as if it is true, it appears to my mind, not only to obliterate from Indian law the whole doctrine of the resulting trust, which the Privy Council has in many cases acknowledged to exist in India, but also to introduce, in much extended form, the doctrine of advancement, which the Privy Council has with equal regularity said does not exist in India.

In my opinion, S. 82, Trusts Act does not, on its true construction, require any such drastic change in the law. When considered carefully, it, to my mind, says no more than that the Court has to be satisfied of two things before a resulting trust can b be declared; first that some one other than the actual transferee provided the purchase money, and secondly, that that person did not intend the money to be a gift. It does not say how the Court is to be satisfied of this latter fact and still less upon whom the onus of proving it is to lie. The position, therefore, is that, having arrived at the conclusion that the purchase money was provided by someone other than the transferee, the Court has to consider whether that person intended it as a gift or not. It is at that point that the established doctrine of the resulting trust at once comes into full and immediate play, and, if there is no other evidence in the case, that doctrine, as the Privy Council has pointed out, must apply. In order to displace it, it becomes necessary, therefore, for the actual transferee to prove, if he can, that the money was c intended as a gift. The position is, therefore, wholly unaltered by S. 82, Trust Act. I regret that, with great respect, I cannot agree with the conclusion reached by the Chief Court of Oudh in 16 Luck. 341.[6] If I may say so, that case, in my opinion, overlooked that the moment the fact was proved that the purchase money was not provided by the transferee, the doctrine of the resulting trust at once, and automatically, applied, unless the opposite intention was proved. It is right to say that in that case 47 I. A. 275[8] (*ubi supra*) in which the same argument based on S. 82, Trusts Act, was advanced and rejected by the Judicial Committee, was not brought to the notice of the learned Judges who decided it.

The matter, therefore, becomes, in my opinion, a question of fact, whether the defendants succeeded at the trial in establishing that the money which went to the purchase of the site in 1918, and to the d rebuilding on it of the house in 1929, was intended by Abdur Razaq Khan to be a gift to his son, Abdul Jabbar Khan. In my opinion, no such intention has been, on the facts of this case, sufficiently proved. The learned Subordinate Judge in his judgment expresses himself as having no doubt that the "sale transaction was intended to be real and for the benefit of his son". It is only with hesitation that I should venture to disagree with a judge of first instance on a question of pure fact, but I cannot bring myself to follow fully the reasoning by which he reaches that conclusion. He appears in the first place to attribute to Abdur Razzaq Khan, who at one time was a Government servant, a deliberate intention in purchasing the property in his son's name to conceal from his employers that he (the father) was the purchaser. If this was his real motive, then it points to anything but an intention to benefit his son. But in the very next sentence the learned Judge proceeds to attribute to Abdur Razzak Khan another intention altogether, namely to satisfy his natural love and affection for his son. e Whether the learned Judge came to his ultimate conclusion by some process of combining these two intentions I do not know, but at first sight, they would appear to be somewhat contradictory.

I do not desire to deal with the facts at great length as they will be dealt with by my learned brother, in whose judgment I concur. The main fact relied upon by the defendant Abdul Jabbar Khan, to support his claim of advancement is that, after the new house was built, a tablet or inscription was placed on the house bearing the words "Jabbar Manzil, Plan made and supervised by Abdul Razaq, Overseer." Assuming in the defendant's favour that this inscription was to be found on the house in the form set out above and that it was placed there by the direction, or with the concurrence of the father it must be conceded that, standing by itself, it would constitute a strong piece f of evidence that the house belonged beneficially to the defendant, though it is not inconceivable that a man might have whim to name his own house after his only son, without making it over to him. However that may be, it must be admitted that it is a piece of evidence tending in the defendant's favour. But against this there are a number of circumstances which point the other way. In the first place, it appears to be quite clear that the title deeds were retained by the father and were never handed over to his son, and when it came to producing them at the hearing of this case, they were produced by the plaintiff. That is a strong indication that Abdul Razzaq had not parted with his beneficial interest in the house. Then again there is evidence that the only letting of the premises of which we have evidence, which took place soon g after the site was originally bought, was by the father. The kearayanama in respect of this transaction is to be found at page 53 of the record. I am inclined to think that this has been brushed aside a little too lightly by the learned Judge on the ground that defendant 1 was then only about 13 years of age. So far as the actual possession of the property is concerned, there is not much to help us either way. The father and his son lived together in the house until rather less than a year before the father died, when he moved to Allahabad and married the plaintiff. But even then he left his furniture in a locked room on the premises. The evidence of possession is not at all inconsistent with the father having been in reality the owner.

I cannot, moreover, close my eyes to the form in which the defendant's case has been pleaded in his written statement. In his original defence of August h 1934 he pleaded only that the house was his by virtue of his having provided the whole of the purchase money both for the site and for the rebuilding. On this part of the case he was wholly disbelieved by the learned Judge and so far as this appeal is concerned, it has now been abandoned. But on 1st December 1934 an amendment was introduced into the written statement by which defendant 1 for the first time pleaded any case of advancement or gift. As to whether that amendment was properly allowed at that stage I will express no opinion, but it, at least, by its very late appearance tends to make me cautious in accepting defendant 1's story. On the whole, I am of the same opinion as my learned brother that, while not overlooking the value of the inscription, it is not strong enough, in the face of all the other evidence in the case, to enable me to agree with the learned Judge in thinking that defendant 1 has established his beneficial title to the house and site by way of gift or advancement from

his father. In these circumstances, I agree in thinking that the appeal must be allowed. There remains the question of the form of relief to which the plaintiff is entitled. She has by her plaint framed her suit as one for partition. But the difficulty I apprehend in granting a simple decree for partition is the fact that the property is still vested in defendant 1 as 'benamidar' or, as the Judicial Committee has pointed out, in a trustee holding on trusts resembling the resulting trust in English law. I think therefore, that the decree ought to be in this form. First, there must be a declaration that the house and site more particularly described in the plaint and known as "jabbar manzil" (of which the site was transferred to defendant 1 by a transfer dated 8th August 1918 being Ex. 6 in these proceedings) are, in the events which have happened, vested in defendant 1, Abdul Jabbar Khan, as "benamidar" on trust for the persons claiming through Abdul Razaq deceased and in the several shares to which they are respectively entitled.

This must be followed by a declaration that the plaintiff, Siddiqa Begum, is beneficially entitled under the said trust to one-half of the said house and site under and by virtue of the transfer to her dated 22nd July 1932 referred to in the plaint and to a further one-eighth of the said house and site as an heir of the said Abdul Razaq, deceased, making together an undivided five-eighths of the said house and site. There will then be a further declaration that "the trusts of the said house and site ought to be carried into effect," followed by an order and decree that "in execution of the aforesaid trust as hereinbefore declared" the property shall be partitioned between the parties entitled thereto. The decree will from that point follow the appropriate form of a partition decree. In the result, therefore, in my opinion, this appeal should be allowed, the decree of the learned Judge in the Court below should be set aside and a decree substituted for it in the form I have indicated above. The appellant has succeeded and is entitled to her costs both in this Court and in the Court below.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Allahabad 315

HAMILTON AND YORKE JJ.

Swami Gayananand — Defendant — Appellant

v.

Jagdish Chandra Bagchi and others — Plaintiffs — Respondents.

First Appeal No. 51 of 1939, Decided on 22nd April 1942, from decision of Dist. Judge, Benares, D/- 26th November 1938.

(a) Civil P. C. (1908), S. 92—Whether plaintiff has interest within S. 92 — Each case must be considered on its own facts—It is dangerous to apply conclusions of decided cases—But it is useful to observe what principles have been applied.

In considering the question whether the plaintiff has interest in the particular trust within the meaning of S. 92 it would be certainly not less dangerous than in many other class of cases to try to apply the conclusions of decided cases to the particular facts and to overlook that each case must be considered with reference primarily to its own facts. But it is useful, nevertheless, to observe from decided cases what principles have from time to time been applied to the question. [P 317 C 1]

C. P. C. —

('40) Chitaley, S. 92 N. 8 Pt. 12.

('41) Mulla, Page 327 N. "Interest in the trust."

(b) Civil P. C. (1908), S. 92—Word "interest" in S. 92—Meaning — Hindu public religious or charitable trust — Plaintiffs local Hindus and Brahmans not asserting interest of any kind abstract or concrete — They cannot maintain suit under S. 92.

For purposes of S. 92 something more than a mere abstract sentimental interest is required. Even an 'abstract' interest for purposes of S. 92 (assuming that it could in some circumstances support a suit) would have to be an 'actual' interest, i. e., an abstract interest which the plaintiffs really have. Where in the case of a Hindu public trust for religious or charitable purposes the plaintiffs, notwithstanding their being local Hindus and Brahmans, do not even care to come to the Court and assert that they have an "interest" of any kind—concrete or abstract—in the suit they sponser, they cannot maintain a suit under S. 92: ('24) 11 A.I.R. 1924 P. C. 221, *Rel. on.* [P 318 C 1, 2]

C. P. C. —

('40) Chitaley, S. 92 N. 8 Pt. 10.

('41) Mulla, Page 328 Pts. (s), (t).

(c) Civil P. C. (1908), S. 92—Suit under S. 92—Appellate Court reversing trial Court's judgment holding that plaintiff had no interest within S. 92—Advocate-General held should not be allowed to be impleaded as co-plaintiff at stage of appeal.

In a suit under S. 92 the appellate Court reversed the judgment of the trial Court and held that the plaintiffs could not maintain the suit as they had no "interest" within S. 92. The question was whether the Advocate-General should be impleaded as a co-plaintiff at the late stage of the case in appeal:

Held that although it was open to an appellate Court to apply in appeal the rules of the Civil P. C. applicable to the trial of original suits but on a consideration of the terms of O. 1, R. 8, Civil P. C., and the circumstances of the case the Advocate-General could not be impleaded as co-plaintiff at the stage of appeal. Nor would it be proper for the appellate Court to remand the case to the Court below to enable it to take the statements of the plaintiffs as witnesses or to take such evidence itself as it would contravene O. 41, R. 27, Civil P. C. [P 319 C 1]

C. P. C. —

('40) Chitaley, O. 41, R. 23 N. 10, Pt. 8; O. 41, R. 27 N. 15 Pt. 2.

('41) Mulla, Page 1185 Pt. (l).

(d) Civil P. C. (1908), S. 92—'Interest' within S. 92 whether must be something more than merely sentimental or abstract one or whether abstract interest of Hindu in his own religious institution is enough. *(Quære)*

Whether the necessary 'interest' for purposes of S. 92 must be something more than a merely "sentimental" or "abstract" one. Or whether the abstract interest of a Hindu in his own religious institutions is itself sufficient to support a suit under S. 92 without showing anything more. [P 318 C 1]

C. P. C. —

('40) Chitaley, S. 92 N. 8.

('41) Mulla, Page 327 N. "Interest in the trust."

Gopi Nath Kunzru and S. N. Katju — for Appellant.

B. Malik and M. B. Bhatnagar — for Respondents.

YORKE J.—This is an appeal by one Gayanand Swami in a suit brought against him and others by four plaintiffs under S. 92, Civil P. C., and in pursuance of the consent of the Advocate-General in that behalf obtained under the section. We are concerned in the first place with an issue in the nature of a preliminary issue, which is very common in such cases as these, whether the plaintiffs have any such "interest in the trust" as to have entitled them to institute the suit. We shall, therefore, in the first place set out no more of the facts than will be necessary to enable us to deal with that issue. Gayananand is said to be a pious Hindu, who, in or about the year 1902, established, and had registered under the Religious Societies Act, a society called the 'Bharat Dharma Mahamandal.' In relation to this institution he appears at a later stage to have become associated with a wealthy and devout Hindu named Rani Surat Kumari Devi, who in 1913 became one of the trustees of the 'Bharat Dharma Mahamandal.' Between 1919 and 1920 this lady is said to have furnished Gayananand with considerable sums of money amounting in all to some Rs. 3,15,000 and, for the present purpose, we can accept it that on 14th December 1919 Gayananand executed a trust instrument by which he settled these funds upon the trusts 'for public purposes of a charitable or religious nature' with which in this suit we are concerned. It is not in dispute that the trust of the trust instrument partake of that character. This trust was known as the "Mahamaya Trust."

It will be sufficient at this stage to summarise the trust somewhat briefly. The first trustees were Gayananand and the Rani themselves for their respective lives or until their respective resignations. The objects of the trust were various and catholic. They included the building of a temple at Benares, provision for the establishment of a 'Puja' or worship at it when established, the establishment of a 'free kitchen' attached to the temple, the distribution of grain and water to the poor, the performance of Hindu religious ceremonies, the making of a gift of land to a Hindu Ladies' College and Widows' Home and a Hindu college of Divinity, the making of annual grants of money to the foregoing institutions so long as their teachings are conducive to the 'Vernashram Dharma' and finally, the construction and establishment of an institution which the settlor described as a "Hall of All Religions," for the promotion of the study of comparative religions and encouragement of toleration. There then followed numerous trusts and provisions for the management of the Trust, with none of which we need at this stage deal in detail, except perhaps to notice the paragraph which provided that :

" After the death of the founder Trustee if their successors act against the aims and objects of this Trust, the civil Court on the application of at least 7 prominent Hindus abiding by the Varnashram Dharm rules and on inquiry as to the truth of the allegations and if satisfied, will take such steps as will set the management right, according to its noble aims."

We shall revert to these trusts so far as may be necessary at a later stage. In the meanwhile, according to the plaint in the suit—and it is not disputed—Gayananand had in 1924 established a Syndicate for the promotion of public limited liability company on commercial lines which actually came into existence under the name of the 'Bharat Dharma' Syndicate Ltd. This company had an authorized capital of ten lacs of rupees, of which nearly nine were issued. It was formed principally to publish and deal in religious literature, though, ultimately it appears to have developed into a 'banking' institution among other things. We do not wish at this stage to follow the fortunes, or rather misfortunes, of the Bharat Dharma Syndicate Ltd. in detail ; and, indeed, it will probably be better if, in relation to the preliminary point with which we are now dealing, we do not consider what we know happened in this respect. It is sufficient for us to say that this company has since 1935 been and still is, in liquidation in this Court and that many of the very serious charges of breaches of trust which have been laid against Gayananand in this suit relate to allegations of fraudulent misappropriation of the monies of the trust in connexion with his promotion of and transactions in connexion with, the Bharat Dharma Syndicate Ltd. The charges made are of a serious character.

With this short introduction we can now approach the issue whether the four plaintiffs are persons who have such an 'interest in the trust' as to have entitled them to institute the suit. We have considered carefully the learned Judge's findings of fact in the case and we may say at once that we are inclined to agree with him in his view that the trust-deed itself has a strong 'flavour' of 'Sanatan Dharma' or orthodox Hinduism about it; that at any rate two of the plaintiffs—Narayanachari and Prabodh Chandra Kavyatirtha—are, or they may well be, Brahmans, and 'Sanatan Dharma Hindus' and that all of them may for the present purpose be assumed to be residents of Benares itself. It must, also, be accepted as a fact that no temple has ever been built as provided for by the trust deed. These facts in relation to the status of two of the plaintiffs we are prepared in the abstract for the moment to accept, though they can scarcely be said to be established by any very convincing evidence.

The outstanding feature, however, of the whole case, so far as the preliminary issue is concerned, is that no single one of the plaintiffs chose to give any evidence at the trial of any sort or kind, nor, so far as we can gather, ever troubled to attend the Court. On the other hand, the only evidence given on behalf of the plaintiffs was that of a certain person called Manohar Lal Bhatnagar, who was at one time the Secretary, and later a Director, of the Bharat Dharma Syndicate Ltd., and at all times the right hand man of Gayananand, defendant 1 and appellant. This gentleman has given a little evidence about what he understands to be the religious views of the plaintiffs, or of two of them but, though we are for the present purpose accepting it, it cannot by any means be thought either satisfactory or convincing. The position, therefore, is this. The suit is started by four Hindu Brahman residents of Benares. We know nothing at all of them except that they are, or may believe, in the Sanatan Dharma. None of them has come forward in his own suit to say whether he has the least real interest in its result, in the welfare of the trust or, indeed, in any sincere sense, in the Hindu religion itself. We observe that two of the plaintiffs have been described as 'prohits', but, so far as the evidence goes, there is no proof that they really are, nor, if they are, that they are sincerely interested in this trust. Whether they have any connexion with any other religious or charitable institution in Benares or elsewhere, we have no knowledge. In short we know nothing of them. On the face of the pleadings, the interest of the plaintiffs was directly challenged.

We think that, in such circumstances, it is little short of astonishing that no single one of the plaintiffs should have stepped into the witness box to say that he and his co plaintiffs had any real "interest" in this suit at all. So far as they are concerned, it was a vital and direct issue — indeed it was a condition precedent to the validity of the very institution of their suit — and yet not one of them appears to say that he is interested. We are left with the meagre evidence of one solitary witness who himself is a man who, from his very intimate connexion with the commercial and financial aspect of this case, may well have had good reasons, wholly unconnected with the Hindu religion, for wishing to find four men of straw to fill the role of plaintiffs in the suit. And the suggestion has been freely made that the real motive of these proceedings is to forestall the reconstruction scheme which is now on foot in the winding up. Even when that evidence is given—and accepted—it amounts to no more than that the plaintiffs are Hindu residents of Benares, Brahmins and, possibly (though not certainly) followers of the Sanatan Dharma. Of their history, or status, we know nothing. Of any, 'interest' which is even remotely 'actual' or 'real', as opposed to the mere abstract interest of any Hindu in a Hindu institution, there is no word of evidence at all.

That then is the position we have to deal with and it is necessary that we should examine it in the light of the law by which the Courts in India have construed the word 'interest' in S. 92, Civil P. C. But we may say at once that we think that it would be certainly not less dangerous in this than in many other class of cases to try to apply the conclusions of decided cases to the particular facts of others and to over look that each case must be considered with reference primarily to its own. We think that it may well be that the nature of the 'qualifying' interest may vary widely with the character of the trust itself, indeed, if the trust itself is clear, precise and narrow, it may well be that an 'interest' would, in order to qualify a plaintiff, have to be precise and clear cut too. Or, perhaps, in other trusts of a more vague and general kind, the qualifying interest might itself be less definite. But it is useful nevertheless to observe, from decided cases what principles have from time to time been applied to the question. We think that, on the whole it can be said that, in this as well as in other Courts, the more widely held view is that something more than a mere abstract sentimental interest is required. Whether and to what extent, the interest must be 'actual' is, perhaps, a matter of mere doubt and may, as we have suggested, vary in individual cases.

This question was discussed by five Judges altogether of the Madras High Court in 42 Mad. 360,[1] and in the result two of the Judges (Abdur Rahim and Sastri JJ.) took what we may describe as the 'abstract view' while three of the Judges (Sir John Wallis, Oldfield and Coutts-Trotter JJ.) favour the view—to take the words of Sir John Wallis :

"That interest in the provision"—i. e., the provision of S. 92, Civil P. C.—"if not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared to the whole body of religious community throughout India; in other words, he must be in a position to derive some benefit from the trust in respect of which the suit is filed . . . ."

This case was one in which one of the plaintiffs was a lawyer of Madras who was also a member of a society which interested itself in the management of temples in southern India. The actual temple in question was at Tellicherry and the only connexion with Tellicherry which the plaintiff had was that he had once or twice held a brief there and had on those occasions casually visited the temple. The plaintiff was, of course, himself, a devout Hindu. This circumstance, however, did not prevent the majority of the Madras Judges from thinking that he had no real 'interest' in the temple in the sense of an 'interest' which was substantial and not merely sentimental, remote or illusory. Oldfield J. in his judgment observed :

". . . . On the other hand, no good reason has been shown against the interpretation of the word 'interest' in the section in the manner in which it is ordinarily interpreted in other legal connexion and in which I shall interpret it, as an interest which is substantial and not sentimental or remote . . . ."

Coutts-Trotter J. says :

". . . . I am content to say that the task is impossible, that the most that can be done, or attempted to be done, is to say that the interest required by the statute to reside in the relator must be, in the words of Lord Eldon, (1827) 1 Bligh. (N.S.) 17,[2] 'clear' or, in the words of the learned Chief Justice in this case, 'a present and substantial, and not a remote and fictitious, or purely illusory interest,' or in the words of the learned Judges in 20 Cal. 810[3] at p. 817, 'an existing interest and not a mere contingency . . . .'"

It is true that in this particular case there was a substantial cleavage of opinion among the Judges and that the other two Judges held the broader view that inasmuch as it was the right of any Hindu to worship at any Hindu temple in the world, his 'interest' in the welfare of the establishments of the Hindu religion in general could not be confined to a case in which he himself was directly connected with a particular temple in the sense that he had made, or was likely to have occasions to make, some special use of it for worship. That is the "abstract view" and is the view that the natural concern of any Hindu for the welfare of his religion and the institutions connected with it is sufficient to satisfy the definition of the word 'interest' as contained in S. 92, Civil P. C. The case contained a considerable discussion of the earlier history of S. 92 of the Code, and, in particular, of the effect of the disappearance of the word 'direct' as qualification of the word 'interest' from the Code of 1877 in consequence of its replacement by the Code of 1888. We do not think any useful purpose would now be served by our discussing this again or by dealing with the numerous earlier authorities which have been exhaustively reviewed in this case in the Madras High Court.

We think, however, that it is worth our pointing out in relation to the case before us that this Madras case was, on its facts, a good deal stronger than ours. The plaintiff in that case did at least have some colour of interest in the establishment in relation to which he had brought the suit and he had gone into the witness box himself not only to establish that interest but to assert his own concern in particular for the welfare of the temple and for

1. ('19) 6 A.I.R. 1919 Mad. 384 : 50 I. C. 693 : 42 Mad. 360 : 36 M. L. J. 396, T. R. Ramachandra Aiyar v. Parameshwaran Unni.

2. (1827) 1 Bligh (N. S.) 17 : 30 R. R. 7, Corporation of Ludlow v. Greenhouse.

3. ('93) 20 Cal. 810, Mohiuddin v. Sayiduddin.

the credit of the Hindu religion in general. Had the three Judges of the Madras High Court been able to take the opposite view, there would at least have been this to say, that they there had before them a plaintiff who himself had maintained in the proceedings that he was a person with an 'actual' and not merely an abstract and unproved personal concern in the result of his suit. In our case, we have not even that. We have merely four plaintiffs of whom we know practically nothing who, even if they are Brahmans of Benares, have shown little concern with the suit to which they have given their names, that they have not even cared to come to the Court to show what, if any, their 'interest' is nor indeed, whether they really have one, whether as Hindus in the abstract or at all. Moreover, the case is one in which from the beginning the plaintiff's bona fides, so far as this suit is concerned, has been challenged, and there is at least some ground for suggesting that they may be serving the interest of others, rather than exhibiting a genuine concern for the public purposes which they are nominally championing.

The whole question turns on the meaning of the word 'interest.' It may well be that, as the majority of the Judges in the Madras High Court, appear to think, the necessary 'interest' must be something more than a merely 'sentimental' or 'abstract' one. Or it may be, as the other Judges have thought, that the abstract interest of a Hindu in his own religious institutions is itself sufficient to support a suit without showing anything more. We think, however, that, without being compelled to decide between these two points of view, there is yet another class of case in which the plaintiffs fail to establish that they have an 'interest' of any sort or kind, even though they do happen to be local Hindus. Even an abstract interest is in a sense an 'actual' interest. It is genuine interest, even though in the abstract, it proceeds from a real concern for their own faith. But in a case in which the plaintiffs, notwithstanding that they are local Hindus and Brahmans, do not even trouble to assert that they have an 'interest' of any kind—concrete or abstract—we find it very difficult to hold that they can maintain a suit under S. 92, Civil P. C.

We, feel, therefore, that it is not necessary for us in this case actually to choose between the majority and minority views in the Madras case in 42 Mad. 360,[1] because in our view the present case can be distinguished from it. We are aware that the majority view in this case has not been universally accepted in India (*see* for instance, A. I. R. 1925 Lah. 189[4]) and that many other cases have been readily—and not always, we think, unwillingly—distinguished on the facts. We think it very necessary in such cases as these to bear in mind the particular facts of the case actually before the Court and in the present one before us we think it turns less upon the question whether the plaintiff's 'interest' is substantial or abstract, than upon whether it exists at all even in the abstract. If we may, however, venture a comment of our own it would be that, in a proper case, we should find, on general principles of the exercise in the public interest of the Court's Chancery jurisdiction over Charities, much to attract us in the minority view of the Madras High Court. To discuss all the authorities which we have read upon this matter would be, we think, unnecessary to confuse this judgment. But we think it necessary to mention one more Madras case in the Privy Council. In 47 Mad. 884,[5] the Judicial Committee had before it held to be maintainable a suit started under S. 92, Civil P. C., by a person who was a descendant of the founder, but, apparently, had no other interest. Their Lordships referred to Sir John Wallis's judgment in 42 Mad. 360,[1] with approval and observed :

"... They agree with Sir John Wallis that to hold that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple, gives him an interest in the trust, appears to defeat the object with which the legislature inserted these words in the section ..."

and they proceed to point out that that object is as much to protect the managers themselves of charities as the public interest. In a case in which as in the one before us, not merely is 'interest' not proved in the sense of any substantial interest, but no 'interest' at all is proved, even an abstract one, we think that what the Board has said above applies with double force.

In the result, therefore, in the present case we have not found it necessary to decide whether if the plaintiffs had proved even an "actual abstract interest", it would, in the particular circumstances, have been sufficient to support the suit. We are content to say that the plaintiffs have not proved an 'interest' of any kind. We think that even an 'abstract' interest (assuming that it could in some circumstances support a suit) would have to be an 'actual' interest, i. e. an abstract interest which the plaintiffs really have. And, where, as here, the plaintiffs themselves do not even trouble to say whether they have any concern at all in the suit they sponser and there are in fact other unusual features such as the daily presence in Court and assistance given to counsel appearing in the suit by one Harish Chandra Varma, we can come to no other conclusion but that the qualification required by S. 92 of the Act is not satisfied. Nor do we think that the provision of the Trust itself to which the Judge has drawn our attention advances their case at all, because even under that it would be necessary for the plaintiffs' interest to be, and to be proved to be, an actual one. But, as we have already said, this case is an unusual one and there are many most disturbing features about it, since the written statement itself contains admissions of acts which prima facie amount to gross breach of trust. Before allowing this appeal upon a point which is primarily technical, we had thought it right to ask the Advocate General, as 'amicus curiæ' to appear before us, and to ascertain his view as the guardian of the public interest and to afford him such opportunity, if any, as he might desire to take, and is open to him to intervene in the proceedings. The learned Advocate-General has now appeared before us after taking instructions from the Local Government. He has, of course, supported the arguments of learned counsel for the respondents as to the maintainability of the suit. But, as we have shown above, we are clearly of opinion that the view taken by the lower Court cannot be sustained.

The next question which arose was whether the learned Advocate-General was prepared to ask us to implead him as a co-plaintiff even at this late stage of the case. It is true that in one Madras case, 43 Mad 707[6] the High Court did order the trial Court

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4. ('25) 12 A. I. R. 1925 Lah. 189 : 85 I. C. 111 : 5 Lah. 455, Narinjan Singh v. Kirpal Singh.

5. ('24) 11 A.I.R. 1924 P.C. 221 : 82 I.C. 804 : 47 Mad. 884 : 51 I.A. 282 (P.C.), Vaidyanatha v. Swaminatha.

6. ('20) 7 A.I.R. 1920 Mad. 133 : 55 I. C. 546 : 43 Mad. 707 : 38 M. L. J. 201, Ambalavana Pandara Sannidhi v. Advocate General of Madras.

in a similar suit to implead the Advocate-General when the suit was likely to fail on the ground of absence of interest of those plaintiffs who had obtained the sanction of the Advocate-General under S. 92, Civil P. C. It is true also that in many cases it is open to an appellate Court to apply in appeal the rules of the Civil Procedure Code which are applicable to the trial of original suits. But on a consideration of the terms of R. 8 of O. 1, we cannot but agree with the learned Advocate General that it is very doubtful whether he could ask us to implead him at this stage and could therefore ask us for time to enable him to ask the Government to authorise him to move this Court for that purpose. Nor do we think that it would be proper to remand the case to the Court below to enable it to take the statements of the plaintiffs as witnesses or to take such evidence ourselves. That would be to contravene the principle that further evidence is not to be admitted in appeal merely to enable the plaintiffs to fill up a lacuna in their case. In these circumstances, with some reluctance, in view of the disturbing features to which we have alluded earlier, we are of opinion that it is not possible at this late stage for any steps to be taken to remedy the technical defects which are apparent in the case. In our view, the plaintiffs are not persons who have shown that they had such an interest as would enable them to maintain the suit. The learned Judge has, in our judgment, wrongly held that the plaintiffs have such an interest in the Mahamaya Trust as would entitle them to maintain the present suit. The plaintiff's suit must therefore fail.

We accordingly allow this appeal, set aside the decree of the lower Court and order that the plaintiff's suit be dismissed with costs of both Courts.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Allahabad 319

MOHAMMAD ISMAIL AND MULLA JJ.

Mt. Chanda Begum — Plaintiff — Applicant

v.

M. Maqsood Husain Khan — Opposite Party.

Civil Revn. Appln. No. 404 of 1940, Decided on 29th April 1942, against order of Civil Judge, Budaun, D/- 20th July 1940.

(a) Civil P. C. (1908), O. 33, R. 5 and S. 115 — Application for leave to sue in forma pauperis rejected — Revision lies.

There is clear distinction between a case in which an application for leave to sue in forma pauperis is rejected and one in which it is allowed. The order rejecting an application for leave to sue in forma pauperis is revisable under S. 115 : ('30) 17 A.I.R. 1930 All. 758 ; 32 All. 623 ; ('33) 20 A.I.R. 1933 All. 295 and ('34) 21 A.I.R. 1934 All. 424, *Rel. on* ; ('26) 13 A.I.R. 1926 All. 446, *Not foll.* [P 319 C 2]

C. P. C. —

('40) Chitaley, S. 115, N. 26 ; O. 33, R. 5, N. 9, Pt. 1.

('41) Mulla, Page 413, Pt. (j) ; Page 1044, Pt. (y).

(b) Civil P. C. (1908), O. 33, R. 1 — Application by Mahomedan lady for leave to sue in forma pauperis — Her claim against her husband to realise dower is not "means" within O. 33, R. 1.

What has to be decided in an application for leave to sue in forma pauperis is whether the person making the application is or is not a person possessed of sufficient means to pay the court-fee. A claim which a Mahomedan lady might have against her husband to realise her dower is not "means" within the meaning of O. 33, R. 1, and hence it cannot be taken into account in determining the question whether the lady is a pauper within O. 33, R. 1. [P 320 C 1]

C. P. C. —

('40) Chitaley, O. 33, R. 1, N. 5, Pt. 12.

('41) Mulla, Page 1038, Pt. (h).

Z. H. Lari — for Applicant.

Mushtaq Ahmad — for Opposite Party.

MULLA J. — This is an application in revision under S. 115, Civil P. C., by one Mt. Chanda Begum whose application for leave to sue in forma pauperis has been rejected by the learned Civil Judge of Budaun. The learned Civil Judge has given two reasons for rejecting the application : firstly, that the applicant's husband possesses sufficient means to pay the court-fee which is payable by the applicant herself, secondly, that the applicant admittedly has a claim of dower against her husband to the extent of Rs. 51,000 and the dower being unspecified at least one-third of it, that is, a sum of Rs. 17,000 is moajjal or prompt and it is open to the applicant to sell a portion of that part of her dower in order to provide the necessary court-fee for her suit. A preliminary objection was taken by learned counsel for the opposite party that the order passed by the learned Civil Judge was not open to revision at all. Reliance was placed in support of this contention on the case in 48 All. 493.[1] That case has, however, been discussed and dissented from in a later decision of this Court in 1930 A.L.J. 901.[2] It was held by a Bench of this Court in 7 A.L.J. 741[3] that there was a clear distinction between a case in which an application to sue in forma pauperis is rejected and one in which it is allowed. That distinction was approved in 1930 A.L.J 901[2] in which the whole case law was fully discussed by Sulaiman C. J. It appears that the decision in 1930 A.L.J. 901[2] has subsequently been approved and followed in two other cases of this Court, one being 1933 A.L.J. 110[4] and the other being 1934 A.L.J. 827.[5] In view of these cases learned counsel for the opposite party had to concede that he could not press this preliminary objection. We accordingly overrule the objection.

The only point which remains for consideration is whether the learned Civil Judge has or has not acted with material irregularity in the exercise of his discretion. We need only say that both the reasons given by the learned Civil Judge are wholly wrong and it must, therefore, be held that he has

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1. ('26) 13 A.I.R. 1926 All. 446 : 94 I.C. 484 : 48 All. 493 : 24 A.L.J. 557, Shankar Ban v. Ram Deo.
2. ('30) 17 A.I.R. 1930 All. 758 : 126 I.C. 1 : 52 All. 927 : 1930 A.L.J. 901, Sumatra Devi v. Hazari Lal.
3. ('10) 32 All. 623 : 6 I.C. 831 : 7 A.L.J. 741, Malik Muhammad Ayub v. Malik Mohammad Mahmood.
4. ('33) 20 A.I.R. 1933 All. 295 : 145 I. C. 436: 55 All. 216:1933 A. L. J. 110, Piare Lal v. Bhagwan Das.
5. ('34) 21 A.I.R. 1934 All. 424 : 148 I. C. 624 : 1934 A.L.J. 827 : 56 All. 895, Secretary of State v. Mt. Sonkali.

acted irregularly in the exercise of his discretion. So far as the first point is concerned, learned counsel for the opposite party had to concede that he was not prepared to press it. In fact he said that the point had been referred to by the learned Civil Judge only with a view to showing that the husband of the applicant was in a position to pay the dower. As regards the other point, it is enough to state that what has to be decided in an application for leave to sue in forma pauperis is whether the person making the application is or is not a pauper within the meaning of O. 33, R. 1, that is, a person possessed of sufficient means to pay the court-fee. The simple question is whether a claim which a Mahomedan lady might have against her husband to realise her dower is 'means' within the meaning of O. 33, R. 1. We have not the slightest hesitation in holding that the answer must be in the negative. It depends entirely upon the option of the lady to prefer a claim for her dower or to surrender it. She cannot by any means be forced to exercise that option. It is evident, therefore, that her claim for dower cannot be deemed to be 'means' within the meaning of O. 33, R. 1. The result, therefore, is that we allow this application and setting aside the order passed by the learned Civil Judge we grant the application for leave to sue in forma pauperis. The opposite party will pay the costs of both the Courts.

G.N./R.K. *Application allowed.*

A. I. R. (29) 1942 Allahabad 320

IQBAL AHMAD C. J. AND DAR J.

Mt. Sarda Kunwar—Plaintiff—Appellant

v.

Gajanand and others—Defendants—Respondents.

Second Appeal No. 1389 of 1938, Decided on 22nd April 1942, from decision of Dist. Judge, Benares, D/- 6th July 1938.

Civil P. C. (1908), S. 9 — Birt Jajmani right and manbrit—Distinction — Right to Birt Jajmani is right in property—Suit by legal heir of panda for declaration of his right of inheritance of Birt Jajmani right and for injunction restraining defendant from interfering with that right and for return of bahis is suit of civil nature—Scope of injunction in such case indicated.

A manbrit essentially differs from a Birt Jajmani. In the manbrit the relation between Jajman and Purohit is a temporary one and there is no fixity or hereditary character about it. But in Birt Jajmani, especially those relating to Hindu pilgrimages like Muttra, Benares and Allahabad, though it is open to parties to break away the old connexion and establish a new one by custom and usage of the country as a matter of practice and as a general rule the connexion between Purohit and Jajman is both permanent and hereditary. [P 323 C 1]

The right to Birt Jagmani is a right in property. It is a heritable property and in some cases transferable. An action by a legal heir (widow) of a Gangaputra or a Panda for declaration of his right to inheritance of the Birt Jajmani right and for an injunction restraining the defendants from interfering with the plaintiff's right and for recovery of possession of the pilgrims' Bahis is a suit of a civil nature and hence is cognizable by the civil Court : *Case law discussed.* [P 323 C 1]

In such cases the defendant can be restrained by an injunction but the correct scope of that injunction must be specified. The defendant cannot be prohibited from working as Purohit nor can he be restrained from accepting any pilgrim coming from a particular place as his jajman, provided the Jajman of his own free will with full knowledge of the facts chooses to accept the defendant as his Panda. But the defendant cannot be permitted to work under name and colour of the plaintiff's Birt Jajmani nor can he be permitted to use Bahis, marks and other paraphernalia associated with the plaintiff's Birt Jajmani. [P 323 C 1]

C. P. C. —

('40) Chitaley, S. 9, Notes 16, 17.

('41) Mulla, Page 22 N. "Suits of a civil Nature."

Shiva Prasad Sinha—for Appellant.

P. L. Banerji—for Respondents.

DAR J. — This is an appeal against a judgment and decree, dated 6th July 1938 of the District Judge of Benares by which he reversed a judgment and decree, dated 7th December 1937, of the City Munsif of Benares in a suit for declaration of certain rights and for an injunction restraining the defendants from interfering with those rights. Krishna Lal and his two sons Baldeo Lal and Girdhar Lal lived many years ago as members of a joint Hindu family at Benares. This family worked as Gangaputras or Hindu priests who minister to pilgrims visiting Benares and help them in performance of certain religious ceremonies and in lieu thereof receive offerings from them. This family had an extensive and ancestral Birt Jajmani of pilgrims from Nepal, Rajgarh and Koti and had also held an appointment from the Maharaja of Nepal who used to appoint one of its members by a sanad called Lal Mohar. In addition to this exclusive Birt Jajmani in Nepal, Rajgarh and Koti, the family also held in partnership a Birt Jajmani with Gatai Dube relating to Kumaun, Almora, and Nainital. Girdhar Lal was the last survivor in the family and on 5th December 1907, an agreement was made between him and the ancestors of defendants 3 to 10 by which 6/16 share in the Birt Jajmani of Nainital, Kumaun and Almora was allotted to Girdhar Lal and 10/16 share to the ancestors of defendants 3 to 10. Girdhar Lal died about the year 1910 and he was succeeded in this Birt Jajmani by his widow Mt. Sarda Kunwar, who was at that time young, inexperienced and a pardanashin widow. Mt. Sarda Kunwar appointed one of her relations Deonath Dube to manage and work the Birt Jajmani for her. Deonath Dube died about the year 1935 leaving a widow Mt. Basanti and three nephews, one of them was Gajanand.

After the death of Deo Nath, Gajanand managed and worked the above Birt Jajmani when disputes arose between him and Mt. Sarda Kunwar and as a result Mt. Sarda Kunwar raised an action in the Court of the City Munsif of Benares on 9th January 1937 for a declaration that she was entitled to the entire Birt Jajmani of Nepal, Rajgarh and Koti and of 6/16 share in the Birt Jajmani of Kumaun, Nainital and Almora and for an injunction restraining the defendants from interfering with her right in the said Birt Jajmani and for delivery of possession of the Lal Mohar given by the Maharaja of Nepal and of the Bahis in which pilgrims' names, signatures and addresses were recorded. In this suit she made the widow of Deonath and his nephew Gajanand as defendants 1 and 2 and she made defendants 3 to 10 those persons who under the agreement of 1907 held 10/16 share in the Birt

Jajmani of Kumaun, Nainital and Almora. The widow of Deo Nath did not make any appearance in this suit and defendants 3 to 10, the holders of 10/16 share in the Birt Jajmani of Kumaun, Almora and Nainital admitted the plaintiff's claim and the suit was mainly contested by defendant 2, Deo Nath's brother's son. A number of pleas were raised by him and among them one was that the right of Birt Jajmani was not a right to any property or to any office and as such the suit was not maintainable in the civil Court. He had also raised other questions of law and fact but they have all been concluded by findings against him and it is not necessary to particularise for the purpose of this appeal.

The trial Court found that the Birt Jajmani of Nepal depended upon the will of the Maharaja of Nepal and though as a fact the Maharaja of Nepal had appointed plaintiff's husband, Girdhar Lal as his priest and though as a fact the Birt Jajmani of Nepal had been in plaintiff's family for a long time, yet, after the death of Girdhar Lal, there being no male member in the family and the plaintiff being a widow, the Maharaja had appointed Deonath as his priest and had given Lal Mohar to him. Consequently, the civil Court could not force the Maharaja of Nepal to accept any one as his priest and the plaintiff was not entitled to any relief with regard to the delivery of Lal Mohar or with regard to Birt Jajmini of Nepal, Rajgarh and Koti. But the plaintiff was entitled to the relief which she claimed with regard to the Birt Jajmani of Kumaun, Almora and Nainital. Accordingly the trial Court partly decreed and partly dismissed the claim in the above terms.

Against the decision defendant 2 Gajanand made an appeal to the District Judge of Benares and the plaintiff Mt. Sarda Kunwar filed cross-objections. The learned District Judge agreed with the trial Court that the plaintiff was not entitled to recover possession of the Lal Mohar of the Maharaja of Nepal which depended upon the wish of the Maharaja of Nepal but disagreeing with the trial Court he expressed the view that if the plaintiff's action was maintainable she would be entitled to the Birt Jajmani of Rajgarh and Koti and agreeing with the trial Court he held that the plaintiff would be entitled to the Birt Jajmani of Kumaun, Almora and Nainital. But he held that the plaintiff's claim was not maintainable in law as the right to Birt Jajmani was not a right to any property or office and the plaintiff's suit was not of the civil nature which could be enforced in a civil Court. In arriving at this conclusion he relied upon 2 Agra 80,[1] 1889 A.W.N. 169,[2] 17 A.L.J. 842,[3] 43 All. 159[4] and 1934 A. L. J. 1197.[5] In this view of the matter, he dismissed the plaintiff's claim. The plaintiff has made this second appeal and it is contended before us that the learned District Judge of Benares has entirely misconceived the law which applies to this case and the suit brought by the plaintiff was of a civil nature and should have been decreed.

This is not an action by a priest, Panda or Purohit against a Jajman or client for forcing his services on the client or for recovery of any fee which the client does not wish to pay nor this is an action by a priest against another priest for recovery of any fee which had been paid to the defendant by some client on personal consideration. This is an action by a legal heir of a Gangaputra or a Panda at Benares for declaration of his right to inheritance and for an injunction restraining the defendants from interfering with the plaintiff's rights and for recovery of possession of the pilgrims' Bahis. It has been found by both the Courts below that the plaintiff's husband and husband's ancestors had been carrying on from a long time past the work of a hereditary priest at Benares on an extensive scale and they had a large clientele of the usual type which is associated with Birt Jajmani and the Birt Jajmani had descended from father to son in the family. Birt Jajmani is a well known institution in these provinces and has been the subject of consideration in several cases in these provinces as well as in the provinces of Bengal and Bihar. In 43 All. 35[6] which was a case of partition of a Birt Jajmani of Mathura Pandas and in which the daughters of the family claimed their share of inheritance by partition, Tudball and Kanhaiya Lal JJ. thus described the nature of Birt Jajmani rights :

"This class of property has repeatedly been the subject-matter of decisions by the various Courts in India and the rights of the heirs of these Chaubas and other persons, the owners of a birt jajmani, have repeatedly been upheld. In 39 All. 196,[7] a mortgage of such rights was upheld, and in 15 C. L. J. 376,[8] the whole subject of these rights was discussed at considerable length by Mukerji J. There is also an unreported decision of a single Judge of this Court in Second Appeal No. 569 of 1903. There can be no doubt that the right of birt jajmani has been held by Courts to be heritable and sometimes transferable."

In 43 All. 20,[9] which was a case brought by a Panda at Allahabad who had inherited with the Birt Jajmani a particular kind of flag, to restrain another Panda from using the said flag, at p. 23, Piggot and Kanhya Lal JJ. thus explained the nature of a Birt Jajmani right :

"The right in virtue of which the plaintiff brings this suit is one of a kind generally described by the expression 'birt jajmani.' It would be easy to cite cases in which a right so described, to receive offerings from pilgrims visiting a particular shrine, has been recognized by the Courts in this Province, and by this Court, as of the nature of property as being enforceable by suit, as being generally heritable and sometimes as being transferable. We have to consider what the particular right of birt jajmani means in connexion with the ceremonial bathing at the confluence of the rivers at Allahabad. Obviously no particular pilgrim can be compelled to seek the ministrations of any particular priest. It has been suggested also that no suit would lie by any particular priest against a pilgrim who had accepted his ministrations for the recovery of any particular fee. This latter argument, whether well founded or not, is of no practical consequence. As a matter of established custom the pilgrims who accept the ministra-

1. 2 Agra 80, Beharee Lall v. Baboo.
2. ('89) 1889 A.W.N. 169, Durga Prasad v. Genda.
3. ('19) 6 A.I.R. 1919 All. 208: 51 I.C. 539: 41 All. 656: 17 A. L. J. 842, Durga Prasad v. Shambhu.
4. ('21) 8 A. I. R. 1921 All. 374 : 59 I. C. 659 : 43 All. 159 : 18 A. L. J. 983, Bansi v. Kanhaiya.
5. ('34) 21 A. I. R. 1934 All. 851 : 151 I. C. 11 : 56 All. 1026 : 1934 A. L. J. 1197, Hanso Pathak v. Harmandil Pathak.
6. ('21) 8 A.I.R. 1921 All. 286: 57 I.C. 315: 43 All. 35 : 18 A.L.J. 835, Lokya v. Sulli.
7. ('17) 4 A.I.R, 1917 All. 115: 37 I.C. 661: 39 All. 196: 15 A.L.J. 41, Sukhlal v. Bishambhar.
8. ('12) 15 C. L. J. 376: 14 I. C. 677, Narayan Lal Gupta v. Chulhan Lal Gupta.
9. ('21) 8 A.I.R. 1921 All. 316: 59 I.C. 873: 43 All. 20: 18 A.L.J. 679, Beni Madho v. Hira Lal.

tions of a particular priest in connexion with their ceremonial bathing do pay him some remuneration for his services. Probably they would be too much afraid of the possibility of his calling down upon them the divine displeasure if they refused payment of whatever the customary fee may be. Now it is beyond question, that is to say, it is apparent from the evidence on the record, it does not seem to have been seriously denied in the pleadings, and it would not be difficult to quote decisions of this Court which proceed on the assumption, that particular pilgrims are in the habit of seeking out particular priests, or the descendants or representatives of some particular priest with whom they know that their family has dealt for generations. It may be that a pilgrim has greater faith in the due performance of all necessary ceremonies, and therefore in the religious benefit derivable from the ceremonial bathing, if he knows that it has been performed under the guidance and with the help of the prayers and ministrations of the representative of the priest with whom his family has been in the habit of dealing. The question then is simply whether the plaintiff is entitled to restrain Beni Madho from making use of an emblem when such use in effect serves as a notice to the illiterate pilgrims that Beni Madho is the representative and successor of Sri Kishan, whereas such representative capacity belongs in law to the plaintiff Hira Lal. The nearest case to the present, that in 37 All. 72[10] decided by a Bench of this Court of which one of us was a member, proceeds on the assumption that the birt jajmani right of pragwala at the sacred confluence of the rivers at Allahabad is a right both heritable and enforceable at law. It is quite true that this point was not specifically argued in that case but the decision proceeds on the assumption that this was so."

In 1923 A.L.J. 358[11] which was a case of partition of a birt jajmani in a Panda family at Allahabad, Ryves and Daniels JJ., observed as follows :

"There can be no doubt that in 18 A.L.J. 679[9] and in 43 All. 35[6] it has been held by a Divisional Bench of this Court that this class of property, namely birt jajmani has been the subject-matter of decisions by the various Courts in India, that the rights of owners of birt jajmani have repeatedly been upheld and that such rights are heritable and sometimes transferable."

And in A.I.R. 1917 Pat. 37[12] which was a case relating to inheritance of birt jajmani at Gaya and in which the claim of the heir was recognised and decreed, Chamier C. J. observed as follows :

"A Gayawal is born a Gayawal but apparently may never have a gaddi. He has no duties which any one can compel him to perform. He is attached to no temple or other building or to any particular place. He has no right to compel any one to accept his ministrations and he cannot be removed from his position. His position appears to me to be not unlike that of a Pragwal at Allahabad or a priest at any other place of pilgrimage, who keeps books in which he enters the names and addresses of those who come to him and has a hereditary connexion with different families but cannot compel members of those families to accept his ministrations or prevent them from resorting to other priests at the same place. A somewhat similar case is that of a purohit or Mahabrahman. There seems to be some difference of opinion in Bombay on the subject but it has been held by the Calcutta, Madras and Allahabad High Courts for many years, that in the absence of a definite contract a purohit or Mahabrahman is not entitled to a decree against a rival purohit or Mahabrahman for a share in the offerings received by him from persons alleged to be jajmans of the plaintiff — the ground of the decision being that voluntary offerings may be given to any one to whom the jajmans choose to give them : *see* 6 I.C. 864,[13] 10 I.C. 41,[14] 20 All. 234[15] and 24 I. C. 204.[16] One result of this view seems to be that the purohit or Mahabrahman holds no 'office.' There appear to me to be many difficulties in the way of holding that the occupant of a Gayawal gaddi has an office hereditary or otherwise, but it is an indisputable fact that for centuries past the gaddi of a Gayawal has been treated either as an office or as property devolving according to the Hindu law of inheritance and it is said that a curious custom of adoption has sprung up according to which a gaddi may pass to an adopted son. It appears to me that if the occupant of a Gayawal's gaddi has not an hereditary office he has a business and that his business is properly capable of being inherited on his death. It is well known that Gayawals send out agents to collect pilgrims and bring them to Gaya. A Gayawal may do a good deal in the way of increasing the number of his clients and improving his 'connexion.' Attached to his business is what would be called a good will with reference to an ordinary trade or business. His books are an important part of his stock in trade and are a valuable asset. The result appears to be the same whether a gaddi is an hereditary office or a business."

A great deal of controversy exists with regard to some of the incidents connected with Birt Jajmani rights. Opinions differ whether this kind of right should be regarded as immovable property or may be regarded only as a personal property. Opinions also differ as to whether the birt jajmani is susceptible of any transfer or of a partial transfer in favour of a person who is otherwise eligible or of no transfer at all. There seems to be a general agreement as we have stated above that this right cannot be enforced against the jajman nor can it be enforced against any priest, who has received voluntarily a fee from a jajman. But the general statement of law in the cases quoted above namely, that Birt Jajmani right is a heritable property and is in some cases transferable is not open to doubt and cannot be seriously challenged. It remains now to consider the cases relied upon by the learned Judge in support of his view. 1889 A. W. N. 169[2] and 17 A. L. J. 842[3] were cases of an auction sale of a Birt Jajmani right and it was held under S. 60, cl. (f), Civil P. C., that this right was not capable of a forced sale which might entail the transfer of right in favour of a person who could not possibly exercise that right. 43 All. 159[4] was a case of Manbirt and not of Birt Jajmani and it related to a dispute

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10. ('15) 2 A.I.R. 1915 All. 3 : 26 I.C. 427 : 37 All. 72 : 13 A.L.J. 9, Ganesh v. Babu Ram.

11. ('23) 10 A.I.R. 1923 All. 350 : 75 I.C. 323 : 45 All. 445 : (1923) 21 A.L.J. 358, Ram Chander v. Chabbu Lal.

12. ('17) 4 A.I.R. 1917 Pat. 37 : 42 I. C. 478 : 2 Pat. L.J. 705, Lachman Lal v. Baldeo Lal.

13. ('10) 12 C. L. J. 75: 6 I. C. 864, Gourmani Debi v. Chairman of the Panihati Municipality.

14. ('11) 13 C. L. J. 449: 10 I. C. 41, Dwarka Misir v. Ram Protap Missier.

15. ('98) 20 All. 234: 1898 A. W. N. 23, Oochi v. Ulfat.

16. ('15) 2 A. I. R. 1915 Mad 597: 24 I. C. 204: 26 M. L. J. 482, Mahadeva Vazulu v. Mathura Suryaprakasam.

a as to the division of a voluntary offering made by a client. The judgment in this case was delivered by Tudball J. who also delivered the judgment in 43 All. 35[6] and it is obvious from the fact that the same learned Judge was party to both cases that they referred to two different kinds of rights.

A Manbrit essentially differs from a Birt Jajmani. In the Manbrit the relation between Jajman and Purohit is a temporary one and there is no fixity or hereditary character about it. But in Birt Jajmani, especially those relating to Hindu pilgrimages like Muttra, Benares and Allahabad, though it is open to parties to break away the old connexion and establish a new one by custom and usage of the country as a matter of practice and as a general rule the connexion between Purohit and Jajman is both permanent and hereditary. In 1934 A. L. J. 1197[5] which was a suit brought by a son of a Hindu priest at Azamgarh against his father for partition of a b joint family property, a question arose whether the two items of property which were purchased by the father from his income as priest should be regarded as an ancestral property or personal property of the father and it was held that they were the personal property of the father. This was also a case of Manbrit, and Sir Shah Sulaiman expressly states that the property in dispute would be the personal property of the father.

In our opinion, the right claimed by the plaintiff is a right in property and the plaintiff's suit is one of a civil nature and her suit was wrongly dismissed by the learned District Judge and on the findings arrived at by the Court below she is entitled to a decree for declaration of her rights and to an injunction against the defendants and for recovery of possession of the pilgrims' Bahis. But, though c defendants 1 and 2 are to be restrained by an injunction, it is necessary to specify the correct scope of this injunction. The defendants cannot be prohibited from working as Purohits nor can they be restrained from accepting any pilgrim coming from Rajgir, Koli, Almora, Kumaun and Nainital as their jajman, provided the jajman of his own free will with full knowledge of the facts chooses to accept the defendants as their Panda. But the defendants cannot be permitted to work under name and colour of the plaintiff's Birt Jajmani nor can they be permitted to use Bahis, marks and other paraphernalia associated with the plaintiff's Birt Jajmani.

We accordingly allow this appeal, set aside the decree of both the Courts below and in lieu thereof grant to the plaintiff the following decree : (1) It is declared that by right of inheritance to Girdhar Lal d Gangaputra the plaintiff is owner and in possession of the Birt Jajmani of Hindu Pilgrims of Rajgarh and Koti and of 6/16 share in the Birt Jajmani of Nainital, Almora and Kumaun and she is entitled to receive offerings from the pilgrims of the said places as a Gangaputra and defendants 1 and 2 have no right or interest in the said Birt Jajmani or its offerings. (2) A permanent injunction is hereby issued to defendants 1 and 2 restraining them from interfering with the plaintiff's right as mentioned above. (3) The plaintiff is entitled to possession of the Bahis relating to plaintiff's Birt Jajmani and an inquiry will be made about these books in execution of this decree and if discovered possession will be awarded to her. (4) The defendants will bear their own costs in all the Courts and defendant 2 Gajanand, shall pay 3/4th of the plaintiff's costs in all the Courts.

G.N./R.K. *Order accordingly.*

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BRAUND AND YORKE JJ.

Upper Jumna Valley Electricity Supply Co., Ltd.— Applicant

v.

Notified Area, Mowana—Opposite Party.

Misc. Case No. 545 of 1941, Decided on 12th March 1942; reference made by Addl. Dist. Magistrate, Meerut.

U. P. Municipalities Act (2 of 1916), S. 128— Circumstances and property tax—Tax must be on net income.

The commonly accepted meaning of the word "income" apart altogether from any particular context, is "the balance of gain over loss" : (1881) 6 A. C. 373; ('36) 23 A.I.R. 1936 Oudh 206 and ('38) f 25 A.I.R. 1938 All. 302, *Rel. on.* [P 324 C 1, 2]

Therefore the circumstances and property tax should be assessed on the net income and not on the gross income. [P 324 C 2]

Gopal Behari — for Applicant.

Jagnandanlal — for Opposite Party.

BRAUND J.—This is a reference to us made by the Additional District Magistrate, Meerut, under S. 162 (1), U. P. Municipalities Act, 1916. It would appear that the Upper Jumna Valley Electricity Supply Co. Ltd., which carries on its operations in part within the Notified Area both of Baghpat and Mowana, has been assessed by the Committees of those two areas respectively to certain sums for the years 1939 and 1940 in respect of what is known as "circumstances and property tax." On appeal from that assessment to the District Magistrate, the g latter felt himself in some doubt on a question of principle and has referred it to us. Put shortly, the matter which perplexed him was whether the income of the assessee on which the "circumstances and property" tax ought to be assessed was the net income or the gross income for the years in question.

This so-called "circumstances and property tax," is not a very pleasing thing and has been subject of more than one judicial comment. It seems to arise under S. 128, Municipalities Act of 1916, which gave power to a Municipal Board (in which for the present purpose may be included a Notified Area Committee) to impose taxes of certain specified kinds one of which—No. 9—was "a tax on inhabitants assessed according to their circumstances and property." It is almost impossible to imagine a more vague expression than that. We are not concerned h at the moment to make any comments on the validity of the tax which has been imposed in the case and we content ourselves with drawing attention to the actual notification of 28th June 1919, which in the case of the Notified Area of Mowana actually imposed the tax. It was imposed in these words :

"A tax on all persons residing or carrying on any trade, calling or vocation or owning property within the notified area of Mowana is to be levied according to their circumstances and property . . ."

Then follows an explanation to the effect that the word "person" is to include a firm, company, or association, and finally it was provided that "the rate of assessment" should be on a sliding scale adjusted and assessed on the "income" of the assessee. We assume that what was meant was the "annual income of the assessee" though it is not in terms actually so said. The result appears to be that the tax, which was actually imposed according to the machinery for imposing it provided by the

Municipalities Act, was a tax which had to be assessed by virtue of a reference to the assessee's "income". We point out, therefore, that the charging provision imposing the taxation does so impose a charge on "income" and on nothing else. In the case of the charge of the tax so far as the Notified Area of Baghpat is concerned, it is imposed by a notification in language which does not, for any material purposes, differ from the language in the case of Mowana.

By S. 153, read with S. 296, Municipalities Act, the Local Government was given certain powers to make rules, among other things, to provide for the assessment, collection and composition of taxes imposed under the Municipalities Act. In the case of Mowana Notified Area, advantage was taken of this and a code of rules was provided according to which the tax in question had to be assessed, calculated and paid. The only materiality of these rules for the present purpose is that we observe that, in framing them, the Local Government has thought fit to depart from the language of the charging provision which, we have already said, inposes a tax on income and on nothing else, by introducing a number of variations of that expression such as "income or profits," "total annual income or profits" and so forth. All we mention this for is to point out again that on the present reference all we are concerned with is that which the tax has been imposed upon, namely, the "income" of the assessee.

The short point in reference, therefore, is what is the meaning of the word "income" as it appears in the respective notifications applicable to those two Notified Areas. The Notified Area Committees, notwithstanding the definition which has been given to the expression in the rules of one of them as "income or profits"—have contended that the word "income" in the notification must be so literally construed as to mean everything "that comes in" and that there is no room for deducting outgoings or expenses of any kind. In other words, they contend for the extreme view that "income" means the gross amount of everything that comes in without deduction. The assessee, on the other hand, contends that they must at least be allowed to deduct all those outgoings which would be deductible in a commercial sense before profits are arrived at. In our view there can be no doubt but that the contention of the assessees is the right one. We have the assistance in the first place of an expression of opinion, albeit in another context, by the Judicial Committee itself as to the commonly accepted meaning of the word "income." In 6 A. C. 373[1] at p. 384, Sir Montague E. Smith, in construing a statute of New Brunswick containing the words "the amount of income," says this :

"Their Lordships have come to the conclusion, upon consideration of the Act in question, that there is nothing in the enactment imposing the tax, nor in the context, which should induce them to construe the word "income," when applied to the income of a commercial business for a year, otherwise than in its natural and commonly accepted sense, as the balance of gain over loss ....."

That is very clear expression of opinion that the commonly accepted meaning of the word "income," apart altogether from any particular context, is "the balance of gain over loss." There have been, moreover, cases in India itself which have taken the same view : A. I. R. 1936 Oudh 206[2] and 1938 A. L. J. 258.[3] In all the circumstances, we feel not the least doubt that the proper construction to be given to the word "income" in each of the notifications relating to the Bhaghpat and Mowana Notified Area Committees respectively is that it means the net income of the assessee in the same sense in which the word "profits" would commercially speaking be ascertained. The learned Additional District Magistrate has perhaps invited us to go a little further and to tell him what types of expenses and so forth should be deducted. We think it better to resist the temptation to do that and to confine ourselves merely to the question of principle. We shall, therefore, answer his own question by saying that the company in this case should be assessed on its net income for the years in question. We think that the proper order for costs is that the assessees shall be entitled to their costs of this reference to the High Court in any event.

K.S./R.K. *Reference answered.*

1. (1881) 6 A. C. 373 : 50 L. J. P. C. 33 : 44 L. T. 897 : 29 W. R. 917, Lawless v. Sullivan.

2. ('36) 23 A. I. R. 1936 Oudh 206 : 160 I. C. 803: 12 Luck 182 : 1936 O.W.N. 185, Allahabad Bank Ltd. v. Municipal Board, Sitapur.

3. ('38) 25 A. I. R. 1938 All. 302 : 175 I. C. 613 : I.L.R. (1938) All. 489 : 1938 A.L.J. 258, Auraiya Pay Office of the Imperial Bank of India v. Notified Area Committee, Auraiya.

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ALLSOP AND VERMA JJ.

Sheikh Mohammad Hammad and others — Plaintiffs — Appellants

v.

Tej Narain Lal alias Tej Bahadur Lal and another — Defendants — Respondents.

First Appeal No. 362 of 1935, Decided on 17th February 1942, from decision of Sub-Judge, Azamgarh, D/- 30th March 1935.

Civil P. C. (1908), O. 22, Rr. 4 and 5—Death of respondent pending appeal — One of heirs appointed by Court to represent deceased—Heir represents all those claiming through deceased —Decree in appeal is binding upon them—Fact of deceased being Mahomedan does not affect position.

Where on the death of a respondent during the pendency of the appeal one of his heirs is appointed by the Court to represent the deceased in the appeal, the heir represents all those who claim the property in issue as the heirs of the deceased and a decree passed in the appeal is binding upon them as much as it is upon him. The fact that the deceased was a Mahomedan does not affect the position : 26 Mad. 230 ; ('24) 11 A. I. R. 1924 Bom. 420 and ('28) 15 A. I. R. 1928 All. 532, *Rel. on*; *Case law discussed.* [P 326 C 1, 2]

C. P. C. —
('40) Chitaley, O. 22 R. 4 N. 3 Pt. 1; O. 22 R. 4 N. 9 Pt. 1; O. 22 R. 5 N, 7 Pt. 1.
('41) Mulla, Page 935 Pt. (i).

Sir Syed Wazir Hasan and B. N. Misra — for Appellants.

Shiva Prasad Sinha and S. N. Verma — for Respondents.

ALLSOP J. — The property in suit originally belonged to one Daulat Prasad and was transferred

after his death by his widow Mt. Janki Kuer by means of two deeds of mortgage executed in the year 1902. The mortgagee brought a suit on the basis of his mortgages and obtained a decree for sale of the property. The property was put to sale and was purchased by Nazir Husain in the year 1918. After the death of Mt. Janki Kuer in that same year a suit was instituted in the year 1920 by Harnandan Lal and Raghunandan Lal who were admittedly the reversioners to the estate of Daulat Prasad. They impleaded the mortgagee from Mt. Janki Kuer and Nazir Husain the purchaser of the property. Their suit for possession was dismissed. They appealed and during the course of the appeal they both died. One of them left no issue and the other left him surviving his son, the present defendant, Tej Narain Lal. Tej Narain Lal was impleaded as the plaintiff appellant in place of Harnandan Lal and Raghunandan Lal and he eventually succeeded in his appeal, obtained a decree for possession on the condition that he should pay a sum of money, paid the money and took possession of the property in suit.

We now come to the facts which have given rise to the controversy in the suit with which we are dealing. Nazir Husain also died during the pendency of the appeal and his eldest son, Zainul Ebad, was impleaded as his representative in interest. The decree obtained by Tej Narain Lal was thus a decree against Zainul Ebad alone according to the record. Nazir Husain left him surviving besides Zainul Ebad, a widow Mt. Sharafat Bibi, another son Mohammad Hammad and four daughters. It is the widow and Mohammad Hammad and the four daughters who are the plaintiffs appellants in the appeal before us. They sought possession of the property upon the allegation that the suit instituted by Raghunandan Lal and Harnandan Lal against Nazir Husain had been dismissed as against Nazir Husain and that the decision in the appeal was not binding upon them because they were not impleaded as the representatives in interest of Nazir Husain. The learned Judge of the trial Court has dismissed the suit upon two grounds. He has referred to the fact that there was a dispute between Nazir Husain's two brothers, Mushir Husain Qidwal and Maqbul Husain, and the present plaintiff Mohammad Hammad, on the one side and Zainul Ebad on the other side, that this controversy was referred to arbitration and that by the award it appeared that none of the plaintiffs had any interest in the property in suit. We agree with the learned Judge of the trial Court that the effect of the arbitration award was to destroy any claim that Mohammad Hammad might have to the property in suit because the decision was that certain property belonging to Nazir Husain should pass to him, certain other property to Zainul Ebad and the remainder to Mushir Husain and Maqbul Husain and the property in suit is not included in the property which was awarded to him. On the other hand, we cannot see how this award can have any effect on the rights of Nazir Husain's widow and his daughters who were not parties to the dispute or to the reference to arbitration. The other ground upon which the learned Judge has dismissed the suit is that Zainul Ebad was appointed by the Court to represent the interests of Nazir Husain after the latter's death during the pendency of the appeal which resulted in a decree for possession in favour of Tej Narain Lal, and that Zainul Ebad represented the estate of Nazir Husain and the decree passed against him was binding upon all those who claimed the property through Nazir Husain. We have come to the conclusion that the decision of the learned Judge of the Court below upon this point is correct.

We need refer only to three decisions which seem to us to conclude the point. The first of these is the case in 26 Mad. 230.[1] In that case a suit for sale on the basis of a mortgage was instituted against a certain person who died in the course of the proceedings. After his death, one of his heirs alone was impleaded as his representative and a decree for sale was passed. The plaintiff purchased the property himself in execution of the decree. Thereafter, the heirs who had not been impleaded as the representatives of the mortgagor dispossessed the plaintiff and he was compelled to bring a suit for possession. It was held in these circumstances that one heir had been appointed as the representative of the interests of the deceased by an order of the Court and that the decree passed against him in the suit for sale was binding upon the other heirs of the deceased mortgagor. There is a similar decision in A. I. R. 1924 Bom. 420.[2] Finally, we may refer to the case in 50 All. 857.[3] In that case it was held that an appeal did not abate against heirs who had not been impleaded as representatives of one of the deceased parties when other heirs had been so impleaded. Learned counsel for the appellant has argued that this decision is not strictly in point because it does not deal with any question of res judicata. It seems to us however that the plaintiffs, in order to succeed, are driven into the position that the original decree dismissing the suit of Raghunandan Lal and Harnandan Lal is binding in so far as their shares in the property are concerned and they can maintain that position only by saying that that decree is binding because the appeal against it abated in so far as they are concerned. In our judgment the ruling which we have quoted precludes them from putting forward an argument of this nature.

Learned counsel for the appellant has not been able to produce any distinct rulings on the question whether a person appointed as the legal representative of a deceased party in a suit sufficiently represents all others who may be interested in the property as claimants through the deceased. He has referred us to the case in 1936 A.L.J. 622.[4] It seems to us however that that case does not deal with the question which is before us. Under the provisions of O. 22, R. 4 of Sch. 1, Civil P. C., a representative is to be appointed in place of a deceased party to a proceeding. Under R. 5 of that order it is for the Court to decide who the proper representative is if there is a dispute upon the question. It was held in the case in 1936 A. L. J. 622[4] mentioned above that an order passed under O. 22, R. 5 that a certain person was the representative of a deceased party did not operate as res judicata when the question arose in a subsequent suit which of the claimants was the person really entitled to succeed to other property. That is not the question which we have to consider in this case. We have no doubt if the question arose in respect of some other pro-

1. ('03) 26 Mad. 230 : 12 M. L. J. 368, Kadir Mohideen v. Muthukrishna Ayyar.
2. ('24) 11 A. I. R. 1924 Bom. 420 : 80 I. C, 758 : 26 Bom. L. R. 375, Johrabi Sadaullah Khan v. Bismillabi Sadruddin.
3. ('28) 15 A. I. R. 1928 All. 532 : 111 I. C. 238 : 50 All. 857 : 26 A.L.J. 820, Mohammad Zafaryab Khan v. Abdul Razzaq Khan.
4. ('36) 23 A.I.R. 1936 All. 412 : 163 I.C. 283 : 58 All. 734 : 1936 A. L. J. 622, Antu Rai v. Ram Kinkar Rai.

perty whether the plaintiffs were or were not entitled to a share in the estate of Nazir Husain that the order of the Court that Zainul Ebad should represent him in Raghunandan Lal's and Harnandan Lal's appeal would not operate as res judicata. The situation with which we have to deal is a different one. The question is whether Zainul Ebad having been appointed by the Court to represent Nazir Husain in the appeal arising out of the suit of Raghunandan Lal and Harnandan Lal did not in that suit represent all those who claimed the property which was in issue in that suit as the heirs of Nazir Husain. If he was their representative then the decree passed in that suit is binding upon them as much as it is upon him and we think that the authorities which we have quoted establish beyond all doubt that Zainul Ebad was the representative of all who demand through Nazir Husain in that appeal. There is one other authority to which we may refer in 47 All. 466.[5]

Learned counsel for the appellants has suggested that the rules of Mahomedan law are such that no individual Mahomedan can represent others so as to bind them in the course of litigation. It is of course true that Mahomedan heirs succeed to separate shares in an estate and it is doubtless true that in the ordinary course a person litigating about the share of one of them could not produce any effect on the share of another who was not impleaded but those are not propositions which affect the decision of this appeal. Raghunandan Lal and Harnandan Lal instituted their suit against Nazir Husain and the death of the latter did not change the nature of the claim so that it became a number of separate but connected claims against the various heirs. Zainul Ebad was not impleaded as the owner of a share in his own right but in a representative capacity as the person best suited to uphold the interests of Nazir Husain's estate. Learned counsel has referred to the case in 40 Mad. 243,[6] but that was a case where one brother sued to redeem a mortgage when he had succeeded to a share in the equity of redemption and it was held that the decree passed against him could not bind another brother who was a minor at the time and who was not represented in the suit and it is to be observed that this was not a case in which the original holder of the property had been a party and had died in the course of litigation; that case carries us no further.

Reference has also been made to the cases in 1938 A. L. J. 843,[7] 58 All. 594,[8] 50 Cal. 978[9] and 1937 A.L.J. 1320;[10] but these again are cases which are authority only for the proposition that Mahomedans succeed to separate shares. They are not cases where any question arose of an order passed under R. 4 or R. 5 of O. 22 of Sch. 1, Civil P. C. We may mention that the case in 26 Mad. 230[1] and the case in 50 All. 857[3] were cases in which Mahomedans were concerned. We are satisfied that the decision of the Court below is right that Zainul Ebad sufficiently represented the interests of the present plaintiffs in the appeal arising out of the suit instituted by Raghunandan Lal and Harnandan Lal against Nazir Husain and that the decision in that suit prevents them now from obtaining a decree for possession of the property as against Tej Narain Lal. The result is that we dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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5. ('25) 12 A.I.R. 1925 All. 479 : 87 I. C. 799 : 47 All. 466 : 23 A.L.J. 332, Dip Narain Rai v. Lachhman Upadhiya.

6. ('18) 5 A. I. R. 1918 Mad. 1049 : 40 I. C. 210 : 40 Mad. 243 : 32 M. L. J. 195 (F. B.), Abdul Majeeth v. Krishnamachariar.

7. ('38) 25 A.I.R. 1938 P.C. 169 : 174 I.C. 977 : 13 Luck. 494 : 32 S. L. R. 772 : 65 I. A. 219 : 1938 A. L. J. 843 (P. C.), Mohammad Kazim Ali v. Mohammad Sadiq Ali.

8. ('36) 23 A. I. R. 1936 All. 94 : 160 I. C. 1030 : 1936 A.L.J. 431 : 58 All. 594, Manni Gir v. Amar Jati.

9. ('24) 11 A.I.R. 1924 Cal. 384 : 79 I. C. 491 : 50 Cal. 978, Sukur Mahomed v. Asmot Mandal.

10. ('38) 25 A. I. R. 1938 All. 182 : 174 I. C. 651 : I.L.R. (1938) All. 167 : 1937 A. L. J. 1320, Phool Chand v. Mantia.

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ALLSOP AND VERMA JJ.

Ram Lal—Plaintiff—Appellant

v.

Mt. Genda and others—Defendants—Respondents.

First Appeal No. 440 of 1935, Decided on 2nd February 1942, from decree of Second Civil Judge, Cawnpore.

(a) Transfer of Property Act (1882), Ss. 68 (1) (a), 67 and 58 (d) — Usufructuary mortgage — Covenant to repay mortgage money in certain time does not alter character of mortgage — Mortgaged property cannot be put to sale — Mortgagee is only entitled to money decree.

A mere covenant to repay the mortgage money in a certain time without any hypothecation does not alter the character of a usufructuary mortgage and the mortgage property cannot be sold. Where in the case of usufructuary mortgage there is nothing to suggest that the mortgagors intended that the mortgage money might be recovered by sale of the mortgaged property and the mortgagors merely gave the morgagee the right to institute a suit for the recovery of his money in certain circumstances, the mortgagee in a suit based upon the covenant to repay is entitled only to a simple decree and not to a decree for sale of the mortgaged property : ('38) 25 A.I.R. 1938 All. 418 (F. B.), *Rel. on.* [P 327 C 2]

T. P. Act —

('36) Mulla, Page 342 N. "No time limit;" Page 421 Pt. (v).

('36) Mitra, Page 315, N. 343; Page 412, N. 409; Page 420, N. 416.

(b) Practice—New plea—Appeal — Usufructuary mortgage—Suit by mortgagee based upon covenant of repayment entitling him to money decree—Plea that mortgagee is entitled to decree for sale on ground of his being deprived of his security or possession cannot be allowed to be raised for first time in appeal — Matter is not one of mere technicality but changes nature of claim.

Where the case of the usufructuary mortgagee is based upon the covenant of repayment which would entitle him to a decree for the money under S. 68 (a) he cannot be allowed to set up the plea that he is entitled to a decree for sale upon the ground that he had been deprived of his security or possession of the property for the first time in appeal as it changes the nature of his claim and is not a matter of pure technicality. [P 328 C 1]

C. P. C. —
('40) Chitaley, O. 41 R. 1, N. 12 Pt. 1.
('41) Mulla, Page 1155 N. "Grounds of objection which may be taken for the first time in appeal."

(c) Usufructuary mortgage — Lease of mortgaged property back to mortgagor—Mortgagee obtaining decree for rent against mortgagor — Subsequent suit on covenant to repay—Money decree passed — Deduction of amount of rent decree from mortgage money held justified — Amount of rent decree can be included only if decree was for sale.

Where a usufructuary mortgagee leases back the mortgaged property to the mortgagor and obtains a decree for rent and subsequently sues on the covenant of repayment in the mortgage he is entitled to money decree for the mortgage money after deducting the amount of the rent decree. The decree would include the whole amount only if it were a decree for sale. [P 328 C 1]

P. L. Banerji and S. N. Seth—for Appellant.

B. Malik and B. N. Sahai—for Respondents.

ALLSOP J. — This appeal arises out of a suit for the sale of certain property on the basis of a mortgage. There was an alternative relief for foreclosure, but it is not suggested now that a decree for foreclosure could be passed and that is a matter which no further concerns us. The learned Judge of the lower Court passed a simple money decree in favour of the plaintiff-appellant and the main question in issue before us is whether instead of a simple money decree he should have passed a decree for the sale of the property. The mortgage with which we are concerned was executed by Mt. Genda Bibi and her husband Banke Behari Lal in favour of Ram Lal, the plaintiff-appellant. By the deed the mortgagors mortgaged a house in order to secure a sum of Rs. 6000 advanced to them. This was a usufructuary mortgage. The mortgagors said that they had put the mortgagee into possession of the house and that he should retain possession for a period of three years. There were certain other covenants. The mortgagors undertook to keep the house in proper repair and it was agreed, if they did not do so, that the mortgagee might sue to recover the mortgage money. The mortgagors also guaranteed that there was no prior charge upon the property and there was a covenant that the mortgagee might recover the mortgage money if it was found that there was such a charge. Finally the mortgagors agreed to pay the entire mortgage money to the mortgagee within a period of three years with interest at a certain rate. They agreed that the mortgagee would have a right to sue for his money if they did not make the payment within the fixed period. It appears that the mortgagee on the date when the deed of mortgage was executed in his turn executed a lease of the house in favour of Banke Behari Lal. Subsequently, there seems to have been some difficulty about the recovery of rent under the terms of the lease and the mortgagee instituted suits against Banke Behari Lal. The last of these was a suit for ejectment as a result of which a decree for the ejectment of Banke Behari Lal was passed. When the mortgagee sought to execute this decree he was met by an objection on the part of Mt. Genda Bibi, who said that she was in possession as the owner of the house and not in her capacity as the wife of the lessee. Her objection was sustained and it does not appear that the mortgagee instituted any suit in order to obtain a declaration that she was not entitled to remain in possession of the house. The mortgagors have not appeared before us and are not represented. The appeal is contested by subsequent mortgagees of the house, who are naturally interested in preventing a decree for sale being passed on a mortgage which is prior to theirs.

Learned counsel for the plaintiff-appellant has argued in the first place that his client is entitled to a decree for sale under the provisions of Ss. 68 (1) (a) and 67, T. P. Act. He has, however, very properly brought to our notice a decision of a Full Bench of this Court in I. L. R. (1938) All. 714.[1] There was a previous decision of this Court in 28 All. 157,[2] that a mere covenant to repay the mortgage money did not take what would otherwise have been a usufructuary mortgage out of that category. This decision has removed the possible effect of the decision in 21 All. 4,[3] it being held in the later case that the former had been decided upon its special facts. The Full Bench case in I.L.R. (1938) All. 714[1] maintained the decision in the previous case in 28 All. 157,[2] and consequently we must hold that the mortgage with which we are dealing is purely a usufructuary mortgage. Its terms are those of an ordinary usufructuary mortgage with the addition of a covenant to repay the mortgage money in a certain time. It was held also in I.L.R. (1938) All. 714[1] that the mortgaged property cannot be put to sale when there is a usufructuary mortgage together with a mere covenant to pay the mortgage money without any hypothecation. In the mortgage-deed with which we are dealing there is nothing to suggest that the mortgagors intended that the mortgage money might be recovered by sale of the mortgaged property. They merely gave the mortgagee the right to institute a suit for the recovery of his money in certain circumstances. We consider, therefore, that the learned Judge of the lower Court was perfectly right in holding that the mortgagee was entitled only to a simple money decree and not to a decree for sale of the mortgaged property.

Learned counsel has also placed another argument before us. He has said that the history of the relations between the mortgagors and the mortgagee shows that the latter was deprived of his security by the assertion of Mt. Genda Bibi of her right to remain in possession of the property as its owner and that the mortgagors failed to secure the possession of the property to the mortgagee without disturbance by the mortgagors. He argues, therefore, that he was entitled to recover the mortgage money under cls. (b) and (c) of S. 68 (1), T. P. Act, and he relies upon the decision of their Lordships of the Privy Council in 4 Luck. 363[4] for the proposition that a mortgagor who has secured the right to recover the mortgage money under the provisions of cls. (b) and (c) of S. 68 (1), T. P. Act, is entitled to a decree for the sale of the mortgaged property under the provisions of S. 67 of the Act. In that case their Lordships had held that the mortgage which was before them was a combination of a usufructuary and a simple mortgage and the result is that the provisions of S. 67 that a usufructuary

1. ('38) 25 A. I. R. 1938 All. 418 : 176 I. C. 492 : I. L. R. (1938) All. 714 : 1938 A.L.J. 746 (F. B.), Kanhaiya Prasad v. Mt. Hamidan.
2. ('05) 28 All. 157 : 1905 A.W.N. 226, Kashi Ram v. Sardar Singh.
3. ('98) 21 All. 4 : 1898 A.W.N. 167, Jafar Husen v. Ranjit Singh.
4. ('29) 16 A. I. R. 1929 P. C. 139 : 116 I. C. 414 : 4 Luck. 363 : 56 I.A. 299 (P.C.), Narsingh Partab v. Md. Yaqub Khan.

mortgagee as such is not entitled to institute a suit for sale of the property did not require consideration. In that case the mortgagee was seeking to recover his money under that part of the mortgage which was simple.

Learned counsel has, however, pointed out that the Full Bench of this Court in I. L. R. (1938) All. 714[1] gave a usufructuary mortgagee a decree for sale purporting to follow the decision of their Lordships in 4 Luck. 363.[4] We might consider ourselves bound by the decision of the Full Bench of this Court in that case, but the real answer to the appellant upon this point is that he never made a case in the trial Court that he was entitled to recover his mortgage money upon the ground that he had been deprived of his security or that his possession of the property had not been secured to him. His case was clearly based upon the covenant of repayment which would entitle him to a decree for the money under the provisions of cl. (a) of S. 68 (1), T. P. Act. Learned counsel has urged that we should not prevent his client from obtaining a decree for sale upon a mere technical omission in the pleas. It seems to us, however, that this matter is not one of pure technicality. If we were now to give the plaintiff appellant a decree for sale upon the ground that he had been deprived of his security or possession of the property, we should be allowing him to change the whole nature of his claim and it is possible that we might be causing considerable injustice to the contesting respondents who are subsequent mortgagees, as we have already stated, and are not the mortgagors themselves who were parties to the various transactions between them and the mortgagee. We are not willing to allow the plaintiff appellant to change his case in this way, and the result is that the appeal must fail.

We may mention that the appellant raised the question of the amount of the decree, but that is a question which would only arise if a decree for sale could be passed. The plaintiff appellant had already obtained a decree for arrears of rent and the sum due on that decree was deducted from the whole amount of the mortgage money. If a decree for sale had been passed, it might rightly have included the whole amount, but as we cannot pass such a decree, it is not contended now that the sum decreed was less than it should have been. We dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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YORKE J.

Chandra Prabhakar — Appellant

v.

Emperor.

Criminal Appeal No. 1050 of 1941, Decided on 15th May 1942, from order of Addl. Sess. Judge, Cawnpore, D/- 29th November 1941.

Penal Code (1860), S. 304A — Culpable negligence explained — Negligent act must be proximate and efficient cause of death—Village theatrical company playing "Sultana Dacoit" on chabutra at night — Accused, mukhia of village, carrying with him his twelve bore loaded gun with one hammer at full cock as he was in fear of certain dacoits released from jail, coming on scene and standing in corner of chabutra to watch performance—While he was so doing, *B* who was playing role of drunken dacoit in order to make play more amusing approaching accused and grappling with him—In course of struggle accused's gun going off — *B* receiving shots in head and dying—Accused held not guilty under S. 304A.

Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished. The death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must have been the *causa causans*; it is not enough that it may have been the *causa sine qua non.* [P 329 C 2]

While a village theatrical company was playing the piece called "Sultana Dacoit" on a chabutra as part of the celebrations in connection with a wedding the accused who was the mukhia of the village and was carrying with him his twelve bore loaded gun with one hammer at full cock, as he was in fear of being attacked by certain dacoits who had been recently released from jail, came on the scene and took his stand on a corner of the chabutra or on one side of the chabutra to watch the performance. While he was doing so, one of the actors *B* who was playing the part of a drunken dacoit thought it would be an amusing addition to the play to make an apparent assault on the mukhia. He approached the mukhia who was standing holding his gun and grappled with him *(lipat gaya)* and there was something in the nature of a struggle or wrestling and in the course of this struggle the gun went off and *B* received shots in his head from which he died :

Held that as the accused was in fear of dacoits he was fully justified in carrying his gun with him and in having it loaded. There was nothing either rash or negligent in the accused carrying a loaded gun at night and standing quietly in a corner and watching a dramatic performance. The accused was in the position of a person who was not endangering anybody's life at all as long as he stood where he was, whether the gun was loaded only or whether it was both loaded and cocked. No doubt the accused was the cause "sine qua non," but it was the intervention of *B* which brought about the situation of danger and that was not an intervention which he could by any means be able to foresee. Hence the accused could not be convicted under S. 304A.

[P 329 C 1 ; P 330 C 1]

Penal Code —

('36) Ratanlal, Page 761 Pt. 7; Page 762 Pt. 3.

('36) Gour, Pages 1046 Pt. 1.

K. O. Carleton — for Appellant.

Assist. Govt. Advocate — for the Crown.

JUDGMENT.—This is an appeal by one Babu Ram who has been convicted by the Additional Sessions Judge of Cawnpore of an offence under S. 304A, Penal Code, on the charge that he on or about 2nd July 1941 at village Dharmangadpur at 1 A. M. caused the death of one Babu Faqir by handling his gun rashly or negligently. The facts are, subject to certain considerations which I shall point out later, free from doubt. On the night between 1st and 2nd July 1941 after 11 P. M., a village theatrical company is said to have been playing the piece called Sultana Dacoit on a chabutra in front of the house of one Anant Ram Sonar in village Dharmangadpur as part of the celebrations in connection with the wedding of the daughter

of Anant Ram. Babu Ram appellant who is the mukhia of the village came on the scene carrying with him his gun and wearing a belt with cartridges. It has been shown in evidence that the appellant was at this date not unreasonably in fear of being attacked by certain dacoits who had recently been released from jail and this is the reason why he was carrying a gun with him. In these circumstances, it cannot be doubted that he was fully justified in carrying his gun with him and in having it loaded. A man who is in some fear of attack is not entitled to presume that an assailant would give him time to load his gun. The appellant quite naturally took his stand on a corner of the chabutra or on one side of the chabutra to watch the performance. While he was doing so, one of the actors by name Babu Faqir who was playing the part of a drunken dacoit thought it would be an amusing addition to the play to make an apparent assault on the mukhia. He approached the mukhia who was standing holding his gun and grappled with him *(lipat gaya)* and there was something in the nature of a struggle or wrestling and in the course of this struggle the gun went off and Babu Faqir received shots in his head from which he died within 15 or 20 minutes. I may now touch on the doubtful points in the case. It is first of all said by the prosecution witnesses in cross-examination that when Babu Faqir grappled with the appellant, the appellant shouted to Babu Faqir to let him alone because his gun was loaded, meaning that there was a danger of an accident. The learned Sessions Judge thought that the witnesses had made this statement in cross-examination with the idea of helping the appellant and it may well be that that is the truth.

The second doubt which arises at this stage and about which there is no certain evidence is whether the gun, which is an ordinary double barrel breach loading twelve bore hammer gun, was only loaded or both loaded and cocked, that is the hammers had been cocked. The learned Sessions Judge has arrived at the conclusion that the gun was cocked. About the alternative he thought it was not easy to conceive that the hammer should receive just such a kick or push as would raise it not to its full pitch and yet to more than three-fourths of it and let the hammer spring back and fire the gun. I have had the gun before me and examined it and I should perhaps say that I have handled and used many twelve bore hammer guns for the last 40 years or more. It is true that the main spring actuating the right hammer is slightly weaker than that which actuates the left. It follows from this that it would be slightly easier by catching it in clothing during the struggle to pull this hammer back accidentally than it would be so to pull back the left-hand hammer. It is of course conceivable that in a struggle the hammer might be drawn back half way or three-fourths of the way towards what is called full cock, and then if the hammer which was pulled back slipped free from what was holding it, it would spring back and if the spring had been sufficiently compressed, the gun would fire. It is of course I think quite free from doubt that if this had been the manner in which the gun was fired on this occasion, no charge could possibly have been sustained under S. 304A against the appellant. There is nothing either rash or negligent in carrying a loaded gun at night and standing quietly in a corner and watching a dramatic performance.

The learned Sessions Judge was of opinion that the hammer was at full cock and on the whole I am inclined to agree with him in that finding of fact. We have then to consider whether, by having in his hands a loaded gun with at any rate one hammer at full cock and watching a dramatic performance, the appellant was committing a rash or negligent act. Now I can conceive that had the appellant come to the scene of occurrence carrying his gun at full cock and had he then had, for example, to step up into a chabutra or step across a drain or other obstacle on the road and had he in so doing tripped or fallen and thereby discharged the gun and wounded somebody, it might have been said that he had caused death by a negligent act. I find it, however, very difficult to say that by merely standing quietly in a corner and looking at a performance while holding a gun which is loaded and cocked and thereby creating a situation in which a third person might come to his death by making an unprovoked assault upon the appellant, the appellant was guilty of a negligent act or could be held guilty of causing death by a negligent act. There is no reported case precisely parallel with the present case but it has been held (I am quoting from Ratanlal's Law of Crimes, Edn. 15) that: "Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence, and ought to be punished."

Similarly, in another case, it has been held that: "Death should have been the direct result of a rash and negligent act of the accused and that act must have been the proximate and efficient cause without the intervention of another's negligence. It must have been the *causa causans*; it is not enough that it may have been the *causa sine qua non*."

Similarly, it has been said that: "The rash and negligent act means the act which is the immediate cause of death and not any act or omission which can at most be said to be a remote cause of death." It seems to me that one can find an analogous case (though I recognise that arguments from analogy are by no means free from danger) by comparing two cases of death caused, for example, by a motor lorry. There is no doubt in my mind that a motor lorry or motor car is in a sense a highly dangerous weapon, but I cannot conceive that if *A* is driving along a road and *B* suddenly springs out from behind a tree and comes in front of the car or lorry and is knocked down and killed, it could possibly be said that a charge under S. 304A was sustainable against *A*, the driver of the car or lorry. On the other hand, if *A* is driving a lorry along a road and sees *B* in front of him walking in the same direction quietly and along the left hand margin of the road, and *A* sounds his horn and drives on as if it would be the inevitable result of the warning having been given that *B* would step out of the road but *B* being deaf did not step out of the road and was knocked down and killed, in that case *A* would in my judgment have committed an offence under S. 304A because there is in such a case a culpable negligence. *A* is not entitled to assume that *B* has heard him and he is not entitled to assume that even if *B* has heard him *B* will think it necessary to step off the smooth portion of the road of which he is occupying no more than is necessary for him and to travel by the rough portion at the side. So also, in the present case, the appellant is in the position of a person who is not endangering anybody's life at all as long as he stands where he is, whether the gun be loaded only or whether it be both loaded and cocked. No doubt the appellant is the cause "*sine qua non*," but in my judgment, it was the intervention of the deceased Babu Faqir which

brought about the situation of danger and that was not an intervention which the appellant could by any means be able to foresee. In these circumstances, in my opinion, the appellant has been wrongly convicted of an offence under S. 304A, Penal Code. The learned Sessions Judge says :

"The accused's loaded gun having gone off while in his hand and killed Babu Faqir, the onus lay on him to show that he had taken all care and caution with his loaded gun to safeguard others' lives and that, by an agency beyond his control, the gun went off."

So far as that proposition goes, I am not in disagreement with the learned Sessions Judge but when he goes on to say that this onus has not been discharged, I am unable to agree with him. It may be that the appellant did not himself lead any evidence with a view to discharging the onus but the onus was already discharged by the prosecution evidence which shows that the appellant was standing perfectly quietly on one side of the chabutra carrying his gun in a way not calculated to endanger the life of others and it was due to the assault of Babu Faqir, an agency beyond the control of the appellant, that the gun went off. I have no hesitation in holding that the appellant has been wrongly convicted of an offence under S. 304A, Penal Code. I set aside the conviction and sentence and direct that the appellant's bail bonds be discharged.

G.N./R.K. *Conviction set aside.*

A. I. R. (29) 1942 Allahabad 330

BAJPAI J.

Ganga Sahai — Defendant — Appellant

v.

Badrul Islam — Plaintiff — Respondent.

Second Appeals Nos. 1300 and 1301 of 1940, Decided on 16th February 1942, from decision of Addl. Civil Judge, Bulandshahr, D/- 10th September 1940.

(a) Landlord and tenant — Tenant under kirayanama executed by him taking plot of land to construct kachcha house for residence and agreeing to vacate whenever required by landlord to do so—Kirayanama held operated neither as lease nor as licence—Kirayanama held binding on tenant and not invalid by reason of S. 23, Contract Act.

Under a kirayanama executed by the tenant it was agreed by him that he was taking a plot of land from the landlord for the purpose of constructing a kachcha house on it and to live in it as a reyeya and it was further agreed that whenever the landlord wanted he could get the land vacated. In the suit by the landlord for possession of the plot and recovery of ground rent :

Held that (1) the kirayanama could not operate as a lease : 26 All. 368, *Rel. on*; [P 330 C 2]

(2) nor could the kirayanama operate as a licence as the document was not by the landlord granting to the tenant a right to do or continue to do in or upon the plot something, etc; [P 330 C 2; P 331 C 1]

(3) the kirayanama was perfectly legal and having been executed by the tenant he was bound by the terms thereof unless he was able to prove fraud or coercion. The kirayanama could not be said to be invalid by reason of S. 23, Contract Act.

[P 330 C 2; P 331 C 1]

T. P. Act —

('36) Mulla, Pages 580-581 Note : "Rent notes."

('37) Mitra, Pages 587-588, N. 568.

(b) Easements Act (1882), S. 60 — Contract to contrary disentitles licensee from claiming benefit of S. 60 — Condition entitling landlord to have land vacated by licensee at any time deprives licensee of benefit of S. 60.

A contract to the contrary disentitles the licensee from deriving advantage conferred by S. 60. There is nothing to preclude a party from binding himself to surrender land, although there may be a construction of a permanent character standing thereon. [P 331 C 1]

A condition in the licence that the landlord would have the right to get the site vacated whenever he so chose by the licensee deprives the licensee of the benefit of S. 60 : ('38) 25 A. I. R. 1938 All. 32 and ('32) 19 A.I. R. 1932 All. 33, *Rel. on.* [P 331 C 1]

C. B. Agarwala — for Appellant.

Mushtaq Ahmad — for Respondent.

JUDGMENT. — This is an appeal by the defendant who was unsuccessful in the trial Court as well as in the lower appellate Court. The plaintiff brought a suit against the defendant for possession of a certain plot of land on which a kachcha house stands and for the recovery of Re. 1 as arrears of ground rent. A registered kirayanama dated 14th September 1918 was produced by the plaintiff. The suit was contested by the defendant on the allegation that he was given a permanent right of occupation in the disputed plot by the former zamindar and a large sum of money was spent by him in erecting the house upon it and the suit was, therefore, in any event barred by S. 60, Easements Act. As I said before, a registered kirayanama was filed in evidence. In this kirayanama signed by the defendant it was agreed by him that he was taking the plot of land for the purpose of constructing a kachcha house on it and to live in it as a reyeya and it was further agreed that whenever the landlord wanted he could get the land vacated. Certain oral evidence was also tendered by the parties, as a result of which the kirayanama was formally proved and the fact that a rupee was due as arrears of ground rent was also proved. It also appeared from a certain witness produced by the defendant that the building erected by the defendant on the disputed land consisted of a kachcha enclosure wall with a bamboo gate, Sahdari made of kachcha bricks and a dubari of which the front pakha was pucca and the back one was kachcha.

Upon these facts I have got to adjudicate upon the rights of the parties. It is quite clear in view of the decision in 26 All. 368[1] that the kirayanama dated 16th September 1918 cannot operate as a lease, but at the same time the document is attempted to be enforced not against the plaintiff lessor (who never executed any document) but against the defendant who executed the document. He of course is bound by the terms of the document unless he is able to prove fraud or coercion and all that the plaintiff wants in the present case is that the defendant should be held bound by the kirayanama. Learned counsel for the defendant-appellant has argued that the document not being a lease needs must be a licence. I cannot agree with this contention. Licence has been defined in S. 52 as follows :

"Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right

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1. ('04) 26 All. 368 : 1904 A. W. N. 46 : 1 A. L. J. 96, Nand Lal v. Hanuman Das.

does not amount to an easement or an interest in the property, the right is called a license."

Here again, the document is not by the zamindar granting to the defendant a right to do or continue to do, in or upon the immovable property of the zamindar something, etc., but it is a kirayanama executed by the defendant containing certain terms on which the defendant accepted to build a house on the land. The document having been legally proved the defendant must be held bound by it. Section 60, Easements Act, was pleaded by the defendant throughout, and I may concede for the defendant that the construction which has been built upon the premises is a work of a permanent character within the meaning of that expression in section 60, Easements Act. I agree, however, with Mohammad Ismail J. in what he said in A. I. R. 1938 All. 32[2] at page 34 :

"Again, I have not been referred to any provision of law which precludes a party from binding itself to surrender land, although there may be a construction of a permanent character standing thereon."

In 1931 A. L. J. 649[3] a Bench of this Court, of which I was a member, said :

"In the absence of any express terms to the contrary, the case would come under S. 60, Easements Act, under which a licence cannot be revoked when the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution."

It was clearly recognised in this case that a contract to the contrary would disentitle the licensee from deriving advantage conferred by section 60, Easements Act, and in the present case the defendant has, in terms expressed and in unambiguous language, given out that the landlord would have the right to get the site vacated whenever he so chose. I have not been able to appreciate the argument of learned counsel for the appellant based on S. 23, Contract Act. There is nothing illegal in the contract such as I have been considering and I cannot see why the contract cannot be given effect to. For the reasons given above, there is no force in this appeal and I dismiss it with costs.

G.N./R.K. *Appeal dismissed.*

2. ('38) 25 A. I. R. 1938 All. 32 : 172 I. C. 973 : 1937 A. L. J. 1297, Mohammad Hasan v. Budhu.
3. ('32) 19 A. I. R. 1932 All. 33 : 132 I. C. 565 : 1931 A. L. J. 649, Nabi Mohammad v. Bhagwat Prasad.

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ALLSOP AND VERMA JJ.

Allah Diya and another — Defendants — Appellants

v.

Mt. Sona Devi — Plaintiff — Respondent.

First Appeal No. 141 of 1936, Decided on 9th April 1942, from decision of First Sub-Judge, Saharanpur, D/- 15th February 1936.

(a) Transfer of Property Act (1882), S. 3— Attestation—It is unsafe to assume that person signing as witness must necessarily know contents and must have approved transaction.

It is not very safe to assume that a person who has signed a document as a witness must necessarily know its contents and must be assumed to have approved of the transaction. [P 332 C 2]

T. P. Act —
('42) Chitaley, S. 3 N 31 Pt. 1.
('36) Mulla, Paga 19 Pt. (y).
('36) Mitra, Page 33 N. 30. "Attestation does not amount to notice."

(b) Civil P. C. (1908), S. 100 — Finding that certain person agreed to alienate property is one of fact.

A finding that a certain person agreed to the alienation of certain property is one of fact. [P 332 C 2]

C. P. C. —
('40) Chitaley, Ss. 100 and 101 N. 52 Pt. 1.
('41) Mulla, Page 367, Note "No second appeal lies on the ground of erroneous finding of fact."

(c) Hindu law — Alienation—Limited owner —Necessity—Consent by reversioner does not necessarily lead to definite presumption that alienation was for necessity — Consent may lead to inference of necessity in absence of other evidence.

No doubt in the case of an alienation by a limited owner the consent of a person who may naturally be supposed to have been likely to object, if there was ground for objection, may lead, in the absence of other evidence, to an inference that the property has been alienated for legal necessity, but it does not necessarily follow that in every case where the reversioner consents to the alienation of the property that there must have been legal necessity : ('18) 5 A.I.R. 1918 P. C. 196, *Rel. on.* [P 332 C 2; P 333 C 1]

Hindu law —
('40) Mulla, Page 174 Pts. (e), (f); Page 187 Pt. (z).
('38) Gour, Page 1076 Pt. (1); Page 1080 Pts. (7), (8).

(d) Hindu law—Jains—Custom (U. P.)—Jain widow acquires absolute interest in self-acquired property of her husband.

In U. P. a Jain widow acquires by custom an absolute interest in the self-acquired property of her husband, that is property in which a son would not acquire an interest by birth. The custom does not extend to the ancestral property of her husband which must be governed by the Mitakshara law : 1 All. 688 (P. C.) ; 16 All. 379 ; ('26) 13 A.I.R. 1926 All. 586 and ('31) 18 A.I.R. 1931 All. 695, *Rel. on*; 27 Cal. 379, *Expl.* [P 333 C 1, 2]

Hindu law —
('40) Mulla, Page 156 Pt. (u); Page 635 Pts. (d), (e), (f).
('38) Gour, Page 902 Pt. (6) : Page 1032 Pt. (13).

(e) Hindu law—Joint family — Separate property—Member on partition holds his share as ancestral property—If he has no son his share may be regarded as separate property in sense that he may alienate it before son is born—Son would acquire interest by birth.

A Hindu, who obtains possession by partition of a share in property which was ancestral before the partition, holds his share in that property as ancestral property. If he has no son, that property is his separate property in the sense that he may alienate it before such time as a son is born to him, but it cannot be doubted that a son would acquire an interest in that property at birth as it was originally ancestral property. [P 333 C 2]

Hindu law —
('40) Mulla, Page 241 Pts. (j), (k), (l); Page 412 S. 340.

a **(f) Hindu law—Joint family—Ancestral and self-acquired property—Distinction.**

The only effect of the distinction between ancestral and self-acquired property is that a Hindu son acquires an interest in ancestral property at birth and acquires no such interest in self-acquired property. [P 333 C 2]

Hindu law —
('40) Mulla, Page 237 S. 222; Page 238 S. 223 (1).

(g) Costs—Suit contested—Fact that plaintiff did not issue notice to defendant before suit is no reason for refusing costs to plaintiff.

When a suit has been contested, the fact that the plaintiff did not issue notice to the defendant before instituting the suit is no reason for depriving the plaintiff of his costs of the suit. [P 333 C 2]

b **C. P. C. —**
('40) Chitaley, S. 35 N. 5.
('41) Mulla, Page 148, Note "Costs to be in the discretion of the Court."

Damodar Das — for Appellants.

A. Sanyal — for Respondent.

ALLSOP J. — By a deed of sale dated 30th November 1932, Budh Singh and Mt. Kailashwati purported to transfer the property in suit to the defendants-appellants. Mt. Kailashwati was the widow of Padam Prasad to whom admittedly before his death the whole property belonged. Padam Prasad was the son of Ajit Prasad and of the plaintiff-respondent, Mt. Sona Devi. Ajit Prasad had a brother Sumerchand and Budh Singh was Sumer Chand's son. It is not now contended that Budh
c Singh had any interest in the property in suit and presumably he executed the deed of sale merely as a possible reversioner to prevent his claiming the property after the death of Mt. Kailashwati. The learned Judge of the Court below held that Mt. Kailashwati was not entitled to alienate the property so that the alienation would have effect after her death and consequently he passed a decree for possession in favour of the plaintiff-respondent, Mt. Sonadevi. Now four grounds have been taken in appeal. The first is that the evidence on the record proves that the respondent consented to the sale of the property in dispute by taking part in the sale transaction and she is, therefore, estopped from bringing the present suit. The learned Judge of the Court below has held that it is not established that Mt. Sonadevi consented to the sale of the property. There is a certain amount of evidence
d which has been led to prove that Mt. Sonadevi was present at the time when the sale of the property was arranged, but we must point out that the evidence is in some respects contradictory. One of the witnesses is the patwari of the village, a man called Surajmal. He has stated that the ladies, that is, Mt. Kailashwati and Sonadevi, did not take part in any negotiations in his presence. Another witness who has been called to prove that they were parties to these negotiations, namely, Mansab Rai, has said that they were both present with Sumer Chand, Budhu Mal, Surjan patwari and others at the time when the matter was discussed.

It is evident that little reliance can be placed upon the evidence of the witnesses. It seems to us also that Mt. Sona Devi would have been asked to sign the deed of sale as a witness if she had in fact consented to the alienation of the property. Budh Singh executed the deed of sale and his father, Sumer Chand, signed as a witness. If the signature of Sumer Chand was taken by way of precaution as alleged by the witnesses for the defendants-appellants, then there is no reason why the signature of Mt. Sonadevi should not also have been obtained if she had in fact been consulted and had agreed that the property should be transferred. In these circumstances, we have no hesitation in agreeing with the learned Judge of the Court below that it is not established that Mt. Sonadevi consented to the sale of the property. The second ground of appeal is that, the adult male reversioners having consented to the sale transaction, no question of legal necessity arises and the sale deed in dispute cannot be impeached by the respondent. The argument involved in this ground of appeal is based upon the fact that Sumer Chand signed the deed of sale as a witness. There is a certain amount of oral evidence led to prove that he took part in the transaction and arranged the terms of the sale. The learned Judge
f of the Court below has accepted this evidence and has come to the conclusion that Sumer Chand did agree to the alienation of the property. We may point out that the learned Judge has relied upon the evidence of witnesses whom he has not believed upon other points to which they have deposed. It seems to us also that it is not very safe to assume that a person who has signed a document as a witness must necessarily know its contents and must be assumed to have approved of the transaction. It is, however, a possible argument that in the circumstances which prevail in the villages of this province Sumer Chand was likely to know that the document which he witnessed was a deed of sale and therefore we would hesitate to differ from the learned Judge of the Court below upon his finding of fact.

g Learned counsel has put forward the argument that legal necessity must be presumed if the nearest adult male reversioner consents to a transfer of property by a limited owner. We do not think it is necessary for us to discuss the law any length. We need only refer to the case in 42 Mad. 523[1] in which their Lordships of the Privy Council have explained the law upon this point. It is doubtless true that the consent of a person who may naturally be supposed to have been likely to object, if there was ground for objection, may lead, in the absence of other evidence, to an inference that the property has been alienated for legal necessity, but it does not necessarily follow that any consent by a reversioner leads to a definite presumption that the property must have been alienated for legal necessity. It is asserted in this case that the property was sold so that Mt. Kailashwati might obtain sufficient funds to make a pilgrimage and to perform certain religious h ceremonies for the good of her husband's soul. It is alleged that she thought it necessary to make this pilgrimage and to perform these ceremonies because her husband at the time of his death directed her to do so. The story on the face of it is improbable. The property was not sold till twelve years after the death of Padam Prasad.

It is difficult to believe that Mt. Kailashwati, if she wished to implement the directions of her husband, should have waited twelve years before doing so. It has also not been established that it was necessary for this lady to obtain a sum of Rs. 5000 in order to make the pilgrimage or to perform the ceremonies which were necessary for the good of her husband's soul. On the face of it, it seems to us that there would be no necessity to obtain a sum of Rs. 5000 which was the consideration for the sale

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1. ('18) 5 A.I.R. 1918 P. C. 196 : 50 I. C. 498 : 42 Mad. 523 : 46 I. A. 72 (P.C.), Rangasami Gounden v. Nachiappa Gounden.

of the property, in order to perform these ceremonies. The whole circumstances suggest that the story put forward by the witnesses for the defendants-appellants is untrue. There is some evidence that Mt. Kailashwati did in fact go upon a pilgrimage, but the evidence is not reliable. There is the statement of the patwari, Surajmal, but he would not be likely to know where Mt. Kailashwati had gone or whether she had left the village and in fact he admits in cross-examination that his information was based upon what the people of the village said. This is really no evidence that the pilgrimage was made. The other evidence which we have read is also unsatisfactory. We do not believe that Mt. Kailashwati sold this property in order to obtain money for the purposes which are alleged. No mention is made in the recitals of the deed itself of the necessity for which the property was transferred. Budh Singh, as we have already said, was one of the executants of the deed of sale and, according to the endorsement made by the Sub-Registrar at the time of registration, the consideration for the sale of the property was delivered to him and Mt. Kailashwati at that time. In these circumstances the presumption is that he profited immediately by the sale and it cannot be assumed that he or Sumer Chand agreed to the sale of the property merely because there was legal necessity for the transfer and they had no ground for objection.

We do not think that it necessarily follows in every case where the reversioner consents to the alienation of the property that there must have been legal necessity. On the facts of this case, we think there are circumstances which definitely rebut any presumption which might arise from the consent of Sumer Chand to the transfer of the property. We are satisfied that there was not in fact any legal necessity for the sale and that the consent of Sumer Chand alone is no sufficient reason for holding that such necessity existed. The remarks which we have made also dispose of the fourth ground of appeal which was that the evidence on the record established the existence of legal necessity for the sale in question. We now come to the third ground which was that Mt. Kailashwati, who was a childless Jain widow, had an absolute interest in the property which was given in partition to her husband, Padam Prasad, who died without leaving male issue. Learned counsel has referred us to certain rulings on which he bases the argument that a Jain widow according to custom obtains an absolute interest in her husband's property. We may refer to the following cases, namely, 1 All. 688;[2] 16 All. 379;[3] 24 A.L.J. 751;[4] 1931 A.L.J. 314[5] and 27 Cal. 379.[6]

The cases of this Court and of the Privy Council mentioned above are doubtless authority for the proposition that it is a custom among the Jains of this province that a widow obtains an absolute interest in the self-acquired property of her husband. The Calcutta case contains a dictum that there is no distinction between self-acquired and ancestral property, but this was only a dictum and was based upon the nature of the evidence produced in the case with which the learned Judges of the Calcutta High Court were dealing. We do not think that this decision, or the decisions in any of the Allahabad cases, are proof of any wider custom than this that a Jain widow acquires an absolute interest in the self-acquired property of her husband. They do not establish that there is a custom that a Jain widow acquires an absolute interest in the ancestral property of her husband. There is also no evidence in the case before us to establish this proposition. Consequently, we must apply the Mitakshara law upon this point. Mt. Kailashwati had only a life interest in the property of Padam Prasad if that property was ancestral. It has been argued that Padam Prasad acquired the property by partition and that it should therefore be treated as self-acquired. In our judgment there is no force in this argument.

It is admitted that this property was originally the property of Padam Prasad's grandfather. It is settled law that a Hindu who obtains possession by partition of a share in property which was ancestral before the partition, holds his share in that property as ancestral property. The result is that the property in suit must be regarded as ancestral property in the hands of Padam Prasad and if that was so, Mt. Kailashwati, as we have already explained, acquired only a life interest in it. Learned counsel has argued that property held by a Hindu after partition, if he has no son, is his separate property. That is doubtless true in the sense that he may alienate it before such time as a son is born to him, but it cannot be doubted that a son would acquire an interest in that property at birth if it was originally ancestral property. The only effect of the distinction between ancestral and self-acquired property is that a Hindu son acquires an interest in ancestral property at birth and acquires no such interest in self-acquired property. The custom which may be presumed to have been proved in respect of the rights of Jain widows extends only to property in which a son would not acquire an interest at his birth. We are satisfied that the property in suit was not the absolute property of Mt. Kailashwati and consequently, that she was not entitled to alienate it without legal necessity. We have already held that no legal necessity is proved or can be presumed. The result is that the appeal must fail and it is hereby dismissed with costs.

The learned Judge of the Court below refused to allow the plaintiff-respondent her costs in his Court. He gave no reason, saying merely that he thought in the circumstances of the case, that costs should not be allowed. We can see no circumstances which could justify the learned Judge in refusing to allow costs to the plaintiff-respondent. Learned counsel on behalf of the appellants has suggested that she did not issue notice to his clients before she instituted the suit, but we cannot see what difference that makes since the suit was contested and there is nothing to suggest that no costs would have been incurred if notice has been issued. We are satisfied that the plaintiff-respondent is entitled to her costs. We therefore allow the cross-objection and direct that the plaintiff-respondent will get her costs in both Courts including the costs of the cross-objection.

G.N./R.K. *Appeal dismissed.*

P. N. Das
Advocate High Court
Jammu & Kashmir

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2. ('75-77) 1 All. 688 : 5 I. A. 87 : 3 Sar. 807 : 3 Suther 529 (P.C.), Sheo Singh Rai v. Dakho.

3. ('94) 16 All. 379 : 1894 A. W. N. 123, Shimbhu Nath v. Gyan Chand.

4. ('26) 13 A.I.R. 1926 All. 586 : 96 I. C. 639 : 24 A.L.J. 751, Nekram Singh v. Sriniwas.

5. ('31) 18 A. I. R. 1931 All. 695 : 133 I. C. 785 : 1931 A. L. J. 314, Pahar Singh v. Shamsher Jang Bijai Bahadur Singh.

6. (1900) 27 Cal. 379, Harnabh Pershad v. Mandil Dass.

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IQBAL AHMAD C. J. AND BAJPAI J.

Bilas Singh and another—Appellants

v.

Emperor.

Criminal Appeal No. 177 of 1942, Decided on 22nd April 1942, from order of Sess. Judge, Bareilly, D/- 21st February 1942.

Criminal P. C. (1898), S. 213 — Commitment proceedings — Duty of Magistrate—Magistrate should see whether there are sufficient grounds for commitment and not for conviction — Good prima facie case for commitment — Magistrate must commit — Magistrate has no power to enter into nice questions of probabilities of case b **— Commitment held justified.**

In commitment proceedings what the Magistrate has to see is whether there are sufficient grounds for commitment and not whether there are sufficient grounds for conviction. Where there is a good prima facie case for commitment the Magistrate is bound to commit the accused and is not empowered to enter into nice questions of the probabilities of the case and discharge the accused on the ground that in his opinion the evidence was not sufficient to sustain a conviction. But the Magistrates should not as a general rule, play the role of a post office only and commit an accused to the Court of Sessions when there is not even a remote probability of the case ending in a conviction. At the same time, the Magistrates cannot assume the functions of a Sessions Judge and take upon themselves the duty c of sifting the evidence in cases which are on the border line. When, according to the prosecution in a murder case, there were no less than seven eye-witnesses and there was admittedly hostility between some of the accused and the deceased which might have afforded a motive for the offence, the Magistrate is justified in committing the accused to Sessions. [P 335 C 2; P 336 C 1]

Cr. P. C. —

('41) Chitaley, S. 209, N. 5 Pt. 1 ; S. 210, N. 5. Pt. 2.

('41) Mitra, Pages 748-749, N. 701.

K. O. Carleton — for Appellants.

Government Advocate — for the Crown.

BAJPAI J. — This is an appeal by two brothers Bilas Singh and Kirat Singh who have been convicted by the learned Sessions Judge of Bareilly of d an offence under S. 302, Penal Code, and sentenced to death. The learned Sessions Judge has also made a reference to this Court for confirmation of the sentence of death. According to the prosecution the assault which resulted in death took place at about 2 P.M. on 28th September 1941 in village Chaubari which is on the left bank of the Ram Ganga river on the main Bareilly-Budaun Road. The murdered man was Ram Dayal Singh, and a report of the occurrence was made at police station Kotwali by Raghubar Singh, the brother of Ram Dayal Singh, at 4 P. M. The distance between the place of occurrence and the police station is about six miles and the report, therefore, cannot be said to have been made after any appreciable delay. According to the report Jagannath Singh and Man Singh, Thakurs of Chaubari, and Sobha and Tori Chamars of Chaubari, brought Ram Dayal Singh to the village in a bullock cart and told Raghubar Singh that Bilas Singh, Kirat Singh of Chaubari and Makku Singh of Akha had beaten Ram Dayal Singh with lathis in Kundri which was to the south of Ram Bilas's charas shop and that several persons in the har had seen the incident. It was mentioned in the report that Ram Dayal Singh who had received a number of injuries could not speak. Raghubar Singh then says that he recently had litigation with the three accused whose names he had mentioned and it was because of this enmity that Ram Dayal Singh was assaulted with lathis and the intention of the accused was to kill him. This report was taken down by the head moharrir Nawal Kishore in the presence of the station officer Chunni Lal. Ram Dayal Singh was living when he was brought to the thana and the report was taken under S. 307, Penal Code. It is of some importance to note at this stage that although it is not definitely stated that Jagannath Singh, Man Singh, Sobha and Tori Chamars were eye-witnesses to the occurrence, such an impression might be created by a perusal of the report and f although it is said that several other persons in the har had witnessed the incident the names of these persons as eye-witnesses are not given in the report.

The Sub-Inspector Chunni Lal has given evidence in this case and he admits that the report was made in his presence on 28th September 1941. He says that he sent Ram Dayal to hospital and he learnt on 29th September—the following day — that Ram Dayal Singh had died. He, therefore, prepared an inquest report and sent the body to the mortuary and the case then proceeded as a case under S. 302, Penal Code. Most of the witnesses who have been examined in this case before the learned Sessions Judge were examined by the police on 29th September 1941, but two of the prosecution witnesses, namely, Dal Singh and Yaqin Shah were examined on 2nd October. The police as a result of their in- g vestigation sent up the case under S. 302, Penal Code, against Bilas Singh, Kirat Singh, Babu Singh Nanhey Singh, Sarman Singh and Kedar Singh and noted that Makku Singh was an absconder. A learned Magistrate committed the accused to the Court of Sessions on 22nd January 1942 and six persons whom we have named above were tried by the learned Sessions Judge of Bareilly who came to the conclusion that no case had been made out against four of the accused persons whom he acquitted. The Court below, however, was of the opinion that the guilt had been brought home to the two appellants before us. They were, therefore, convicted and sentenced to death.

We have heard Captain Carleton on behalf of the appellants and the learned Government Advocate on behalf of the Crown, and we may state at once h that after a perusal of the record and paying due weight to the arguments of learned counsel we have come to the conclusion that it is impossible to convict any body on the prosecution evidence that has been produced in this case. The learned Sessions Judge has not only given the benefit of doubt to the four persons whom he acquitted but is of the definite opinion that they should never have been committed to the Court of Sessions because the evidence against them was wholly insufficient. He, however, thinks that from the first information report it is clear that the three men named in the report actually assaulted the deceased. We shall have to say something in connexion with the observations of the learned Sessions Judge about the Committing Magistrate and about prosecuting inspectors in general at a later stage, but at the present moment we wish to say that if the evidence against the acquitted persons was insufficient it is equally so, so far as the appellants are concerned, and the first information report on which the learned Judge relies

instead of helping the prosecution helps the accused.

We have given a summary of the first information report, earlier and it is clear from that report that Jagannath Singh, Man Singh, Sobha and Tori gave to Raghubar Singh the names of the three assailants Bilas Singh, Kirat Singh and Makku Singh. In the Magistrate's Court Raghubar Singh said that he had named those three men because of a conversation with Munshi Sadiq Husain, second officer. Munshi Sadiq Husain was examined by the learned Magistrate and he said that he had no conversation with Raghubar Singh on that day because he was on duty at the Ramlila procession. In the Court of Sessions Raghubar Singh says that Jagannath Singh, Man Singh Tonde and Sobha did not tell him the names of the assailants and although there was a large crowd collected round Raghubar Singh's house none of them had named the accused to him. It naturally strikes one as something very surprising as to how then Raghubar Singh mentioned the names of Bilas Singh, Kirat Singh and Makku Singh as the assailants of his brother and Raghubar Singh comes out with a still more surprising explanation. He says that he saw Bilas, Kirat and Makku in the thana and therefore he suspected them and that is why he mentioned them in the report. From the evidence of the station officer Chunni Lal it is clear that Bilas or Kirat did not go to the thana till about 9 P. M. and according to the statements of these two accused also it appears that they did not go to the thana till about 9 P. M. The station officer with this report of Raghubar Singh naturally arrested Kirat Singh and Bilas Singh when they reached the thana. Presumably they had gone to the thana because, as they say, when they came to their village from Bareilly they learnt that their names had been taken at the police station and they therefore went there either to make some sort of a report or to find out exactly what was being done.

The learned Judge evolves some sort of an explanation regarding the mention of these three names in the first information report, but we find it very difficult to understand what exactly the learned Judge wishes to suggest. Some of the prosecution witnesses who posed as eye-witnesses of the occurrence say that they mentioned the names of the assailants not to Raghubar Singh but to Ram Dayal Singh's wife who lives in a separate house at a distance of about 300 paces and one or two witnesses also say that they saw Ram Dayal's wife at the place where Ram Dayal was brought on a cart after the assault, and the learned Judge seems to think that Ram Dayal's wife might have mentioned some names to Raghubar Singh and Raghubar Singh may have forgotten those names or may have remembered only some of them, viz., those that he gave in the first information report, but that is not what Raghubar Singh says, and we find it impossible to believe that Raghubar Singh would not have mentioned this fact either in the first information report or before the Committing Magistrate or at least before the learned Sessions Judge. All the accused excepting Makhu Singh were residents of the village Chaubari where Raghubar Singh also resides and most of them have had litigation with Raghubar Singh and his brothers, and it is impossible to believe that Raghubar Singh would have forgotten their names if anybody had given their names to him. The main plank therefore on which the learned Sessions Judge convicts the two appellants before us, namely the first information report, goes away and for the rest the evidence against them is exactly the same as the evidence against the four persons who have been acquitted. We shall now discuss the evidence of the various prosecution witnessess. (After going through the evidence his Lordship proceeded.) These are all the prosecution witnesses in the case and like the learned Sessions Judge we are of the view that their testimony does not inspire confidence and it is not possible to maintain the conviction of the two appellants before us. We have already said that the first information report supported by the testimony of the maker of the report — Raghubar Singh—does not help the case for the prosecution ; on the contrary it seems to weaken the case. We have, therefore, no option but to allow the appeal. Before parting with this case we have got to say something about the comments made by the learned Sessions Judge regarding the Committing Magistrate and regarding the prosecuting inspectors in general. Before, however, we do so we might say that the record made by the learned Sessions Judge of the evidence of witnesses in this case is not so full as it ought to be. The printed record in this Court is prepared from the English notes of evidence but in this case we have had to look into the vernacular record in the case of almost every witness. We do not consider it necessary to give a catalogue of the various omissions which the learned Sessions Judge made while recording evidence. Suffice it to say that there were omissions and some of them were important too. As regards the committal in this case the learned Sessions Judge says :

"The learned Magistrate admits in the last paragraph of his order that on further scrutiny he might have discharged some of the accused by discussing their case individually but he refrained from doing so because the prima facie evidence against all the accused was overwhelming, if the eye-witnesses were to be believed. It is the duty of the Committing Magistrate to scrutinise the evidence against each accused before committing him to Sessions and putting him to the trouble and expense of a Sessions Case. The learned Magistrate just above makes a very sensible remark : 'To me it appears that because of his enmity with the accused, Raghubar Singh thought the murder of his brother to be a suitable opportunity for avenging himself on his old enemies.' This remark means that the evidence of the eye-witnesses should have been carefully considered before all the accused were committed . . . ."

The learned Sessions Judge then referred to S. 210, Criminal P. C. The relevant provisions of law in this connexion are Ss. 209 and 210, Criminal P. C. A Magistrate can discharge an accused after recording his reasons, only if he finds that there are not sufficient grounds for committing the accused person. The same phraseology occurs in S. 210 and the words have been interpreted by all the High Courts in India as meaning that in commitment proceedings what the Magistrate has to see is whether there are sufficient grounds for commitment and not whether there are sufficient grounds for conviction. Where there is a good prima facie case for commitment the Magistrate is bound to commit the accused and is not empowered to enter into nice questions of the probabilities of the case and discharge the accused on the ground that in his opinion the evidence was not sufficient to sustain a conviction. In making these observations we are not unmindful of the fact that in certain cases the time of the Sessions Court is wasted and the accused are put to unnecessary harassment because

of the omission of the Magistrate to scrutinise the evidence with a view to finding whether a good prima facie case has been made out against the accused or not. This Court on numerous occasions has pointed out that the Magistrates should not as a general rule, play the role of a post office only and commit an accused to the Court of Sessions when there is not even a remote probability of the case ending in a conviction. At the same time the Magistrates cannot assume the functions of a Sessions Judge and take upon themselves the duty of sifting the evidence in cases which are on the border line. In this particular case, we think the Magistrate could not have taken upon himself the responsibility of discharging any one of the accused when, according to the prosecution, there were no less than seven eye-witnesses and there was admittedly hostility between some of the accused and Ram Dayal Singh which might have afforded a motive for the offence. We now wish to discuss the comments of the learned Sessions Judge about prosecuting Inspectors in general. He says :

"We are not administering divine justice or even what might be called natural justice, i. e., rough and ready justice among simple and primitive people. We are administering a highly developed system of law among sophisticated and litigious people who have the benefit of extremely experienced lawyers and are protected by rules of evidence and procedure and thousands of High Court rulings. If prosecuting officers in the Magistrates' Courts were trained lawyers instead of being members of the police department who have not the benefit of consulting their colleagues and learning from the experience of a competitive profession, these mistakes could not be made. An experienced lawyer prosecutor would not have pressed the case against these four accused because he would have known that his colleagues in the bar would regard such conduct as grossly incompetent. No such criticism affects Government servants who are sheltered by the terms of their service. The retention of prosecuting Inspectors in the Magistrates' Courts is a blot on the criminal administration for which there is no excuse, especially at the present time when it is of the utmost importance that the public should rely on the efficiency of the criminal administration and should be given the benefit of the legal profession which is in close touch with public opinion and which is by far the most numerous and best organised profession in the country. It is impossible to expect Magistrates to do their work quickly and efficiently if they are assisted only by another department of the Government service."

We regret that we are unable to endorse this opinion of the learned Sessions Judge in its entirety. Both of us were members of the bar and one of us was a Government advocate for some years, and although we cannot claim the same experience which the learned Sessions Judge might have in these matters, we do not think that prosecuting Inspectors as a whole are a blot on the criminal administration. They as Sub-Inspectors receive training in the investigation of cases and later on when they are appointed as prosecuting Inspectors they are appointed because of their experience in criminal matters and also in the law of Criminal Procedure, Evidence and Penal Code. They have to appear at an examination in these three branches of law and the papers are the same as are set for the Bachelor of Laws examination of the University. It cannot, therefore, be said that they are persons who are ignorant of law. It may be that if experienced lawyers could be prosecuting Inspectors they might be able to conduct cases better than the average prosecuting Inspector, but some prosecuting Inspectors are very experienced officers and they conduct in the majority of cases of prosecution with great efficiency and care. The police line is open to lawyers and if they choose to come in the regular way in the police service as Sub-Inspectors it will be for the Government to decide whether the lawyer Sub-Inspectors should not be preferred to non-lawyer Sub-Inspectors when occasion arises. We however consider that we shall be doing great injustice to the police service by endorsing the observations of the learned Sessions Judge which do not appear justifiable to us.

We have discussed the case in all its bearing and although we do not agree with learned counsel for the appellants that this murder was the work of some desperadoes who had some difference over charas with Ram Dayal Singh who was a charas vendor, although we have a lurking suspicion that some of the accused in this case are probably responsible for the offence and that justice has been baulked of its victims, yet we feel that the evidence in the present case is so unworthy of belief that we cannot possibly convict the appellants before us. We, therefore, allow this appeal, set aside the conviction and sentence of the appellants and direct that they be released forthwith unless wanted in connexion with some other case.

G.N./R.K. *Accused acquitted.*

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GANGA NATH J.

Gorakh Prasad and others—Applicants

v.

Emperor.

Criminal Revn. Appln. No. 1115 of 1941, Decided on 2nd April 1942, from order of Sess. Judge, Gorakhpur, D/- 27th August 1941.

Criminal P. C. (1898), S. 415 — Two non-appealable sentences of fine aggregating to less than Rs. 50—No appeal lies.

The phrase "any two or more of the punishments therein mentioned" in S. 415 referred to two or more of the punishments of different kinds. S. 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate of fine does not exceed Rs. 50. [History of Ss. 413 and 414 and its effect on S. 415 explained.] [P 337 C 1]

Cr. P. C.—

('41) Chitaley, S. 415 N. 1.

('41) Mitra, Pages 1306 & 1307 N. 1114.

K. N. Gupta — for Applicants.

Deputy Government Advocate — for the Crown.

ORDER.—This is an application in revision against the order of the learned Sessions Judge, dismissing the applicant's appeal on the ground that no appeal lay to him. The applicants were convicted under Ss. 426 and 506, Penal Code and each of them was fined Rs. 5 under each section. It was contended on behalf of the applicants that under S. 415, Criminal P. C., an appeal lay to the learned Sessions Judge. Section 415, Criminal P. C., lays down :

"An appeal may be brought against any sentence referred to in S. 413 or S. 414 by which any two or more of the punishments therein mentioned are combined but no sentence which would not otherwise be liable to appeal shall be appealable merely

on the ground that the person convicted is ordered to find security to keep the peace."

In S. 413, Criminal P. C., two punishments, one of fine and the other of imprisonment, have been mentioned. In S. 414, Criminal P. C., there is a mention of only one punishment of fine. If the words of S. 415, Criminal P. C., were to be construed literally, there would be some difficulty in applying them to S. 414, Criminal P. C., as in S. 414 only one kind of punishment has been mentioned. Similarly, there would be difficulty in interpreting the phrase "any two or more of the punishments therein mentioned" as there is no mention of any third punishment in either of these sections. Sections 413 and 414 were amended in 1923. The ambiguity, if there is any, in S. 414 is due to the fact that at the time of amending Ss. 413 and 414 no one thought of making a corresponding amendment in S. 415. Before the amendment, there were three kinds of punishments, provided in Ss. 413 and 414, viz., in S. 413 a sentence of imprisonment not exceeding one month only, fine not exceeding Rs. 50 only or whipping only, and in S. 414 a sentence of imprisonment not exceeding three months only, fine not exceeding Rs. 200 only or whipping only. The phrase "any two or more of the punishments therein mentioned" in S. 415 referred to sentences in which two or more different kinds of punishments referred to in Ss. 413 and 414 were combined. After the amendment in Ss. 413 and 414 introduced in 1923 it is not possible to attribute any real meaning to the phrase "any two or more of the punishments therein mentioned" in S. 415 so far as it relates, at any rate, to S. 414. Keeping in view the history of Ss. 413 and 414 as they originally stood before the amendment made in them in 1923, it becomes plain that the phrase "any two or more of the punishments therein mentioned" in S. 415 referred to two or more of the punishments of different kinds. Section 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate of fine does not exceed Rs. 50. The decision of the learned Sessions Judge is perfectly correct. There is no reason for interference. The application is rejected.

K.S./R.K. *Application dismissed.*

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GANGA NATH J.

Chhedi—Appellant

v.

Emperor.

Criminal Appeal No. 159 of 1942, Decided on 29th May 1942, from order of Addl. Sess. Judge, Fatehpur, D/- 6th December 1941.

Penal Code (1860), Ss. 75 and 511 — Attempt to cheat being punishable under S. 511, S. 75 does not apply.

An attempt to cheat is not an offence punishable under Ch. 12 or Ch. 17, Criminal P. C., but is punishable under S. 511 in Ch. 23. Consequently S. 75 would not apply to the offence of an attempt to cheat. [P 337 C 2]

Penal Code —

('36) Ratanlal, Page 136, Pt. 1.

('36) Gour, Page 260, Pt. 7.

Assistant Government Advocate —

for the Crown.

JUDGMENT. — This is an appeal from jail by Chhedi against his conviction and sentence under S. 417/75, Penal Code. He has been sentenced to three years' rigorous imprisonment. The case for the prosecution was that the appellant came to Binda Ahir in village Sitapur on the evening of 17th July 1941 and told him that Binda's son Ram Nath who was working as a trolleyman had improperly pulled the alarm chain of the train in which he was travelling and broke it, that the driver of the engine in his attempt to stop the train sustained injuries and that Ram Nath had been taken in custody and was in the lock up. He further told Binda that Ram Nath had sent him to bring Rs. 110 to secure his release. Binda somehow arranged for Rs. 110 and started for Lucknow the next morning with Jag Mohan and the accused. The accused took Binda and Jag Mohan first to a hospital at Lucknow and tried to get the money from Binda to be given to the driver who, as alleged by the accused was lying in a serious condition in the hospital. Binda did not give the money. The accused then took Binda and Jag Mohan to another house and went inside. He came out with a piece of paper and said that it was the release order which he had obtained from a Babu who was inside the house and that the money should be given to him to be paid to the Babu. Binda refused to give the money to the accused, saying that he would give it only after he had seen his son. The accused then took Binda and Jag Mohan to the Guard room. In the way they met some men of the platelayer to whom Binda told the whole story. They called the police and the appellant was got arrested. The accused was taken to Alambagh police station where report Ex. 1 was made by Binda.

The evidence of Jag Mohan P. W. 2 and Rampal P. W. 3, proves the facts narrated above. The appellant was charged with an offence under S. 420, Penal Code, but the learned Judge has convicted him of an offence under S. 417, Penal Code, because the appellant did not succeed in getting any property. The offence of cheating under S. 417 was not complete as the appellant did not succeed in making Binda deliver any property to him or to any person. But there could be no doubt that the appellant was guilty of the offence of an attempt to cheat Binda. Under S. 238, sub-s. (2) (a), Criminal P. C., the appellant can be convicted of an attempt to cheat. Sub-s. 2 (a) is :

"When a person is charged with an offence, he may be convicted of an attempt to commit such offence, although the attempt is not separately charged."

The other question that arises for consideration in this case is whether S. 75, Penal Code, would apply to the case. An attempt to commit an offence is itself an offence within the definition of an offence as given in S. 40, Penal Code. It is punishable under S. 511, Penal Code. Where no express provision is made in any other part of the Code for the punishment of such an offence, S. 75 applies, in the case of a second conviction, to offences punishable under Chap. 12 and Chap. 17, Penal Code. An attempt to cheat is not an offence punishable under Chap. 12 or Chap. 17 of the Code, but it is punishable under S. 511 in Chap. 23. Consequently S. 75 would not apply to the offence of an attempt to cheat.

The punishment for the offence of an attempt to cheat under S. 511, Penal Code, would be only half of the longest term provided for the offence of cheating under S. 417, Penal Code, which is only one year. I, therefore, alter the conviction under S. 417/75, Penal Code, to one under S. 417/511, Penal Code, and reduce the sentence of three years

a rigorous imprisonment to that of six months' rigorous imprisonment.

G.N./R.K. *Order accordingly.*

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YORKE J.

L. Bengali Mal and others —
Judgment-debtors — Appellants

v.

Baijnath Prasad and others —
Decree-holders — Respondents.

Exn. Second Appeal No. 205 of 1941, Decided on 10th April 1942, from decision of Civil Judge, Allahabad, D/- 12th November 1940.

b **Limitation Act (1908), Art. 182 (3) — Words "where there has been a review of judgment" in Art. 182 (3) must be interpreted strictly as meaning what they say — Art. 182 (3) applies only where review application has been allowed and there has been actual review or re-hearing —Art. 182 (3) has no application where review application is rejected.**

The words "where there has been a review of judgment" in Art. 182 (3) must be interpreted strictly as meaning what they say : ('32) 19 A. I. R. 1932 P. C. 165, *Rel. on.* [P 338 C 2]

In their plain meaning the words "where there has been a review of judgment" in Art. 182 (3) only cover cases where the review application has been allowed and there has been an actual review or re-hearing of the case or appeal. In that case the limitation will begin to run from the date of the c new decree. It would begin to run from the date of the new decree even if the new decree was the same as the decree in respect of which the application for review had been made and allowed. Article 182 (3) therefore has no application to cases in which the application for review has been rejected. In such cases limitation begins to run from the original decree : ('22) 9 A. I. R. 1922 Oudh 148 ; ('41) 28 A.I.R. 1941 Pat. 213 and ('32) 19 A.I.R. 1932 All. 601, *Rel. on* ; 4 All. 274, *Expl.* ; ('37) 24 A. I. R. 1937 Pat. 337, *Not foll.*; ('36) 23 A.I.R. 1936 Bom. 162, *Commented upon.* [P 338 C 2 ; P 339 C 2]

Limitation Act —

('42) Chitaley, Art. 182 N. 48 Pt. 4.

('38) Rustomji, Page 1725 Pts. 1, 2.

B. Malik and J. Swarup — for Appellants.

d *Balmakunda* — for Respondents.

JUDGMENT. — This is a second execution appeal by the judgment-debtors objectors. In the suit out of which the decree under execution has arisen the original decision is dated 3rd November 1932. Against that decision there was an appeal which was dismissed on 19th April 1934. On 16th July 1934 there was an application for review of judgment, which application was rejected on 12th September 1936 with the result that there was no re-hearing of the appeal. The present application for execution was made on 8th February 1939 and on receipt of notice the judgment-debtors entered an objection that the application for execution was barred by limitation as having been made more than three years from the date of the appellate decree. They contended that limitation began to run from 19th April 1934, while on behalf of the decree-holders it was contended that it began to run from 12th September 1936. The learned Munsif, sitting as an execution Judge, allowed the judgment-debtors' objection and held that the execution application was beyond time. He relied on a e case reported in A. I. R. 1922 Oudh 148.[1] On the matter going in appeal the learned Civil Judge has apparently relied on the case in 4 All. 274[2] and has held that the time began to run from the dismissal of the application for review. The case on which the learned Civil Judge has relied was, however, not at all on all fours with the present case. It was a case in which an application was made for review of the judgment. That application was allowed and on a re-hearing a fresh decree was passed. An appeal was filed against that decree and an appellate decree was passed. It was successfully contended that time began to run not from the original decree but from the appellate decree modifying what might be called the second original decree.

The question is what is the meaning of the words f which find a place in Art. 182, cl. (3), Limitation Act. That article provides a period of limitation of three years for the execution of a decree or order by a civil Court not provided for by Art. 183, or by S. 48, Civil P. C., 1908 and it provides that the time from which the period begins to run "where there has been a review of judgment" is the date of the decision passed on the review. Prima facie where an application for review of judgment has been rejected, it is clear that there cannot have been a review of judgment. On the other hand, where the application has been allowed then the period of limitation begins to run from the date of the substituted decree which results on a re-hearing of the suit or appeal as the case may be. Taking the plain meaning of the words "where there has been a review," they only cover cases where the application has been allowed and there has been an actual g review or re-hearing of the case or appeal. In that case the limitation will begin to run from the date of the new decree. It would indeed begin to run from the date of the new decree even if the new decree was the same as the decree in respect of which the application for review had been made and allowed. On the point, first of all, of the interpretation of the wording of the Limitation Act, I may refer to the remarks of their Lordships of the Privy Council in A. I. R. 1932 P. C. 165[3] at p. 167. There their Lordships are referring to the wording of Art. 182 (2) and they say :

"The words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the word is, their Lordships think, the only safe guide."

I might perhaps say that it is precisely because he forgot this clear pronouncement that the learned Judge of the Court below seems to have gone astray. For the view that the words "where there has been a review of judgment" in the article are to be interpreted strictly as meaning what they say there is a good deal of support. In the case referred to by the learned Munsif, A. I. R. 1922 Oudh 148,[1] Dalal, A. J. C., took the view that :

"The question whether an application for review will give a fresh starting point for limitation or not

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1. ('22) 9 A. I. R. 1922 Oudh 148 : 24 O. C. 280, Bhagwan Baksh Singh v. Mt. Manraji Kunwar.

2. ('84) 4 All. 274 : 1884 A. W. N. 25, Narsing Sewak Singh v. Madho Das.

3. ('32) 19 A.I.R. 1932 P.C. 165 : 137 I.C. 529 : 60 Cal. 1 : 59 I. A. 283 (P. C.), Nagendra Nath Day v. Suresh Chandra Dey.

cannot be decided in the abstract but must depend on the facts of every case. If the application for review is not accepted and the Court refuses to reopen the matter, no fresh starting point will be obtained by the applicant for the purposes of limitation. That is obvious because in those circumstances there will not have been a review but only an application for review."

The point was mentioned incidentally in a Bench decision of this Court in 1932 A. L. J. 731.[4] The case had to deal mainly with cl. (2) of Art. 182 but referring to Art. 182, cl. (3), the learned Judges remarked :

"Moreover the clause on which the learned counsel relies does not refer to an application for review but to cases where there has been a review of judgment."

They made it quite clear that the words must be construed strictly. Another very recent case to which reference has been made is A.I.R. 1941 Pat. 213.[5] Referring to the provisions of cl. (3), Fazl Ali J. remarked :

"Article 182, cl. (3) provides that where there has been a review of judgment the period of limitation begins to run from the date of the decision passed on the review" (that is on the re-hearing of the suit or appeal). "This provision has been construed in a number of cases where it has been held that it does not apply where the application for review has not been granted but rejected, that is to say, in such cases limitation is not enlarged under this clause."

The learned Judge went on to remark that he entirely agreed with this view and he considered that there was no justification whatever for inserting the word "application" into this provision. He went on to say :

"On the other hand, the words 'when there has been a review of judgment' must mean a review by some one who can review the judgment, that is to say, by the Court which pronounced the judgment to be reviewed. If that is the meaning to be attached to the words, it is plain that the article will have no application where an application for review has been rejected, because in that case there has not been a review of judgment."

With the greatest respect I entirely agree with that view. The learned counsel for the respondents has referred to A. I. R. 1937 Pat. 337,[6] but the remarks in that decision with reference to cl. (3) are, if I may say so, largely obiter and were not approved of by the learned Judges who had to decide the later case above quoted, though they did not think it necessary in the circumstances to make a reference to a larger Bench. Another case which has been relied upon is a judgment of a Single Judge of the Bombay High Court in A.I.R. 1936 Bom 162.[7] This was a case in which there was a decree. Thereafter there was an application for review which was granted and then there was an appeal against the order made on review and there was an order made by the Court in that appeal. The question was whether the decree-holder could take advantage of the later proceedings. On the view taken by this Court in 4 All. 274,[2] there could be no doubt whatever on the question, and the reliance which is placed upon this decision is based upon certain remarks made in the body of the judgment, as for example where the learned Judge says :

"My view then is that the words in Art. 182 (3) 'decision passed on the review' mean a decision passed in review proceedings, and whatever such a decision is, it gives a fresh starting point of limitation."

If by the words "the review proceedings" the learned Judge meant "in the application proceedings," that would be a support for the contention put forward on behalf of the respondents. But if he only meant a decision passed in the "re-hearing" proceedings, then plainly it is of no use to him at all. With the greatest respect I am unable to derive any assistance from this decision for the reason that every sentence in it upon which the learned counsel has been able to found any argument is capable of two interpretations and it is only if the interpretation which he supports is accepted that the decision is of any help to him. In my judgment on the plain meaning of the words which find a place in Art. 182 and on a consideration of the decisions relevant to the interpretation of those words there can be no doubt that they do not cover cases in which the application for review has been rejected. In such cases limitation begins to run from the original decree. In this case it began to run from 19th April 1934 and the application for execution made on 8th February 1939 was clearly barred by limitation. I accordingly allow this appeal, set aside the order of the lower appellate Court and restore the order of the learned Munsif allowing the objection and dismissing the application for execution. The appellants will have their costs throughout. Leave for Letters Patent appeal is refused.

G.N./R.K. *Appeal allowed.*

4. ('32) 19 A. I. R. 1932 All. 601 : 138 I. C. 692 : 1932 A.L.J. 731, Sukhnandan Singh v. Mt. Ramdevi Kunwar.
5. ('41) 28 A.I.R. 1941 Pat. 213 : 194 I.C. 608 : 20 Pat. 513 : 22 P. L. T. 26, Mohammad Naqir v. Alauddin Ahmad.
6. ('37) 24 A.I.R. 1937 Pat. 337 : 169 I.C. 581 : 16 Pat. 306: 18 P. L. T. 231, Firm Dedhraj Lachminarayan v. Bhagwan Das.
7. ('36) 23 A.I.R. 1936 Bom. 162: 162 I. C. 223: 38 Bom. L. R. 215, Narayan Ganpat v. Radhabai Krishnaji.

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GANGA NATH AND YORKE JJ.

Emperor

v.

Debi Charan alias Debi Prasad and others — Respondents.

Criminal Appeals Nos. 442 and 492 of 1941, Decided on 1st June 1942, from order of Sess. Judge, Fatehpur, D/- 25th February 1941.

(a) Criminal trial—Identification proceedings —Every objection made by accused should be noted by Magistrate conducting such proceedings.

It is the duty of a Magistrate who conducts identification proceedings to make a note of every objection which is made by an accused at the time of the identification proceedings so that the Court which has to judge the value of the identification evidence may take into consideration the objections and in the light of those objections may appreciate the evidence of identification. [P 341 C 1]

(b) Criminal trial—Identification proceedings —Delay in conducting, is not desirable.

The sooner the identification proceedings are conducted, the better it is. It is not desirable to delay identification proceedings because a delay may affect the ability of a witness to identify an accused. [P 341 C 1]

(c) Criminal P. C. (1898), Ss. 439, 369—Appeal by accused dismissed and conviction and sentence affirmed by High Court—Revision for enhancement is not barred.

The fact that an appeal by the accused has been dismissed confirming his conviction and sentence does not bar an application in revision by the Government for enhancement of sentence : Cri. Revn. No. 1045 of 1939, *Dissent.*; *Case law referred.* [P 341 C 2]

Cr. P. C.—
('41) Chitaley, S. 439, N. 32.
('41) Mitra, Page 1462, N. 1220 : "Revision after appeal."

(d) Penal Code (1860), S. 395 — Sentence — Several people injured in dacoity and one of dacoits found in possession of loaded revolver —Four years' imprisonment held inadequate for such accused.

There was a fight between the dacoits and the villagers in which a number of persons were injured. One of the dacoits was found in possession of a loaded revolver. He was sentenced to four years' rigorous imprisonment under S. 395, Penal Code, and six months' rigorous imprisonment under Arms Act :

Held that both the sentences were rather inadequate. The sentence under S. 395, Penal Code, was enhanced from four years' to ten years' rigorous imprisonment and the sentence of six months' rigorous imprisonment under S. 19 (f), Arms Act, to that of two years' rigorous imprisonment. [P 341 C 2]

Penal Code —
('36) Ratanlal, Page 953, Pt. 10.
('36) Gour, Page 1321, Para. 4618.

Government Advocate — for the Crown.

E. V. David and L. N. Gupta — for Respondents.

GANGA NATH J. — This is an appeal by the Local Government against the acquittal of Debi Charan alias Debi Prasad, Prem Shanker, Randhir Singh, Kedar alias Gulzari and Ram Ratan. Kedar and Ram Ratan have been absconding and notice of the appeal has not been served on them. So the appeal against them is not disposed of. The Local Government has also filed an application in revision for the enhancement of the sentence of Debi Dayal. These persons were prosecuted under S. 395, Penal Code, for a dacoity committed in the house of Misri Lal in village Rannupur, district Fatehpur. Debi Dayal was prosecuted also under S. 19 (f), Arms Act.

The case for the prosecution was that on 7th June 1940 between 10 and 11 P. M. a dacoity was committed in the house of Misri Lal. A fight took place between the dacoits and the villagers of Rannupur and the neighbouring village Lohri Sari who came to Misri Lal's house on hearing an alarm raised by Misri Lal and Barua who was sleeping on the roof of Misri Lal's house. Debi Dayal received an injury on his head and fell down. He was arrested by the villagers and taken to the police station. A loaded revolver was found in his possession. The learned Sessions Judge acquitted Debi Charan, Prem Shanker and Randhir Singh, but convicted Debi Dayal under S. 395, Penal Code, and S. 19 (f), Arms Act, sentencing him to four years' rigorous imprisonment under S. 395, Penal Code, and to six months' rigorous imprisonment under S. 19 (f), Arms Act. The sentences were to run consecutively. There can be no doubt about the occurrence of the dacoity in the house of Misri Lal. The prosecution has examined a number of witnesses, including Misri Lal, who have all deposed as to how the dacoits came and committed the dacoity. At the time of the occurrence Misri Lal was sitting smoking with some persons near his house. Some dacoits approached him and told him that the police had come and the Sub-Inspector wanted him. Misri Lal came with them to his house but before he reached his house he suspected that these persons were dacoits. He ran away and raised an alarm. After the report, the Sub-Inspector came and inspected the place. He found a box broken open and things lying scattered inside the house of Misri Lal.

The only question is whether the participation of Debi Charan, Prem Shanker and Randhir Singh in the dacoity is proved. Thirteen eye-witnesses have been produced by the prosecution who have identified these persons. Randhir Singh was put up for identification with Kedar and Ram Ratan on 2nd July 1940. Prem Shanker and Debi Charan were put up for identification on 11th September 1940.

Debi Charan has been identified by Balua, Ram Sahai and Gopal. Balua made two correct identifications and three mistakes. Ram Sahai made three correct identifications and two mistakes. Gopal made four correct identifications and one mistake. The evidence of Balua and Ram Sahai cannot be regarded as satisfactory. Apparently there is no defect in the evidence of Gopal and he seems to be a good witness, but it would not be safe to base a conviction on his evidence alone. Prem Shanker was identified by Ram Sahai and Raghunandan. Ram Sahai made three correct identifications and two mistakes. His evidence is, therefore, poor. Raghunandan made four correct identifications and one mistake. Apparently he is a good witness, but his solitary evidence would not be sufficient for the conviction of Prem Shanker. Randhir Singh has been identified by no fewer than 11 witnesses, viz., Misri Lal, Ragubar, Durga son of Bachcha, Barhma, Rameshar, Kali Charan, Ram Sahai, Durga son of Debi Dayal, Sukhdeo, Raghunandan and Gopal. Misri Lal made three correct identifications and one mistake. Raghubar made three correct identifications and two mistakes. Durga made three correct identifications and two mistakes. Barhma made one correct identification and one mistake. Rameshar made three correct identifications and two mistakes. Kali Charan made three correct identifications and one mistake. Ram Sahai and Durga each made three correct identifications and two mistakes. Sukhdeo made two correct identifications and one mistake. Raghunandan and Gopal each made four correct identifications and one mistake. With the exception of the evidence of Raghunandan and Gopal the evidence of the other witnesses is not satisfactory. It has been urged on behalf of the defence that no reliance should be placed on the identification evidence as the accused had been shown to the witnesses at the time of his arrest. An objection to that effect was also made by his counsel who was present at the time of the proceedings. Randhir Singh was arrested in Gajner. Amir Baksh, chaukidar of Gajner, was produced by the prosecution. He was not examined in the lower Court but he was put up for cross-examination. In his cross-examination he has stated :

"The Sub-Inspector of Jahanabad had gone to Gajner for his arrest. He went there by motor lorry. There would have been 25 or 30 men in the motor lorry with daroghaji. The lorry stopped in front of the house of daroghaji of Gajner. Randhir Singh would have been brought under arrest at about 11

or 12 o'clock noon. He was made to sit on the chabutra in front of daroghaji's house. Besides Randhir Singh, a number of people were sitting on the chabutra. Some were village people and some from the motor lorry. Randhir Singh was sitting there till dark."

It appears from this evidence that there is some substance in the complaint of the accused, because, according to the evidence of Amir Baksh, about 25 or 30 persons were taken by the Sub-Inspector in the lorry with him and these persons were made to sit with Randhir Singh accused on the chabutra in front of the Sub-Inspector's house at Gajner. The witness was not cross-examined on this point by the prosecution. There is no reason to disbelieve the evidence of this witness. If the Sub-Inspector took with him 25 or 30 outsiders and they were with him when he arrested this accused and these persons were allowed to remain with him, it would be difficult to say whether the witnesses who have been produced by the prosecution were not among them. The value of the identification has been lost very much. We do not think it safe to rely on the evidence of the witnesses who have identified him. In this connexion it may be stated that it appears that Mr. Narsingh Narain, Deputy Magistrate, who conducted the identification proceedings does not realize his responsibility. An objection was taken by Randhir Singh and repeated requests were made by him to make a note of it, but the learned Magistrate did not do so. His counsel had to make an application (Ex. S) on which the learned Magistrate had to make a note that the objection had been taken by the accused. The learned Magistrate has stated: "I do not write such objection in my identification memo."

This is not the correct procedure. It is the duty of the learned Magistrate to make a note of every objection which is made by an accused at the time of the identification proceedings so that the Court which has to judge the value of the identification evidence may take into consideration the objections and in the light of those objections, may appreciate the evidence of identification. It also appears that the learned Magistrate is rather dilatory in conducting identification proceedings. Debi Charan was admitted in jail on 8th July 1940. He was asked to conduct the proceedings of the identification of Debi Charan on 11th July 1940. On 15th July 1940 he asked the station officer of Jahanabad to report whether any accused was absconding. The order to the Prosecuting Inspector was:

"Please let me know how many times I have already conducted identification proceedings in this case, whether any accused is still at large and whether action under Ss. 87 and 88, Criminal P. C., has been taken against such accused."

He was informed that proceedings under Ss. 87 and 88, Criminal P. C., against the absconding accused were being taken still he did not like to conduct the identification proceedings and again asked for another report on 16th July 1940 and again on 22nd July 1940. The accused had to be detained in the lock-up unnecessarily till the identification proceedings were ultimately conducted by him on 11th September 1940. The sooner the identification proceedings are conducted, the better it is. It is not desirable to delay identification proceedings because a delay may affect the ability of a witness to identify an accused. There is no force in the Government appeal and it is, therefore, dismissed. The respondents need not surrender to their bail.

As regards the application for the enhancement of the sentence passed on Debi Dayal, it was contended by his learned counsel that this Court had no jurisdiction now to enhance the sentence as an appeal sent by the accused from jail had been dismissed and his conviction and sentence had been confirmed. Reliance is placed on the decision in Criminal Revision No. 1045 of 1939. We find no discussion in this judgment. It has been taken for granted that no revision for enhancement of sentence would lie if an appeal from jail of the accused has been dismissed by a learned Single Judge of this Court. There is another case, 1933 A. L. J. 957,[1] in which the same question as to whether a revision would lie in the present circumstances or not was considered. There it was held that S. 369, Criminal P. C., was no bar to the exercise of the power of enhancement by the High Court as that section must be read subject to the provisions of S. 430, Criminal P. C., the exception to which covers the power of enhancement. It was further observed:

"Under the rules of this Court Ch. 1 (17) (d) a single Judge cannot exercise the jurisdiction of enhancement and that jurisdiction can only be exercised by a Bench of this Court. Accordingly the order of the learned Single Judge disposing of the jail appeal cannot be taken to have been an exercise of the jurisdiction of this Court under Ch. 32 so far as the power of enhancement is concerned."

The same view has been taken in 54 Bom. 822,[2] A. I. R. 1932 Pat. 126,[3] 50 Bom. 783[4] and 61 Cal. 6.[5] We are of the opinion that the revision would lie. Debi Dayal, as stated above, has been sentenced to four years' rigorous imprisonment under S. 395, Penal Code and to six months' rigorous imprisonment under S. 19 (f) of the Arms Act. The sentences are to run consecutively. There was a fight between the dacoits and the villagers in which a number of persons were injured. Debi Dayal was found in possession of a loaded revolver. Both the sentences are, in our opinion, rather inadequate. We, therefore, enhance the sentence under S. 395, Penal Code from four years' to ten years' rigorous imprisonment and the sentence of six months' rigorous imprisonment under S. 19 (f), Arms Act, to that of two years' rigorous imprisonment. Both the sentences will run concurrently. We allow the revision application accordingly.

K.S./R.K. *Order accordingly.*

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1. ('33) 20 A.I.R. 1933 All. 485 : 146 I. C. 157 : 34 Cr. L. J. 1205 : 55 All. 715 : 1933 A.L.J. 957, Emperor v. Abdul Qaiyum.
2. ('30) 17 A.I.R. 1930 Bom. 593 : 129 I. C. 159 : 32 Cr. L. J. 242 : 54 Bom. 822 : 32 Bom. L. R. 1286, Emperor v. Koya Partab.
3. ('32) 19 A.I.R. 1932 Pat. 126 : 135 I. C. 522 : 33 Cr. L. J. 155 : 10 Pat. 872 : 13 P. L. T. 17, Ram Lakhan v. Emperor.
4. ('26) 13 A.I.R. 1926 Bom. 555 : 97 I. C. 805 : 27 Cr. L. J. 1173 : 50 Bom. 783 : 28 Bom. L. R. 1051, Emperor v. Jorabhai Kisabhai.
5. ('34) 21 A.I.R. 1934 Cal. 105 : 147 I. C. 1124 : 35 Cr. L. J. 554 : 61 Cal. 6 : 37 C. W. N. 1122, Khodabux Haji v. Emperor.

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ALLSOP AND VERMA JJ.

Ram Chand — Plaintiff — Appellant

v.

Hira Lal — Defendant — Respondent.

First Appeal No. 158 of 1936, Decided on 16th April 1942, from decision of Sub-Judge, Muttra, D/- 29th February 1936.

(a) Fraud — *A* selling house to *B* — *B* paying certain amount in cash and executing pronote for balance — Suit by *A* on pronote—*B* denying liability on ground of fraud alleging that *C* who acted as agent of *A* had represented to him that there was another purchaser *L* in the field who was prepared to pay higher price and that *B* would profit by reselling house, that after completion of sale he found that *L* to whom he had been introduced and who had said that she would buy the house as alleged by *C* was fictitious person and that he was defrauded into purchasing house for price which was far in excess of its real value — *C* acting as commission agent of *A* to sell house — *C* having no express authority to give any information about house — Evidence of defendant's witness held inadmissible as evidence of similar but unconnected facts — Case held did not come within S. 238, Contract Act — Transaction held not vitiated either by *C's* fraud as agent or fraud by *A* as principal.

A sold his house through his commission agent *C* to *B* for Rs. 18,900 out of which Rs. 11,700 were paid in cash, Rs. 672 were left with *B* for payment to a creditor of *A* and for the balance of Rs. 5500 *B* executed a pronote in favour of *A*. In the suit by *A* on the pronote and for recovery of Rs. 672 *B* denied his liability to pay that sum or the sum due upon the pronote on the ground of fraud practised upon him. He alleged that the negotiations for the sale took place between him and *C* who was acting as the agent of the vendor, that *C* assured him that he could safely buy the house for the sum which he agreed to pay because there was already in the field another purchaser *L* who could be induced to buy the house for Rs. 26,000, that he was taken by *C* and another man to see a woman who posed as *L* and told him that she would buy the house as alleged by *C*. It was the result of these statements that he eventually bought the house for Rs. 18,900. After the sale had been completed he discovered that there was no real *L* who was willing to pay anything to him for the house and the consequence was that he found himself the owner of a house for which he was supposed to pay Rs. 18,900 and which was really not worth more than about Rs. 7000 :

Held that (1) there was no doubt that *C* did deceive *B* by putting forward a fictitious purchaser, and the fact that *A* was benefited by the sale might lead to some vague suspicion that he might have been a party to the fraud but there was no evidence to justify the conclusion that he was definitely a party to it. Nor could *C* and *A* be said to have been acting in collusion simply because on previous occasions *C* had acted as the agent of *A* for the negotiation of the sales of houses; [P 343 C 1,2]

(2) the evidence of witness who alleged that he had also some years back purchased a house from *A* through *C* on the allegation of *C* that he could sell the house for a higher price after his purchase and that he (witness) was eventually compelled to sell the house at a loss of about Rs. 1300 held inadmissible as evidence of similar but unconnected facts; [P 343 C 1]

(3) Section 238, Contract Act, did not apply to the case because the agreement to sell was entered into between *A* himself and *B* and the deed of sale was executed by *A*; [P 343 C 2]

(4) there was certainly no express authority to *C* to give any information about the house. Whether such an authority was implied or not would depend upon the impression which was created by the circumstances upon the mind of *B*. The fact of the matter on the allegation made by *C* was that he was attempting to cheat *A* out of Rs.7000 and therefore it could not be said that *B* believed that *C* was the mouth piece or agent of *A* when he told him about the existence of *L*. Consequently, it could not be said that there was any fraud by an agent in the person of *C* which would bind the principal *A*. Even if it were assumed that *C* was authorised to describe the house and give information about its value, the information which was the basis of the alleged fraud had nothing whatsoever to do with the value of the house; [P 344 C 1,2]

(5) the agreement of sale therefore was not vitiated by any fraud of the alleged agent *C* or of the principal *A* who was therefore entitled to recover the amounts claimed: (1883) 22 Ch.D. 194, *Disting.* [P 344 C 2]

(b) Contract Act (1872), S. 238 — There may be cases outside S. 238 in which agent's fraud may invalidate agreement entered into by principal — Instances indicated.

There may be cases outside the scope of the provisions of S. 238 in which a fraud or misrepresentation practised or made by an agent may invalidate an agreement entered into by the principal. (Instances indicated.): (1883) 22 Ch. D. 194, *Ref.* [P 344 C 1]

P. L. Banerji and Govind Das — for Appellant.

Gopalji Mehrotra — for Respondent.

ALLSOP J. — This appeal arises out of a suit for the recovery of a sum of Rs. 5500 with interest on the basis of a promissory note dated 11th June 1934 and for a sum of Rs. 673-8-0 on account of part of the consideration for a deed of sale which did not pass. The plaintiff, Ramchand was the owner of a house in the city of Muttra. He transferred it by a deed of sale to the defendant Hira Lal. This deed was executed on 11th June 1934 and Hira Lal agreed to pay a sum of Rs. 18,900 for the house. Part of this sum had been paid as earnest money. A sum of Rs. 11,728 was paid in cash. A sum of Rs. 672, which is now claimed, was left with the vendee for payment to a creditor of the vendor's and Hira Lal executed the promissory note to which we have already referred for the sum of Rs. 5500 the balance of the consideration. Hira Lal did not pay the sum of Rs. 672 to the creditor and he now says that he is not liable to pay that sum or to pay the sum of Rs. 5500 due upon the promissory note. His allegation is that he was induced to buy the house by means of a fraud practised upon him and that consequently his agreement to pay the sums which are now in suit is void. His story is that the negotiations for the sale took place between him and a man called Goberdhan Das who was acting as the agent of the vendor. He says that Goberdhan Das assured him that he could safely buy the house for the sum which he agreed to pay because there was already in the field another purchaser one Mt. Lakshami Bai who could be induced to buy the house for a sum of Rs. 26,000. Hira Lal has said that he was taken by Gobardhan Das and another man to see a woman who posed as Mt. Lakshmi Bai and told him that she would buy the house as alleged by Goberdhan Das. It was the result of these statements that he eventually bought the house for Rs. 18,900. After the sale had been completed he discovered that there was no real Mt. Lakshami Bai who was willing to pay anything to him for the house and the consequence was that he found himself the owner of a house for which he was supposed

to pay Rs. 18,900 and which was really not worth more than about Rs. 7000.

The learned Judge of the Court below came to the conclusion that Goberdhan Das had defrauded Hira Lal and that Ram Chand, the owner of the house, was a party to the fraud. We do not think it is necessary to discuss the evidence upon the question whether Hira Lal was defrauded because there seems to be no reason to doubt that Goberdhan Das did deceive him by putting forward a fictitious purchaser, but we have to enquire into the question whether Ram Chand was a party to the deception. The learned Judge of the Court below seems to us to have acted upon suppositions because we have not been shown any real evidence on which he could base the conclusion that Ram Chand knew that Goberdhan Das had made this representation to Hira Lal about the existence of the woman, Mt. Lakshmi Bai, who was an intending purchaser of the house. The learned Judge says that there is one glaring fact which no amount of subtle argument can controvert and that is that the only person who gained by the transaction was Ram Chand, the plaintiff. Apart from this fact, the learned Judge refers to the evidence of a man called Kali Charan who, he says is a person of unimpeached respectability and undoubted honesty. The evidence given by this man is in our judgment quite irrelevant. He stated that he knew Goberdhan and Ram Chand and that he himself had purchased a house from Ram Chand through Goberdhan. He said that that was about five or six years before he gave evidence. The price he paid was Rs. 7500. He said that Goberdhan had told him at the time that he could sell the house after a few days for Rs. 12,000 if he bought it for Rs. 8000. He then said that he eventually had to sell the house at a loss of about Rs. 1300 or Rs. 1400. If this evidence was intended to show that Ram Chand and Goberdhan had committed a previous fraud of the kind which was imputed to them in the suit with which we are dealing, the evidence was irrelevant as being evidence of similar but unconnected facts.

However even if the evidence was relevant, it does not establish the existence of any previous fraud by these people. The witness was compelled to admit in cross examination that he had received a firm offer of Rs. 11,000 for the house from one Mt. Jumna Kunwari and that he would not sell it to her because he demanded a sum of Rs. 12,000. He never said that Ram Chand or Goberdhan had told him that there was any particular purchaser who was willing to pay Rs. 12,000 for the house. If he had sold the house to Mt. Jumna Kunwari he would have profited to the extent of Rs. 3500 instead of suffering a loss, as he alleged of about Rs. 1300 or Rs. 1400. The evidence of Kali Charan even if admissible, does not in any way lead to the conclusion that Ram Chand and Goberdhan were in the habit of committing frauds of the nature alleged in the case before us. When that evidence is excluded, we are left apparently only with the fact that Ram Chand would have profited by the transaction. It seems to us that the learned Judge is not right in saying that he was the only person who could have profited by the transaction, because Goberdhan was apparently negotiating for the sale on the basis of receiving a commission. It may be that the fact that Ram Chand was benefited by the sale might lead to some vague suspicion that he might have been a party to the fraud but there is certainly no evidence to justify the conclusion that he was definitely a party to it.

The learned Judge seems to have thought that Goberdhan and Ram Chand must have been acting in collusion because on previous occasions Gobardhan had acted as the agent of Ram Chand for the negotiation of the sales of houses. It does not seem to us that the conclusion of the learned Judge is justified. Hira Lal said in his statement that there was some discussion between him and Ram Chand about the payment of the costs of executing the deed of sale and that Goberdhan who was present told him not to haggle about a small matter of that kind when he would shortly make a profit of Rs. 7000. Hira Lal stated that Ram Chand said nothing at the time. From this it is suggested that Ram Chandra by his silence was implicated in the fraud practised by Gobardhan. It is impossible to believe that Hira Lal could really have thought that Ram Chand knew of the existence of a purchaser who was willing to pay Rs. 26,000 for the house when he was selling it for Rs. 18,900. If Hira Lal had really believed that Ram Chand knew of the existence of a purchaser of this nature, his suspicions would immediately have been aroused. Even if the evidence is true, all that could possibly have happened was that Goberdhan in a vague way suggested that the house was being sold for a price which would enable Hira Lal to sell it again at a profit and Ram Chand may well have thought that this was a mere jest and was not to be taken seriously. Hira Lal could certainly not have believed that Ram Chand knew that he could sell the house for Rs. 7000 more than what he himself was paying for it. We are satisfied that there is no evidence to establish that Ram Chand had anything to do with the fraud practised upon Hira Lal.

Learned counsel for Hira Lal has urged before us that the agreement connected with the sale is void even if the fraud was practised not by Ram Chand but by Goberdhan as his agent. He has relied upon the provisions of Ss. 17 and 19, Contract Act. His contention is that fraud by an agent invalidates an agreement just as much as fraud by the principal. He has referred us to the case in (1883) 22 Ch. D. 194.[1] The decision in that case was based partly upon a finding that there was a misrepresentation by a principal and partly upon a finding that there was a misrepresentation by an agent who had been employed to find a purchaser for certain premises. The learned Judge expressed the opinion that a person who had been appointed as an agent to find a purchaser had implied authority to describe the premises and if in describing them he was guilty of misrepresentations which would lead to the conclusion that they were more valuable than they really were, these misrepresentations would prevent the principal from obtaining specific performance of an agreement to sell which had been entered into by the proposed vendee as a result of the misrepresentations made to him. It does not seem to us that that decision is of much assistance to us in deciding the case with which we are dealing. It is a decision on the English law of contract and we are governed by the rules set forth in a statute. Even if we are to examine this case or in some measure to rely upon it, it is not a case which is on all fours with the case before us.

Under the provisions of S. 238, Contract Act, a fraud or misrepresentation practised or made by an agent invalidates a contract into which the agent enters on behalf of his principal. The provisions of that section do not apply to the case with which we are dealing because the agreement to sell was entered into between Ram Chand himself and Hira

1. (1883) 22 Ch.D. 194 : 52 L.J.Ch. 380 : 48 L. T. 103 : 31 W.R. 559, Mullens v. Miller.

Lal and the deed of sale was executed by Ram Chand. It is, of course, obvious that there may be cases outside the scope of the provisions of S. 238, Contract Act, in which a fraud or misrepresentation practised or made by an agent may invalidate an agreement entered into by the principal. There may, for instance, be cases where the principal refers the other party to the agreement to some persons for information and in that case the persons supplying the information would doubtless be the express agent of the principal for the purpose of furnishing the information. If the information which he furnished was wrong so as to amount to a fraud or a misrepresentation we do not doubt that the principal would be bound. There may be cases of a similar nature where a person might be acting by implication as an agent for furnishing information. Such a case would be that to which we have referred namely the case which was involved in the dispute in (1883) 22 Ch.D. 194.[1]

The case, however, with which we have to deal is entirely different. We have to see whether Hira Lal when he received the information about the existence of Mt. Lakshmi Bai and her willingness to purchase the property of Ram Chand for Rs. 26,000 could have been under the impression that Goberdhan in giving him the information was acting as the agent of Ram Chand. There was certainly no express authority to Goberdhan to give any information about the house or at any rate there is no evidence before us of any such express authority. Whether such an authority was implied or not would depend upon the impression which was created by the circumstances upon the mind of Hira Lal. We have already explained that Hira Lal could not possibly have believed that Ram Chand would sell the house for Rs. 18,900 if he knew that Mt. Lakshmi Bai was willing to buy it for rupees 26,000. When Goberdhan gave this piece of information to Hira Lal, Hira Lal must have been aware or must have thought that Ram Chand could know nothing about the matter. It might perhaps have been inferred by him that Goberdhan was authorised to describe the house to him and tell him all the circumstances which would affect its value, but he could not have believed that Ram Chand would authorise Goberdhan to tell him about the existence of a purchaser who was already in the field with an offer of Rs. 26,000.

Even if we assume that Gobordhan was authorised to describe the house and give information about its value, the information which is the basis of the alleged fraud had nothing whatsoever to do with the value of the house. Hira Lal admits that Goberdhan told him that the house was worth much less than Rs. 26,000 and that it would not be possible for those who had influence on Mt. Lakshmi Bai to induce her to buy the house for that price unless Hira Lal bought it himself for a sum of Rs. 19,000. It is obvious that Hira Lal was not under any misapprehension about the value of the house. He bought it as a speculation. He must have known that it was the duty of Goberdhan Das as the agent of Ram Chand to tell the latter that there was a purchaser in the field at a price of Rs. 26,000 and yet he himself acting on the assumption, as he must have acted, that Goberdhan Das had withheld this information from Ram Chand, bought the house for Rs. 18,900. It is clear that he must have been under the impression that he and Goberdhan Das between them would do Ram Chand out of about Rs. 7000. It does not seem to us that the misrepresentation or fraud that was alleged had anything to do with the real value of the house. The fact of the matter on the allegations made by Hira Lal is that he was attempting to cheat Ram Chand out of Rs. 7000 and in these circumstances we cannot think that he believed that Goberdhan was the mouth piece or agent of Ram Chand when he told him about the existence of Mt. Lakshmi Bai. We cannot, therefore, think that there was any fraud by an agent in the person of Goberdhan Das which would bind the principal, Ram Chand. If Hira Lal had come into Court on a different allegation, namely, that he and Goberdhan Das and Ram Chand were all in a conspiracy to defraud Mt. Lakshmi Bai, there might have been some force in his contention that the deed of sale was fictitious, but that was not the case put forward by Hira Lal and indeed it would have been difficult for him to allege that there was a fictitious sale when he asserted that he had paid over Rs. 11,000 in cash at the time when the deed of sale was executed in his favour. We are satisfied that the agreement is not vitiated by the fraud of the alleged agent, Goberdhan Das.

The result is that we must set aside the decree of the learned Judge of the Court below who dismissed the suit. We are satisfied that the plaintiff appellant is entitled to recover the money which he has claimed. As this money represents the unpaid purchase price of the property, he is also entitled to a decree under O. 34, R. 4, Civil P. C., which he has asked the Court to pass. The result is that we direct that a decree be drawn up in favour of the plaintiff-appellant in terms of the relief claimed in the plaint. The plaintiff-appellant will get his costs in both Courts from the defendant-respondent. The date on or before which payment must be made under the provisions of O. 34, R. 4 is 15th October 1942. A decree shall be drawn up accordingly.

G.N./R.K. *Appeal allowed.*

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ALLSOP AND VERMA JJ.

Jagdamba Pande — Plaintiff — Appellant

v.

Ram Khelawan Upadhya and others — Defendants — Respondents.

First Appeal No. 176 of 1936, Decided on 28th April 1942, from decision of Civil Judge, Mirzapur, D/- 30th January 1936.

(a) Transfer of Property Act (1882), S. 53 — Fictitious and fraudulent transfer—Distinction.

There is a distinction between a fictitious and fraudulent transfer. In the former case there is really no transfer at all and in the latter there is a transfer but, as it is the result of a conspiracy between the transferor and the transferee to defeat the claim of others, it can be avoided by those others if they wish to avoid it. When the allegation is that there was no transfer at all, there is no consideration so that the question of its adequacy does not really arise : ('40) 27 A. I. R. 1940 All. 407, *Rel. on.* [P 345 C 2]

(b) Provincial Insolvency Act (1920), S. 74— Order for summary administration of estate — Court when passing order of adjudication must determine by order in writing debts of insolvent.

Where the Insolvency Court passes an order that there should be a summary administration of the

estate it is incumbent upon it at the time when it makes the order of adjudication to determine by an order in writing the debts of the insolvent. [P 346 C 2]

(c) Interpretation of Statutes—Indian statute on procedure — Construction — Reference to methods adopted in accordance with other statute in English Court how far permissible, stated.

It is not correct to approach the construction of an Indian statute on procedure by first considering the methods which are adopted in accordance with another statute in the English Courts. [P 347 C 1]

C. P. C. —

('40) Chitaley, Preamble N. 7.

(d) Provincial Insolvency Act (1920), Ss. 33 (3) and 64—S. 64 is subject to S. 33 (3)—Creditor is not entitled to prove his debt after insolvent has been discharged.

The provisions of S. 64 are subject to the rule laid down in S. 33 (3), which makes it clear that a creditor when he applies to have his name entered in the schedule of creditors in respect of any debt must, at the same time, tender proof of his debt and that he must tender his proof and make his application at some time before the discharge of the insolvent. Consequently, after the discharge of the insolvent it is not open to a creditor to come to the insolvency Court to tender proof of his debt and make an application that his debt should be entered in any schedule and should be discharged by the disposal of any property which might then be found to belong to the insolvent : ('36) 23 A. I. R. 1936 Rang. 393, *Rel. on* ; ('36) 23 A. I. R. 1936 Cal. 434 and ('24) 11 A. I. R. 1924 Mad. 163, *Dissent.*; ('25) 12 A. I. R. 1925 Pat. 438 and ('27) 14 A. I. R. 1927 Rang. 263, *Disting.* [P 347 C 1, 2]

K. N. Malaviya — for Appellant.

Shiva Prasad Sinha and Satya Narain Prasad — for Respondents.

ALLSOP J. — This appeal arises out of a suit in which the plaintiff, Jagdamba Pande, sought a declaration that a deed of sale executed on 20th August 1931 by Badri and Kedar in favour of Ram Khelawan was void as against the creditors of the vendors of whom he was one. The deed of sale purported to have been executed in consideration of the payment of a sum of Rs. 4000, of this sum Rs. 1200 was paid in cash at the time of registration and it was recited that a sum of Rs. 100 had previously been paid in order to enable the vendor to purchase the necessary stamp paper and to pay the other necessary expenses towards the execution and completion of the document. The balance of Rs. 2700 was left in the possession of the vendee so that he might discharge certain liabilities which the vendors had incurred towards himself and others. These liabilities consisted of a sum of Rs. 1158 due on four usufructuary mortgages and of four sums due on the basis of promissory notes. The largest of these sums was one of Rs. 795 due to the vendee himself. The property transferred consisted of a one anna zamindari share in the village of Bandhwa, a half share in a residential house, and three blocks of fixed rate tenancy that is an area of 23 bighas 11 biswas and the shares of the vendors in 10 bighas 11 biswas and in 28 bighas 14 biswas of land. The share in the former of these two last items was one-eighth being equivalent to 1 bigha 6 biswas 7½ dhurs and the share in the latter one-fourth being equivalent to 7 bighas 3 biswas 10 dhurs. The learned Judge of the Court below held that it had not been established, as alleged, that the sale was fictitious or that it was intended to defeat and delay the creditors of the vendors. He also held as a matter of law that no declaration could be given because neither the plaintiff nor any other creditor had at the time of the decision of the suit any claim against the vendors. This second finding was based upon the fact that the vendors had been adjudicated insolvents on 4th August 1934 and had been discharged on 13th July 1935 before any debts had been proved against them.

The first question we have to consider is whether it has been established that the learned Judge of the Court below was wrong in his conclusion that the deed of sale was neither fictitious nor intended to defeat and delay the creditors. We may mention that the plaint purports to set out a case under the provisions of S. 53, T. P. Act but that the allegations made therein amount really to this that there was no transfer at all, that no consideration passed, that the property remained in the possession of the vendors and that the deed was purely fictitious and was never intended to operate as a deed of sale. We need scarcely repeat again what has been often said, and for the last time in 1940 A.L.J. 470[1] that there is a distinction between a fictitious and fraudulent transfer. In the former case there is really no transfer at all and in the latter there is a transfer but, as it is the result of a conspiracy between the transferor and the transferee to defeat the claim of others, it can be avoided by those others if they wish to avoid it. In the present case the statements in the plaint and the arguments which have been addressed to us suggest that this was not a fraudulent transfer but a case of a complete fiction. We have been taken through the whole of the evidence and we are not satisfied that the decision of the learned Judge of the Court below was wrong. The first point which has been suggested to us is that the consideration for the property was inadequate and that consequently we should hold that there was a fiction or fraud of some kind. It seems to us that this argument is based in some measure, upon a confusion of thought because as we have already said, the allegations on the plaint suggest rather that there was no transfer than that there was a transfer with the intention of defeating and delaying the plaintiff and other creditors and, if there was no transfer, there was no consideration so that the question of its adequacy does not really arise. The argument is that the property was worth a good deal more than Rs. 4000 and in fact was worth as much as Rs. 10,000. The learned Judge of the Court below has not accepted the estimate put forward by the plaintiff. He has stated that the property might have been worth as much as Rs. 5000 or Rs. 6000 at the time but that it certainly was not worth as much as Rs. 10,000. The statement made by the patwari of the village who was produced by the defendants was that the income from the property amounted to Rs. 270 a year and that property of this nature was ordinarily transferred at 20 years purchase in the year 1931. Accordingly to this calculation, the property might have been worth about Rs. 5400. We may mention, however, again that there were four usufructuary mortgages upon the property or parts of it and that its value might have been affected by fear of expensive and troublesome litigation. Certain deeds were produced by way of

1. ('40) 27 A. I. R. 1940 All. 407 : 190 I. C. 337 : I. L. R. (1940) All. 542 : 1940 A. L. J. 470, Parbhu Nath Prasad v. Sarju Prasad.

exemplars to show the rates at which property of this kind had, in fact, been transferred. The learned Judge of the Court below rejected those deeds which were executed earlier than the year 1931 for the very good reason that there was, as is well-known, a world-wide depression which caused a great reduction in the value of landed property about the time when the deed in suit was executed. He has referred to three deeds which were executed about the same time or a little later. (After examining the deeds his Lordship proceeded.) On the whole, we are satisfied that there is nothing to establish that the property was sold at so low a price that the sale must have been fictitious or fraudulent. We may add that, if the sale was fictitious and there was no consideration, it was open to the parties to mention as consideration any amount that they chose. Ram Khelawan, it has been pointed out in argument, was a practising mukhtar and knew something about the law and it is therefore to be assumed, if he had been a party to a fictitious or fraudulent transaction, that he would have taken care that the transaction could not be challenged upon the ground that the consideration for the transfer was insufficient. Another point which has been argued is that the vendors remained in possession of the property. The plaintiff produced certain witnesses upon this point but they were contradicted by the patwari who deposed that the vendee had taken possession of all the property. We see no reason to disagree with the learned Judge of the Court below upon the question whether the evidence of the patwari should be believed. In our opinion, it is worth a great deal more than the evidence of the witnesses produced by the plaintiff. It has been mentioned that the house which was transferred is still in the possession of the vendors, and this is admittedly so, but it is in their possession under the terms of a registered lease executed by Ram Khelawan in their favour and we have no reason to suppose that this lease was also a fictitious document. There was a suggestion that the sum of Rs. 1200 paid in cash before the registrar was returned immediately afterwards but this is based on the sole testimony of a chaukidar and we are unable to believe so improbable a story on the unsupported evidence of a person of this standing. Then it has been suggested that the vendors transferred the whole of their property so that the plaintiff and other creditors had nothing against which they could proceed. This argument is made against the evidence of the patwari who deposed that there was a fixed rate tenancy and some other property in the possession of the vendors.

Finally, it was argued that Ram Khelawan was a relation of the vendors and that it might consequently be inferred that he had assisted them in defeating the claims of the plaintiff and other creditors. The relationship, even if it is considered to be established, is not very close. There is the evidence of certain witnesses that the son of one of the vendors, Badri was married to the niece of Ram Khelawan's wife, that is, to the daughter of the wife's brother. Ram Khelawan himself deposed that he was not related to the father of the wife of Badri's son and that his wife came from quite another village. He was not cross-examined on this point and we do not think that the evidence produced on the other side is of any great value. We doubt very much whether Ram Khelawan was related to the vendors, but even if he was, the relationship was distant and we do not think that it would justify the conclusion that the sale was fictitious. It has not been suggested that there was any special reason why the vendors and Ram Khelawan should wish to defeat the plaintiff in particular or any other creditors of the vendors. The result is that we agree with the learned Judge of the Court below that it has not been established that the deed in suit was fictitious or that it was intended to defeat and delay the creditors of the vendors. For this reason alone the appeal must fail.

We may, however, mention that we are in agreement with the learned Judge upon the question of law which was raised before him. The appellant has relied upon four rulings, namely, the cases in 47 Mad. 120,[2] A. I. R. 1936 Cal. 434,[3] 4 Pat. 128[4] and 5 Rang. 384.[5] The point which he wishes to make is that a creditor can prove his debts until such time as the whole of the insolvent's estate has been distributed. It has, however, been admitted that the last two cases quoted are not directly in point and that the only case which definitely supports the contention is that in A. I. R. 1936 Cal. 434.[3] The point has been raised because the vendors of the deed of sale which is in question were as we have already said, adjudicated insolvents and no creditor apparently proved any debt before their discharge. The learned Judge of the Court below held that it was too late for any creditor to prove his debt after the discharge of the insolvents and consequently that he had been freed by his discharge from all liability to any of the creditors with the result that it would be useless to give any declaration that the property alleged to have been transferred by the deed of sale was not in fact transferred and was still the property of the insolvents at the time when the insolvency proceedings were continuing. The learned Judge considered that the declaration would be useless because the property would not be available in any event to the plaintiff or the other creditors of the insolvents.

We may mention that in the case with which we are dealing the learned Judge of the Insolvency Court had passed an order that there should be a summary administration of the estate. Having passed that order it was incumbent upon him at the time when he made the order of adjudication to determine by an order in writing the debts of the insolvents. This he apparently did not do but we are not now concerned with the validity or regularity of the orders and proceedings of the Insolvency Court. It appears that no order in writing was passed at that time and that no creditors at any later time submitted any proof of the existence of their debts. In these circumstances, we do not think that it matters in this case that the administration of the estate was intended to be summary. We have to consider the question whether the creditors, after the discharge of the insolvents, could go to the Insolvency Court for the first time and prove their debts so that the property, if it belonged to the insolvents, could be taken over by the Court and used for the purpose of discharging the liabilities of the insolvents to the creditors. It is set forth in S. 33(3),

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2. ('24) 11 A.I.R. 1924 Mad. 163 : 75 I.C. 572 : 47 Mad. 120 : 45 M.L.J. 166, Sivasubramania Pillai v. Theethiappa Pillai.

3. ('36) 23 A. I. R. 1936 Cal. 434 : 166 I. C. 886 : I. L. R. (1937) 1 Cal. 127, Arjun Das v. Marchia Telini.

4. ('25) 12 A. I. R. 1925 Pat. 438 : 85 I. C. 543 : 4 Pat. 128 : 6 P. L. T. 410, Babu Lal v. Krishna Prasad.

5. ('27) 14 A.I.R. 1927 Rang. 263 : 104 I. C. 816 : 5 Rang. 384, Jhan Bahadur Singh v. Bailiff of the District Court of Toungoo.

Provincial Insolvency Act (Act 5 of 1920) that 'any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule as a creditor in respect of any debt provable under the Act.' It seems to us that the meaning of this section is quite clear. It sets forth: (1) that a creditor when he applies to have his name entered in the schedule of creditors in respect of any debt must, at the same time, tender proof of his debt and (2) that he must tender his proof and make his application at some time before the discharge of the insolvent. We do not think that it can possibly be read into the terms of this section that a creditor may tender his proof and make his application at any time after the insolvent has been discharged. It is true that some complication is caused by the provisions of S. 64, Provincial Insolvency Act. This section is in the following terms:

"When the receiver has realised all the property of the insolvent or so much thereof as can, in the opinion of the Court, be realised without needlessly protracting the receivership, he shall declare a final dividend; but before so doing, he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified, but not proved that, if they do not prove their claims within the time limited by the notice, he will proceed to make a final dividend without regard to their claims. After the expiration of the time so limited, or if the Court, on application by any such claimant, grants him further time for establishing his claim, then on the expiration of such further time, the property of the insolvent shall be divided among the creditors entered in the schedule without regard to the claims of any other persons."

In the Calcutta case which has been quoted to us, and in some measure in the dicta in the Madras case, it has been considered that the provisions of this section justify the conclusion that a claim by a creditor may be proved after the discharge of the insolvent. The learned Judges have relied upon some remarks made in an English case in considering the provisions of the English Bankruptcy Act which are not in the same form as the provisions in our Provincial Insolvency Act. With the greatest deference to the learned Judges, we should not ourselves approach the construction of an Indian statute on procedure by first considering the methods which are adopted in accordance with another statute in the English Courts. It seems to us that the provisions of S. 33 (3) and S. 64, Provincial Insolvency Act, are not necessarily irreconcilable. It is not laid down in S. 33 (3) that the debt of a creditor must be proved before discharge. The rule is that the application to be included in the schedule must be made before that time and that it must be accompanied by proof of the debt. It may be that the proof is not considered sufficient by the receiver and, if that is so, there is no reason why further proof should not be provided after the discharge of the insolvent. The provisions of S. 64, it seems to us, are subject to the rule laid down in S. 33 (3). They are provisions for the final distribution of the assets of the insolvent and this distribution may or may not take place before an order of discharge is passed. If the distribution is to take place before such an order, then there is no difficulty. If the distribution is to take place after the order of discharge, it seems to us that there would be no question of proof by any person who had not already made an application supported by such proof as he himself thought sufficient under S. 33 (3) of the Act. There is no provision that we can find for any notification of the debt within the meaning of S. 64 except that provided by S. 33 (3).

In the case with which we are dealing there was no application on behalf of any creditor, as far as we know, and there was no order in writing by which the debts of any of the creditors could be established. In our judgment, it would be too late now for any creditor to go to the Insolvency Court and make an application that his debt should be entered in any schedule and should be discharged by the disposal of any property which might now be found to belong to the insolvents. This is our view upon the question of law, although for the purpose of this appeal it is sufficient for us to have held on the facts that the plaintiff had failed to make out the case which he put before the Court in his plaint. We are confirmed in our view upon the law by the decision of the Rangoon High Court in A.I.R. 1936 Rang. 393.[6] The result is that the appeal fails and it is hereby dismissed with costs.

G.N./R.K. *Appeal dismissed.*

6. ('36) 23 A.I.R. 1936 Rang. 393 : 164 I. C. 1061: 14 Rang. 529, Bank of Chettinad Ltd. v. Ko Tin.

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MOHAMMAD ISMAIL AND MULLA JJ.

Sri Maharaj Panhari Upendra Das Mahant of Math Paikoli —
Defendant — Applicant

v.

Ram Kumar Das — Plaintiff —
Opposite Party.

Civil Revn. Appln. No. 408 of 1940, Decided on 5th May 1942, against order of Special Judge, First Grade, Gorakhpur, D/- 24th August 1940.

Civil P. C. (1908), O. 33, Rr. 8 and 5 and S. 115 — Order allowing application to sue as pauper is not open to revision — But revision lies from order rejecting application.

An order granting an application for leave to sue in forma pauperis is not open to revision under S. 115 but revision lies from an order rejecting such application: 32 All. 623; ('31) 18 A. I. R. 1931 All. 659 and ('30) 17 A. I. R. 1930 All. 758, *Rel. on*; *Case law reviewed.* [P 349 C 2]

C. P. C. —
('40) Chitaley, S. 115, N. 26.
('41) Mulla, Page 413, Pt. (j); Page 1044, Pt. (y).

K. L. Misra — for Applicant.

K. N. Agarwala — for Opposite Party.

MULLA J. — This is an application in revision under S. 115, Civil P. C. It is directed against an order passed by the learned Civil Judge of Gorakhpur by which he has granted an application made before him by the plaintiff opposite party, Ram Kumar Das, for leave to sue in forma pauperis. A preliminary objection has been taken in this Court by the plaintiff opposite party that the order passed by the learned Civil Judge does not amount to a "case decided" within the meaning of S. 115, Civil P. C., and it is not therefore open to the applicant to invoke the revisional powers of this Court. Learned counsel for the opposite party has relied on several decisions of this Court in support of his contention. It has indeed been conceded by learned counsel for the applicant that the trend of authorities in this Court is undoubtedly against him but

he contends that the view taken by this Court has been dissented from by all the other High Courts in India and it is therefore a matter which might well be referred for consideration by a Full Bench of this Court. Upon a careful consideration of a series of decisions of this Court which fully support the preliminary objection, we have arrived at the conclusion that the cases of other High Courts, upon which the learned counsel for the applicant relies and which with but one exception to which we shall presently refer are all single Judge cases, do not disclose any such reason as would compel us to hold that the view taken by this Court, which has now prevailed for more than thirty years, is so opposed to logic or public policy that it must be disturbed. An examination of the case-law in this Court would show that in the earlier stages the view that prevailed was that no order passed upon an application for leave to sue in forma pauperis, whether granting it or rejecting it, was open to revision: *see* 4 All. 91[1] and (1882) A. W. N. 69.[2] Then there came a change and in (1893) A. W. N. 218[3] a single Judge of this Court decided that an order rejecting an application for leave to sue in forma pauperis was open to revision by this Court and this decision was approved and followed by Banerji J. in Civil Revn. No. 24 of 1910.[4] Then came the case in 7 A. L. J. 741[5] in which the revisional power of this Court was invoked for setting aside an order granting an application for leave to sue in forma pauperis. The learned Judges who decided that case, Karamat Husain and Chamier JJ., both arrived at the conclusion that such an order did not amount to a "case decided" and was not, therefore, open to revision. They further pointed out that there was a clear distinction between a case in which an application for leave to sue in forma pauperis is rejected and a case in which it is granted. Karamat Husain J. observed as follows :

"A distinction, however, is to be drawn between the cases in which an application in forma pauperis is rejected and cases in which it is granted. When it is rejected the "case" of the applicant comes to an end and is to be governed by the rulings in (1893) A. W. N. 218[3] and in Civil Revn. No. 24 of 1910.[4] But when the application is granted the "case" of the pauper is not in my opinion decided within the meaning of S. 115 of the new Civil P. C."

Chamier J. remarked :

"It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal in forma pauperis being dismissed or rejected and case in which a similar application is allowed. In the former it may be said that the case had been decided, while in the latter the order appears to be merely interlocutory."

The principle thus laid down was dissented from by a Bench of this Court in 24 A. L. J. 557.[6] After referring to the observations of Chamier J., cited above, Walsh J., who delivered the judgment of the Court, said that he was unable to accept the subtle distinction. It must, however, be pointed out that 24 A. L. J. 557[6] was a case of an application in revision from an order rejecting an application for leave to sue in forma pauperis. The application in revision was rejected by the Bench and it was held that an order rejecting an application for leave to sue in forma pauperis was not open to revision. This case was decided in 1926 but before that a Bench of this Court in A.I.R. 1922 All. 208[7] had decided that no application in revision lay against an order admitting an application for leave to sue in forma pauperis. The decision in 24 A.L.J. 557[6] was after a very careful consideration dissented from by a Bench of this Court consisting of Sulaiman C. J., and Niamat Ullah J., in 52 All. 927.[8] In this case the principle laid down by Karamat Husain and Chamier JJ., in 7 A. L. J. 741[5] was referred to with approval and it was held that the dismissal of an application for leave to sue as a pauper amounts to a "case decided" within the meaning of S. 115, Civil P. C., and a revision lies therefrom if there are proper grounds for a revision. In the course of his judgment Niamat Ullah J. observed as follows :

"The question as to whether an applicant is entitled to sue as a pauper is not a question arising in the suit at all. It is a question anterior to the commencement of the suit. The decision of that question merely determines the right of the plaintiff to be exempted from the payment of court-fee. The law in this respect has, in my opinion, been correctly laid down by Chamier and Karamat Husain JJ. in 32 All. 623,[5] ..... The learned Judges had to deal with a case in which leave had been granted. In revision the order granting such leave was questioned. The suit instituted by the pauper plaintiff was pending. There is some justification for the view that no "case," under those circumstances, could be said to have been decided ; but the learned Judges took care to point out that if the application for leave to sue as a pauper had been dismissed, the same considerations could not be applicable. In commenting upon the observations quoted above, the learned Judges who decided the case in 48 All. 493,[6] say that the distinction drawn is "subtle." It is submitted with very great respect that the distinction is obvious and real and has been clearly set forth by those learned Judges. If the application to sue as a pauper is dismissed, no further proceedings can continue ; and if the application to sue as a pauper was the foundation of a "case," it must be deemed to have terminated with the order of dismissal ; whereas, if the application had been granted, the proceedings may be taken to continue. In the latter case, according to the learned Judges who decided the case in 32 All. 623,[5] proceedings in the case continue and no case can be deemed to have been decided."

The learned Judges who decided the case in 52 All. 927,[8] were not concerned with the question which has been raised in the present case, namely, as to whether an order granting an application for leave to sue in forma pauperis is or is not open to revision by this Court, but a perusal of their judgments would show that they were inclined to agree

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1. ('81) 4 All. 91 : 1881 A. W. N. 136, Harsaran Singh v. Muhammad Raza.

2. ('82) 1882 A.W.N. 69, Bhulneshri Dat v. Bidiadhis.

3. ('93) 1893 A.W.N. 218, Faiz Muhammad Khan v. Aziz-un-nissa.

4. Civil Revn. No. 24 of 1910, Decided on 24th May 1910, Mt. Changia v. Joti Prasad.

5. ('10) 32 All. 623 : 6 I. C. 831 : 7 A. L. J. 741, Malik Muhammad Ayub v. Malik Muhammad Mahmood.

6. ('26) 13 A. I. R. 1926 All. 446 : 94 I.C. 484 : 48 All. 493 : 24 A.L.J. 557, Shankar Ban v. Ram Dei.

7. ('22) 9 A. I. R. 1922 All. 208 : 67 I. C. 641 : 20 A. L. J. 471, Kandhaia Singh v. Mt. Kundan.

8. ('30) 17 A. I. R. 1930 All. 758 : 126 I. C. 1 : 52 All. 927 : 1930 A. L. J. 901, Mt. Sumitra Devi v. Hazari Lal.

with the principle laid down in 7 A. L. J. 741.[5] The question with which we are concerned in the present case arose directly for consideration in 1931 A. L. J. 727,[9] and a Bench of this Court consisting of Mukerji and Niamat Ullah JJ., held that where an application to sue as a pauper is accepted, no revision lies. Mukerji J. who delivered the judgment of the Court, observed as follows :

"It has been held in 1930 A. L. J. 901[8] that a decision disallowing an applicant to sue as a pauper is a "case decided." That has been so held because the matter ends there, and unless the applicant is prepared to pay court-fees, he cannot prosecute his application by way of suit any further. There the matter ends. But, in this particular case, the matter does not come to an end; but the litigation continues. We cannot, therefore, say that a case has been decided. The order is more or less in the nature of an interlocutory order and not a final order.

In 32 All. 623[5] a Division Bench of this Court held that where an application to sue as a pauper is accepted, no revision lies. Thus, we have got a clear authority in support of the proposition that no revision is maintainable."

In 1933 A. L. J. 110[10] a Bench of this Court observed :

"It has been held in several cases in this Court that, where a Court admits an application to sue as a pauper and thereby converts the application into a plaint, no revision is maintainable to contest the validity of the order accepting the application for permission to sue as a pauper, but where the order is one rejecting the application and thereby putting an end to the proceedings before the Court below, a revision is maintainable."

No subsequent case was placed before us to show that a different view was ever taken in this Court and it may, therefore, be taken as settled law so far as this Court is concerned that an order granting an application for leave to sue in forma pauperis is not open to revision under S. 115, Civil P. C. This view has now prevailed for more than thirty years and the question is whether there is any compelling reason to disturb it. Learned counsel for the applicant has drawn our attention particularly to the case in *Durga Prasad* v. *Gur Dularey*, decided by a Bench of the Oudh Chief Court which is reported in 14 Luck. 116.[11] The learned Judges who decided that case could not persuade themselves to accept the settled view of this Court as shown by the various cases referred to above and found themselves in agreement with the view expressed in 24 A. L. J. 557[6] that the fine distinction drawn in 7 A. L. J. 741[5] between a case in which an application for leave to sue in forma pauperis is granted and one in which it is rejected cannot be justified. We have already pointed out that the decision in 24 A. L. J. 557[6] was carefully considered but dissented from in the subsequent case in 52 All. 927.[8] Learned counsel for the applicant has also referred to the cases in A.I.R. 1926 Mad. 958;[12] A.I.R. 1938 Nag. 210;[13] A.I.R. 1931 Rang. 318;[14] A. I. R. 1926 Lah. 642[15] and A. I. R. 1934 Lah. 231.[16] As mentioned above, all these cases are single Judge cases and the only point which emerges from them is that the learned Judges were not able to see any fundamental distinction in principle between a case in which an application for leave to sue in forma pauperis is rejected and one in which it is granted. There is no doubt something to be said for this view, but the question which we have to consider is whether there is a sufficient reason for holding that the consistent view taken by this Court is so opposed to logic or public policy that it must be disturbed and reversed. In our judgment the basic idea which underlies the decisions of this Court is an anxiety to preclude all possibility of a rightful claimant being denied the assistance of the Court for enforcing his claim simply because he happens to be too poor to pay the necessary court-fee. This Court seems to have deliberately placed a limitation upon the exercise of its revisional power in dealing with cases in which an application for leave to sue in forma pauperis is granted. In our judgment it is a wholesome and salutary limitation and we are not inclined to be anxious to have it set aside. The result, therefore, is that we uphold the preliminary objection which is supported by a series of decisions of this Court and dismiss the application in revision with costs.

G.N./R.K. *Application dismissed.*

9. ('31) 18 A. I. R. 1931 All. 659 : 133 I. C. 465 : 1931 A. L. J. 727, B. B. & C. I. Ry. Co. v. Mitthu.
10. ('33) 20 A. I. R. 1933 All. 295 : 145 I.C. 436 : 55 All. 216 : 1933 A.L.J. 110, Piare Lal v. Bhagwan Das.
11. ('38) 25 A.I.R. 1938 Oudh 146 : 175 I. C. 63 : 14 Luck. 116 : 1938 O.W.N. 561.
12. ('26) 13 A. I. R. 1926 Mad. 958 : 96 I. C. 175, Venkatakrishnayya v. Sayamma.
13. ('38) 25 A.I.R. 1938 Nag. 210 : 175 I. C. 107 : I.L.R. (1940) Nag. 463, Krishna Kumar v. Radhelal Biharilal.
14. ('31) 18 A.I.R. 1931 Rang. 318 : 135 I. C. 331, Ma Ma Gale v. Ma Mi.
15. ('26) 13 A. I. R. 1926 Lah. 642 : 96 I. C. 830, Firm Bhajan Ram Gil Raj Mal v. Mt. Narain Devi.
16. ('34) 21 A.I.R. 1934 Lah. 231 : 141 I. C. 570 : 34 P. L. R. 557, Hari Krishna Datta v. K. R. Khosla.

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YORKE J.

Man Singh alias Priya Varat Singh
Appellant
v.
Emperor.

Criminal Appeal No. 121 of 1942, Decided on 5th June 1942, from order of Sessions Judge, Agra, D/- 13th January 1942.

(a) Arms Act (1878), S. 20 — Carrying unlicensed fire arm in sack while travelling in train is offence under S. 20.

The carrying of firearms of which a man is not lawfully in possession inside a haversack or a suitcase when travelling by rail does bring the person concerned within the mischief of S. 20, for it must be conceived that it is his intention that his possession of an unlicensed weapon may not be known to a public servant, as for example the police or to any person employed upon a railway : ('26) 13 A. I. R. 1926 Lah. 262, *Rel. on.* [P 350 C 2; P 351 C 1]

(b) Arms Act (1878), Ss. 19, 20 — Sanction for prosecution under S. 20 is not necessary.

For a prosecution under S. 20 no sanction would be necessary even in parts of India where such sanction might be necessary for a prosecution under Section 19. [P 351 C 1]

(c) Arms Act (1878), S. 20—Sentence—Person travelling on railway in possession of revolver—Four years rigorous imprisonment held not severe.

A man who is found travelling on the railway in possession of a six-chambered revolver even if it not be of the most modern type cannot complain that his sentence is severe when he is given a sentence of four years' rigorous imprisonment, the maximum sentence being one of seven years. [P 351 C 1]

E. V. David and R. B. Pandey—for Appellant.

Assistant Government Advocate—for the Crown.

JUDGMENT. — This is an appeal by one Man Singh alias Priya Varat Singh who has been convicted by the learned Sessions Judge of Agra, of an offence under S. 20 read with S. 19 (f), Arms Act, and sentenced to four years' rigorous imprisonment. The facts are quite clear and after hearing arguments of the learned counsel I am satisfied that the finding of fact recorded by the Court below is quite correct. On 17th October 1941, H. B. Joshi, Excise Inspector, Tundla, was on duty at Tundla junction on the East Indian Railway in connexion with his duties to prevent smuggling of excisable articles. After the train had come in from Agra Cantonment he saw the appellant sitting on the platform with a jhola or haversack. There was something about the way in which the appellant was looking after the haversack which made the Excise Inspector suspicious and he sent his excise peon Dildar Ahmad to find out where the appellant was going. In answer to Dildar Ahmad's enquiry the appellant replied that it was no business of Dildar Ahmad's. This naturally increased the suspicions of the Excise Inspector who thereupon called up two ticket collectors and others and searched the person and the haversack of the appellant. Inside the haversack there were found some clothes and also a six-chambered muzzle loading Colt revolver in a leather case, some pieces of lead, 11 fog signals, a box containing percussion caps, a cigarette tin containing gun powder and pieces of lead, a false moustache and whiskers, an axe blade and other articles. The statement of the Excise Inspector was corroborated by a number of witnesses and the only serious criticism that Mr. David has been able to put forward is that one of these witnesses, Bishambhar Nath, was at that date unemployed and has since the occurrence been taken on in the excise department.

The story told by the appellant in the Court below was itself unsatisfactory. He said that having got down from the Agra Cantonment train and intending to go to Etawah he got into the 14 down Upper India Express, that after a little while Dildar Ahmad, Excise peon, came to him and quarrelled with him about his ticket, that Dildar Ahmad hauled him out of the carriage and that afterwards he brought out from the train the haversack in question which the appellant suggested was not his property. It is obvious that, had the appellant taken his seat in the train for Etawah, it could not have been about his ticket that Dildar Ahmad could have any dispute with him, as Dildar Ahmad is an excise peon and not a ticket collector or ticket inspector. In my judgment, the story told by the prosecution witnesses is entirely free from doubt. Mr. David has devoted the bulk of his argument to an attempt to show that the case of the appellant did not fall under S. 20, but under S. 19 of the Act. Paragraph 1 of S. 20—and it is with para. 1 alone that we are concerned in this case — provides :

"Whoever does any act mentioned in cls. (a), (c), (d) or (f) of S. 19 in such manner as to indicate an intention that such act may not be known to any public servant as defined in the Penal Code, or to any person employed upon a railway or to the servant of any public carrier . . . shall be punished with imprisonment for a term which may extend to seven years, or with fine, or both."

Mr. David suggests that the carrying of firearms of which a man is not lawfully in possession inside a haversack or a suit-case when travelling by rail does not bring the person concerned within the mischief of S. 20. He suggests that something further is needed, as for example in case a person whose haversack or suit-case containing unlicensed arms was being searched and the person concerned surreptitiously removed the unlawful arms from the haversack or the suit-case in order to conceal them from the view of the searching officer or from the view of a railway servant. Some reliance was sought to be placed on a decision of a single Judge of this Court, in 3 A.L.J. 833 ;[1] but that was a case under para. 2 of S. 20 and not the first and therefore is no guide to the proper interpretation of para. 1. A number of cases have been put before me in regard to the proper interpretation of the para. 1 of the section. Mr. C. S. Saran, holding the brief of the Assistant Government Advocate, has referred to two Calcutta cases, A.I.R. 1933 Cal. 516[2] and A.I.R. 1933 Cal. 679.[3] The latter was a case of a man who was carrying a revolver tucked up in the top part of his dhoti and it was held that S. 20 was applicable. The former was a case of a man who had an unlicensed revolver concealed inside a locked trunk in a house and this was also held to come within the scope of the section. Patterson J. who pronounced the judgment of the Court remarked :

"The position, as I understand it, is this : mere possession of an unlicensed weapon is ordinarily punishable under S. 19 (f), but if the circumstances are such as to indicate an intention that the possession may not be known to the police, the offence is punishable under S. 20. Whether the intention referred to above exists or not is a pure question of fact, and this question must therefore be determined in each particular case with reference to the facts proved in that case."

As one might expect cases of this kind are more common in the Punjab than anywhere else, and I have been referred to a number of cases of the Punjab High Court, I need not however quote all of them, except one which has been referred to in the later cases and relied upon. This is the case in *Chet Singh* v. *Emperor*, decided by Addison J. and reported in A. I. R. 1926 Lah. 262.[4] The learned Judge summed up the point as follows :

"In my judgment the general principle laid down in 76 P.L.R. 1915[5] which was decided by a Division Bench of this Court, is correct, namely, that each case of concealment of arms must be decided on its own facts as to whether it falls under S. 19 or S. 20, Arms Act. If, however, arms were merely concealed in a house, which, it could not be anticipated, the police would come and search, S. 20 would not apply. For a conviction to fall under S. 20 there must be some special indication of an intention that

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1. ('06) 28 All. 302 : 3 A.L.J. 833 : 1906 A.W.N. 11 : 3 Cr.L.J. 88, Ram Sarup v. Emperor.
2. ('33) 20 A.I.R. 1933 Cal. 516 : 144 I.C. 957 : 34 Cr.L.J. 879 : 60 Cal. 545, Jogendra Mohan v. Emperor.
3. ('33) 20 A.I.R. 1933 Cal. 679 : 147 I.C. 827 : 35 Cr.L.J. 480 : 37 C.W.N. 509, Ananta Kumar v. Emperor.
4. ('26) 13 A.I.R. 1926 Lah. 262 : 94 I. C. 401 : 27 Cr. L. J. 625 : 7 Lah. 65 : 27 P. L. R. 523.
5. ('14) 1 A.I.R. 1914 Lah. 591 : 28 I. C. 796 : 16 Cr. L. J. 412 : 8 P.R. 1915 Cr. : 76 P.L.R. 1915, Khem Singh v. Emperor.

the possession of the arms was being concealed from a public servant or from a railway official. For example, if arms were carried hidden on a railway journey this special intention might be easy to infer."

In effect the learned Judge held that where a man was carrying arms not exposed and therefore in a sense concealed through a place where there was no expectation of his meeting the police then S. 20 could hardly be held to be applicable. On the other hand, if a man carries an unlicensed weapon through a town concealed in a bag or in a suit-case or does the same thing when travelling by train, it must be conceived that it is his intention that his possession of an unlicensed weapon may not be known to a public servant, as for example the police or to any person employed upon a railway. In my judgment there is not the slightest doubt that the present case falls within the mischief of S. 20, Arms Act. Mr. David has also put forward a suggestion which was not apparently made in the Court below nor in the grounds of appeal in this Court, namely, that the conviction is bad for the absence of sanction to the prosecution. The contention is based upon S. 29 of the Act; but in my judgment there is no force in this contention. The place where the appellant was found in possession of the arms in the present case is on the north side of the river Jumna. It was held by Daniels J. in A. I. R. 1926 All. 143,[6] that "in the Bijnor District and other parts of the United Provinces to the north of the rivers, Jumna and Ganges, the sanction of the District Magistrate for a prosecution under S. 19, Arms Act, is not necessary." The fact of the matter is that S. 32 (2) of the old Act (Act 31 of 1860) was applicable to all those districts which had been disarmed and S. 29 required sanction only in the case of offences committed within three months of the date on which the present Act of 1878 came into force. Mr. C. S. Saran has further pointed out that it has been held by a Bench of the Calcutta High Court that for a prosecution under S. 20, Arms Act, no sanction would be necessary even in parts of India where such sanction might be necessary for a prosecution under S. 19. The only question which remains is the question of sentence. In my judgment a man who is found travelling on the railway in possession of a six-chambered revolver even if it not be of the most modern type cannot complain that his sentence is severe when he is given a sentence of four years' rigorous imprisonment, the maximum sentence being one of seven years. I find no force in this appeal which accordingly fails and is dismissed.

K.S./R.K. *Appeal dismissed.*

6. ('26) 13 A. I. R. 1926 All. 143 : 91 I. C. 47 : 27 Cr.L.J.15 : 24 A.L.J. 30, Amir Ahmad v. Emperor.

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IQBAL AHMAD C. J. AND DAR J.

Mt. Rao Rani—Defendant—Appellant

v.

Mt. Gulab Rani — Plaintiff —

Respondent.

Second Appeal No. 434 of 1939, Decided on 15th April 1942, from decision of Dist. Judge, Jhansi D/- 16th December 1938.

(a) Agra Tenancy Act (3 of 1926), Ss. 226 and 249 — *A* dying leaving widows *G* and *R*—*G* remarrying—Suit by *G* against *R* for her share of profits of *A*'s property — *R* setting up compromise whereby *G* was to forfeit her share on remarriage — Assistant Collector holding compromise valid and dismissing suit — District Judge on appeal holding compromise to be invalid and remanding suit—Assistant Collector in pursuance of order of remand passing decree for profits which was affirmed by District Judge on appeal — Second appeal by *R* to High Court —No appeal held lay to High Court from order of remand—*R* held could question propriety of order of remand under S. 105, Civil P. C., in second appeal against District Judge's decree —Compromise held not in restraint of marriage within S. 26, Contract Act — Compromise held was in nature of family settlement and valid.

A died leaving two widows *G* and *R*. By the custom governing the caste (lodh) to which the parties belonged remarriage of widows was allowed and on remarriage the widow was not divested of the property of her husband. Disputes arose between *G* and *R* in the mutation Court where *R* asserted that *G* was not married to *A*. The dispute was amicably settled by a compromise whereby the names of the two widows were to be entered in equal shares as against the properties left by *A* and either widow would forfeit her right in the share in the event of her remarriage. *G* remarried and thereafter sued *R* under S. 226 for her share of *A*'s property. *R* set up the compromise and the Assistant Collector holding the compromise valid dismissed the suit. The District Judge on appeal held the compromise to be invalid and remanded the suit. In pursuance of the order of remand the Assistant Collector passed a decree for profits in favour of *G* which was affirmed by the District Judge in the appeal by *R*. In the second appeal by *R* to the High Court :

Held that (1) no appeal lay to the High Court under the Agra Tenancy Act from the order of remand passed by the District Judge; [P 353 C 1]

(2) *R* could question the propriety of the order of remand in the second appeal against the decree for profits. [P 353 C 1]

(3) The compromise was in the nature of a family settlement and was binding on *G*; 10 A. L. J. 185, *Rel. on.* The compromise could not be said to be in restraint of marriage within S. 26, Contract Act, as no direct prohibition to remarry was imposed by it. [P 353 C 1]

(b) Agra Tenancy Act (3 of 1926), S. 249 — Meaning of—S. 249 is not inconsistent with that part of S. 105, Civil P. C., which allows validity of an order to be questioned in appeal against decree.

All that S. 249 means is that no second appeal from an order will lie under the Agra Tenancy Act. Section 249 is not inconsistent with that portion of S. 105, Civil P. C., which allows the validity of an order to be called in question in an appeal against a decree : ('30) 17 A.I.R. 1930 All. 455, *Approved.* [P 353 C 1]

C. P. C. —

('40) Chitaley, S. 105, N. 8 Pt. 9.

('41) Mulla, Page 383, N. "Sub-section (2): Appeal from order of remand."

(c) Contract Act (1872), S. 26 — Whether partial or indirect restraint on marriage is within S. 26 *(Quære)*.

It is very doubtful whether partial or indirect restraint on marriage is within the scope of S. 26. [P 353 C 1]

N. C. Vaish—for Appellant.

Sir Syed Wazir Hasan and C. S. Saran — for Respondent.

IQBAL AHMAD C. J. — This is an appeal by Mt. Rao Rani defendant arising out of a suit for profits filed in the Revenue Court by Mt. Gulab Rani plaintiff-respondent under S. 226, Agra Tenancy Act (3 of 1926). The facts of the case are no longer in controversy and are as follows: The parties to the present litigation, viz., Mt. Rao Rani and Mt. Gulab Rani, are the widows of a lodh named Ram Adhar. Ram Adhar died in or about the year 1925 leaving certain zamindari property. Disputes arose between Mt. Gulab Rani and Mt. Rao Rani in the mutation Court and in that Court it was pleaded by Rao Rani that Gulab Rani was not married to Ram Adhar and as such Rao Rani prayed that her name alone be mutated in place of Ram Adhar. The parties, however, amicably settled their dispute and the terms of the compromise were embodied in a deed dated 21st August 1926 which was filed in the Revenue Court. The main terms of the compromise were that the names of the two widows were to be entered in equal shares as against the properties left by Ram Adhar, and that, in the event of either widow re-marrying, she (i. e., the widow re-marrying) would forfeit her interest in the properties left by Ram Adhar, and the other widow will, in that event, become entitled to the whole of the properties. The rest of the terms of the compromise have no direct bearing on the decision of the present appeal. Some time after the compromise Mt. Gulab Rani remarried, left Ram Adhar's home and went to, and has all along continued to, live in her new husband's house in a different village. It is a matter of admission that by the custom governing the caste (Lodh) to which the parties belong, remarriage of widows is allowed and that on remarriage a widow is not divested of the property of her husband. After the mutation case Rao Rani was appointed lambardar and has all along continued to be lambardar. By the suit giving rise to the present appeal Gulab Rani claimed her share of the profits of the properties of Ram Adhar from Rao Rani. Rao Rani contested the suit mainly on two grounds. Firstly she pleaded that the compromise in the mutation case was in the nature of a family settlement and, in view of that settlement, Gulab Rani was not entitled after her remarriage to claim the profits of the properties left by Ram Adhar. Secondly, she pleaded that Mt. Gulab Rani forfeited her rights in Ram Adhar's properties on her remarriage. The second plea raised by Mt. Rao Rani was not pressed in the Courts below and was abandoned.

The Assistant Collector remitted the following issues to the civil Court for decision :

"(1) Was there a family settlement between Mt. Gulab Rani and Mt. Rao Rani in which it was agreed between the two that whoever re-married would forfeit her claims in her deceased husband's property?

(2) Where one of the two widows of a proprietor re-marries, does she forfeit her proprietary claims in her deceased husband's properties by reason of the re-marriage?"

The civil Court (Munsif) decided issue 2 in favour of Gulab Rani, but on issue 1 his decision was adverse to Gulab Rani. He held that the compromise amounted to a family arrangement and, in view of that arrangement, Gulab Rani lost all rights in Ram Adhar's properties on her re-marriage. On receipt of these findings the Assistant Collector dismissed Gulab Rani's suit. Gulab Rani filed an appeal before the District Judge and the learned Judge held that the compromise referred to above was in restraint of marriage within the meaning of S. 26, Contract Act, and was therefore void. In view of this finding the learned Judge reversed the decree of the trial Court and remanded the case to that Court with the direction to determine the amount of profits to which Gulab Rani was entitled and to pass a decree in her favour for that amount. A first appeal from order (No. 220 of 1938) was filed in this Court by Rao Rani against the order of remand passed by the District Judge. During the pendency of that appeal the Assistant Collector, in pursuance of the order of remand, ascertained the amount of profits and passed a decree in favour of Gulab Rani for a sum of Rs. 314-4-9 and this decree of the Assistant Collector was, on appeal, affirmed by the District Judge. The present second appeal was then filed by Rao Rani in this Court against the appellate decree passed by the District Judge.

By consent of parties both the first appeal from order and the second appeal were connected and were put for hearing before a learned Judge of this Court. The learned Judge held that no appeal lay to this Court from the order of remand passed by the District Judge and accordingly dismissed the first appeal from order. In the second appeal the counsel of Rao Rani appellant assailed the order of remand passed by the District Judge on the ground that the compromise did not offend against the provisions of S. 26, Contract Act. The respondent's counsel then contended before the learned Judge that as no appeal lay to this Court against the order of remand, this Court could not, in the second appeal against the appellate decree passed by the District Judge, consider the propriety of the order of remand. As in the opinion of the learned Judge this question was of some importance, he referred the case to a Bench of two Judges. The suit for profits giving rise to the present appeal was filed when the Agra Tenancy Act (Act 3 of 1926) was in force, and it is admitted on all hands that the right of appeal in the present case was governed by the provisions of that Act. By that Act no appeal from order is provided to the High Court. It follows that the order of remand passed by the District Judge could not be challenged in this Court by way of appeal. The question however remains whether the validity of that order could be called into question in the present second appeal against the ultimate decree passed by the District Judge. In our judgment, the answer to this question must be in the affirmative. Section 105 (1), Civil P, C., runs as follows :

"Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."

It is clear from this provision that the correctness of an order affecting the decision of a case can be called into question in an appeal against the decree. There can be no manner of doubt that the question whether the compromise was or was not valid was the cardinal question in the case, and on the answer to that question depended the decision of the claim preferred by Gulab Rani. The earlier decision of the District Judge about the invalidity of the compromise therefore vitally affected the decision of the case. It follows that Rao Rani is entitled in the present second appeal to assail the order of remand passed by the District Judge. Speaking generally by S. 264, Tenancy Act (Act 3 of 1926) the provisions of the Civil Procedure Code have been made applicable to suits and other proceedings

under the Act except where those provisions are inconsistent with anything contained in that Act. It is contended by the learned counsel for the respondent that S. 249, Tenancy Act, is inconsistent with that portion of S. 105, Civil P. C., which allows the validity of an order to be called in question in an appeal against a decree. We are unable to agree with this contention.

Section 249, Tenancy Act, runs as follows: "No appeal shall lie from any order passed in appeal." Having regard to the scheme of the Act we are clearly of opinion that all that S. 249 means is that no second appeal from an order will lie under the Tenancy Act. Section 249, Tenancy Act, is identical with the provisions contained in sub-s.(2) of S. 104, Civil P. C., which provides that "no appeal shall lie from any order passed in appeal under this section." It is true that S. 249 is not very happily worded, but bearing in mind the fact that that section comes under the sub-heading "appeals from orders" in Chap. 15 of the Act, and is immediately after Ss. 248 and 249 which provide about first appeals against orders, we have no doubt that that section bars second appeals against orders. This was the view taken by a learned Judge of this Court in 14 R. D. 398.[1] We therefore hold that it is open to this Court to consider the propriety or otherwise of the order of remand passed by the District Judge.

This brings us to the consideration of the question whether the compromise in the mutation Court was in restraint of marriage within the meaning of S. 26, Contract Act. In our judgment, it was not. As already stated, Rao Rani had asserted in the mutation case that Gulab Rani was not married to Ram Adhar. There was therefore a dispute between Rao Rani and Gulab Rani. The dispute threatened the peace of the family and was amicably settled by the compromise. The compromise was accordingly in the nature of a family settlement. Even though one of the terms of the compromise was that either widow would forfeit her rights in the properties of Ram Adhar in the event of her remarriage, the compromise by itself did not impose any restraint on either of the two widows from re-marrying. Section 26, Contract Act, is no doubt general in its terms, but we entertain considerable doubt that partial or indirect restraint on marriage is within the scope of that section. By the compromise no restraint was imposed on either of the two widows from re-marrying. All that was provided was that if a widow elected to re-marry, she would be deprived of her rights given to her by the compromise. In other words, no direct prohibition to re-marry was imposed by the compromise and the compromise was arrived at in order to preserve the family properties and to ensure their proper management. The view that we take finds support from the decision in 10 A. L. J. 185.[2]

The matter may be looked at in another way. According to the Hindu law the re-marriage of a widow ordinarily divests the estate inherited by her from her deceased husband. The only exception to this rule is furnished by those cases where re-marriage is allowed by the custom of the caste to which the widow belongs. But even in such cases there is divergence of judicial opinions on the question as to whether after re-marriage in accordance with the custom of the caste the widow is or is not entitled to retain possession of the estate of her husband. It was in this state of doubt and uncertainty that the two widows entered into this compromise and good consideration passed from one to another. The compromise did not prohibit either of the two widows from re-marrying. All that it provided was that if any of the two widows exercised the option to re-marry, she will be divested of her husband's property. We, therefore, hold that the compromise was not void and was binding on Mt. Gulab Rani. For the reasons given above we allow this appeal, set aside the decrees of the lower Courts and dismiss the plaintiff's suit. In the circumstances of the present case we direct the parties to bear their own costs in all Courts.

G.N./R.K. *Appeal allowed.*

1. ('30) 17 A.I.R. 1930 All. 455 : 129 I. C. 373 : 52 All. 714 : 1930 A. L. J. 1065 : 14 R.D. 398, Gambhir Singh v. Surendra Singh.
2. ('12) 10 A. L. J. 185 : 16 I. C. 13, Muhammad Hasan v. Noor Jahan.

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ALLSOP AND VERMA JJ.

Din Mohammad and others —
Plaintiffs — Appellants

v.

Secretary of State — Defendant —
Respondent.

First Appeal No. 466 of 1937, Decided on 10th April 1942, from decision of Addl. Civil Judge, Benares, D/- 25th August 1937.

(a) Record of Rights—Khasara is not included in record of rights and does not carry presumption of correctness — It is not conclusive evidence of facts stated therein.

A khasra is normally a field book containing list of the tenants in occupation of agricultural land and it is not one of the registers which are included in the record of rights which carries with it a presumption that the statements made in it are true. A khasra is not conclusive evidence of the facts stated therein. [P 356*g*]

(b) Mahomedan law—Wakf—Mosque—Compound wall not erected along with mosque — Enclosure cannot be presumed to have been dedicated when mosque was built.

Where the compound wall was not erected at the same time as the mosque it cannot be presumed that the whole enclosure was dedicated when the mosque was built. [P 357*d,e*]

(c) Ownership—Land—Proof.

The mere fact that a certain number of people overflowed on to the public land on certain occasions when they found it convenient so to do would not prove that that land belonged to those people. [P 357*f*]

(d) Custom—Customary right — Right to use public land on particular religious occasions — No dominant heritage for better enjoyment of which it could be claimed — Right cannot be acquired by prescription or user — It can be claimed only by custom—Proof—Long user by itself does not create custom.

A right to use a certain land on particular religious occasions in the absence of a dominant heritage for the better enjoyment of which it could be claimed, cannot be acquired by prescription or user. It can be acquired by custom. Therefore it must be proved that the existence of the right has been so long generally recognized that its existence has become a part of the law applicable to the place in which the right is claimed. Long user may be evi-

dence of the existence of the custom, but it does not in itself create a custom. A custom which amounts to law is one which has obtained general recognition by those concerned, or, in other words, a customary rule becomes law when it is generally recognized that the rule should be applied to certain sets of circumstances. In the same way a customary right comes into existence when by the custom of the neighbourhood the right is recognized, or, in other words, when over a reasonable period of time an enquiry from any disinterested person in the neighbourhood would elicit that the right existed : 6 All. 497 ; ('24) 11 A.I.R. 1924 Mad. 197 and ('39) 26 A.I.R. 1939 All. 165, *Ref.* [P 357*g,h* ; P 358*a*]

A. M. Khwaja and Kaleem Jafri — for Appellants.

N. P. Asthana — for Respondent.

ALLSOP J. — The plaintiffs in the suit which has given rise to this appeal were three Hanafi or Sunni Musalmans, one of whom has since died. The plaintiffs stated in para. 2 of their plaint "that the land bearing settlement No. 9130, measuring 1 bigha, 9 biswas, 6 dhurs, situate in mauza Shahar Khas, pargana Dehat Amanat, district Benares, containing one mosque known as Gyan Bafi together with a pucca courtyard at the back and a graveyard enclosure towards the north and a pucca staircase in front of the gate together with a pucca enclosure all round and a pipal tree and two bair trees and a pucca well of brackish water and two pipal trees on the platform near the boundary wall appertaining to the mosque dedicated land is in the possession of the plaintiffs and other Muslims."

The reliefs they claimed were:

"(a) It may be declared that the land bearing No. 9130, situate at mauza Shahar Khas, pargana Dehat Amanat, zila Benares, measuring 1 bigha, 9 biswas, 6 dhurs, together with the enclosure all round and the platforms and trees and the pucca well, the graveyard, the steps, etc., described in para. 2 of the plaint is waqf in the possession of the plaintiffs and other Musalmans and the plaintiffs have a right to say their prayers specially the Alvida prayers and to exercise their religious and legal rights as the need and occasion arise :

(b) If in the opinion of the Court the plaintiffs are not held to be entitled to the whole or any part of the relief (a), then it may be declared that the plaintiffs are entitled to exercise the said rights by way of custom."

It appears from the plan and the photographs on the record and the evidence which has been produced that this mosque is built upon a high plinth in a square or enclosure surrounded on all sides by houses or possibly in some parts by a wall. To the south of the mosque in the same enclosure there are a Hindu temple, a well which is considered sacred by the Hindus and some trees under or near which there are some Hindu idols. To the south, east and north, between the mosque or temple, as the case may be, and the surrounding houses or the wall, there is a space more or less wide paved with bricks. To the west there seem to be some ruins and an open space. There are gateways leading into the enclosure on the east and the north. The paved space between these gates is used as a public road or lane and from the gate on the east towards the temple and other sacred Hindu places to the south there is also a public way.

According to the plaint the cause of action arose in the year 1935 when the District Magistrate of Benares decided that the Musalmans should not, in any case, be permitted to congregate outside the upper platform of the mosque and to say their prayers within the Gyan Bafi mosque enclosure anywhere except within the building of the mosque or upon it and the Superintendent of Police, consequently, purporting to act under S. 31 of Act 5 of 1861, prohibited the Musalmans from saying their prayers, or from sitting for that purpose within the compound, or the platform of the mosque. The plaintiffs mentioned in para. 4 of their plaint that the Musalmans were in the habit of saying funeral prayers in congregation towards the west of the mosque and that they also gathered there in order to celebrate the birth of the Prophet and for other religious purposes, but it appears that the main dispute has arisen because the plaintiffs consider that they are entitled as of right to use the paved portions of the enclosure outside the mosque for the purpose of prayers on the last Friday of Ramzan, that is, Alvida, if the congregation is too large to be accommodated in the mosque itself or on the unenclosed part of the plinth. The defendants were the Secretary of State for India in Council through the District Magistrate and Collector of Benares and the Anjuman Intizmia Masajid through its Secretary. The Anjuman was apparently impleaded because it had entered into some agreement with the District Magistrate upon the question in dispute. From the reliefs which have been quoted above it seems that the plaintiffs based their claim firstly upon the allegation that the whole of the enclosure was waqf property and secondly, if that allegation was considered not to be established, then upon the further allegation that they had in some way acquired a right by custom to use the whole of the enclosure for the purpose of saying their Friday prayers or for any other ceremonies which they were in the habit of performing.

The learned Civil Judge found that the land under the mosque and its plinth was waqf land. He also found that some houses over and nearer the northern gate of the mosque had been in the possession of the mutwallis for over 12 years and might be considered as waqf. It was further established in his opinion that the Musalmans had been in the habit of celebrating an urs or memorial service once a year near two graves to the west of the mosque and of using the part of the open land occupied by ruins as a passage for going over the roof of the mosque (whatever that may mean). He gave the plaintiffs a declaration to the effect that they could use the waqf property for the purpose of their religious ceremonies and that they could use the land near the graves to the west in order to celebrate the urs once a year and that they could use the land covered with ruins as a passage but also declared that they had no right to offer ordinary, funeral or Alvida prayers on any portion of the land marked red in the plaint map which would be part of the decree, but they might, if they liked, offer prayers on the roof of the mosque and of a certain house occupied by a dhobi or washerman and in the house over the northern gate and the house to the east of the gate and over the plinth to the north of the mosque over which there existed many graves. I may mention that the portion marked red in the plaint map is that part of the enclosure between the mosque itself and the surrounding houses or wall.

The plaintiffs appealed. The first question which naturally arises is whether the whole of the enclosure is wakf or dedicated land. The learned Civil Judge has gone into the history of this mosque and has come to the conclusion that it was built on the

site of a Hindu temple which was demolished by
a the Emperor Aurangzeb in the seventeenth century. I do not think that it is necessary to go into the question of the origin of the mosque. It is sufficient to go back to the year 1809 when there was a serious riot between Hindus and Musalmans in that part of Benares where the mosque is situated. It appears from a letter from a Secretary to Government to the acting Magistrate of Benares written on 23rd March 1810, that the previous Magistrate, Mr. Watson, had suggested that the Musalmans should be absolutely excluded from the mosque and that the Vice-President in Council disapproved of this suggestion. The vice-President based his opinion upon the obvious expediency of uniformly manifesting the strictest impartiality on the occurrence of any dispute between the Hindus and Musalmans. He pointed out that a departure from that principle
b would be productive of the utmost jealousy and discontent on the part of those who were excluded and would give rise to the most extravagant pretensions on the part of other party. He asserted that the authorities must depend for the maintenance of public tranquillity on a firm and just confidence in the known intentions of Government to afford both parties equal protection in the exercise of their religious opinions and on the conviction that any violence or outrage on either side would infallibly meet its merited punishment. The Vice-President approved of the proposal of the acting Magistrate for re-establishing the exercise of the Hindu and Mahomedan religion respectively at the place mentioned in his letter which seems to suggest that both parties were to be allowed to perform their legitimate ceremonies in the enclosure of this mosque.

Further light is thrown upon the occurrences of
c that time by a letter addressed to a Secretary to Government by the officiating Commissioner of the Benares Division on 20th December 1853. It is said in this letter that there were some shops within the enclosure of this mosque which were burnt down by the Hindus in the riots of 1809 and that the officiating Magistrate of the time objected to their restoration and suggested to Government that a small monthly stipend of Rs. 10 a month should be paid from the public treasury to the mutwallis of the mosque by way of compensation for the loss of income derived from the shops. The letter goes on to say that the suggestion was accepted and that the money had been paid ever since. The suggestion of the officiating Commissioner was that the stipend should cease and that the Government should purchase 4 per cent. Government paper of the value of
d Rs. 3000 and deliver it over to the mutwallis so that they might obtain the same income from the interest. There is a further letter which shows that this suggestion was accepted by the Government. Then from the year 1854 there are a series of orders by various Courts and officials which show that Hindus and Musalmans were making attempts to encroach upon each other's rights. On 21st June 1854, an order was passed by the criminal Court at Benares from which it appears that some Hindu had sought permission to set up an idol and that permission had been refused because this was an innovation. It also appears from the order that there had been a dispute between the Hindus and Musalmans which had been settled on the agreement that a platform round the Gyan Bafi wall should remain in the possession and occupation of the Hindus who in their turn would throw into the Ganges certain broken idols which were lying about somewhere in the enclosure.

In 1858 there was another attempt to set up an idol. This gave rise to a dispute and the Magistrate eventually directed that a new idol should be set up *e*
in place of an old broken idol to the south of the Gyan Bafi wall. In 1885 there was another dispute because some Hindus had put up a lantern in the eastern gate of the Gyan Bafi enclosure and had put up a permanent staircase in place of a ladder in some part of the enclosure. The lantern and the ladder were both removed. In 1886 there was a further dispute about various constructions made by the Hindus and Musalmans. The District Magistrate by an order dated 8th February 1886, dealt with the disputes. In the course of this order, he mentioned that the copies of former orders passed regarding the Gyan Bafi showed that it had been held throughout the ever recurring disputes between the Hindus and Musalmans that the Musalmans were in sole possession of the mosque and its plinth while the enclosure was open to the use of both *f*
Hindus and Musalmans. In the year 1887, another order was passed on 11th December by the District Magistrate. In the course of that order he said that there could be no doubt that the land and the enclosure belonged to the State, although certain portions of it, for instance, those on which the mosque and the pipal tree stood, were in the possession of one party or the other. He reiterated that the rest of the enclosure was open to the use of both Hindus and Musalmans subject to the condition that neither party should make any new use of it which might inconvenience the other. The direction was that an application by two Musalmans to construct shops on the boundary of the mosque should be rejected and that the construction of the shops should be stayed and the enclosure restored to its former condition. In the year 1889 there was a dispute about a stone bench which the Magistrate *g*
refused to remove because he thought that it would be used by everybody who went into the enclosure.

In the year 1898 the Magistrate forbade the construction of a wall and later on in the same year the District Magistrate passed an order that the Musalmans should remove some earth and stones which they had stacked in the enclosure. In this order he again said that the enclosure was open to the use of both Hindus and Musalmans subject to the condition that neither party should make any new use of the lane which might inconvenience the other. After that in the year 1904 the District Magistrate passed an order under S. 82, Municipal Act, directing the removal of a heap of mortar which had been stacked at the foot of the stairs leading on to the platform of the mosque, the removal of a trough for feeding cattle which had been erected by some *h*
Hindus and the removal of a wall which had been recently built on the east, south-east and south of the mosque. The orders were all passed under the Municipal Act and the Magistrate specifically stated that the heap of mortar obstructed the public road. Another attempt was made to build or rebuild a wall and to instal a new idol in the year 1904. The wall and the idol were removed and an application for permission to build the wall and instal the idol was rejected. In the year 1906 the Municipality of Benares proposed to pave a part of the enclosure and the Musalmans objected. The Magistrate, who was also the Chairman of the Board, did not go into the merits of the dispute but allowed the paving to be put down on the ground that there was no question of the Municipality wishing to interfere with any rights which might be in existence. In the year 1917 the District Magistrate allowed a Musalman described as Chairman of the Gyan Bafi mosque to put up a railing to the staircase, but he mentioned

in his order that this gentleman had reaffirmed his knowledge of the fact that nothing whatever, small or big, was to be altered in the Gyan Bafi enclosure without permission.

In the year 1923 there was another dispute between the Hindus and Musalmans each side raising certain objections to the conduct of the other in making constructions or using the enclosure for keeping poultry and so forth. The Magistrate passed an order settling the disputes. In 1924 there was another similar dispute when the Joint Magistrate of Benares inspected the place and found that the Musalmans had erected a barricade of stones and broken pieces of masonry which they had no right to do. The District Magistrate had to pass an order directing the removal of certain constructions. In 1930 the District Magistrate of Benares issued a letter to the Secretary, Anjuman Intizamia Masajid (that is, the society for the management of mosques) in which he said that the congregation from the Gyan Bafi mosque had overflowed into the enclosure on the Alvida day in 1929 and 1930. He said that he had recorded an order in 1929 when the Hindus had complained and had remarked in it that it seemed clear to him that the object of the Mahomedans had not been to wound the feelings of the Hindus, as the petition at that time had alleged, but that at the same time this overflowing on to the enclosure must not be allowed to constitute a precedent. He said that he had made it clear to the Mahomedans in 1929 that these overflows would not be allowed as they interfered with the pedestrain traffic in the enclosure. He then pointed out that an overflow had again occurred in 1930 in spite of his directions and that he had, therefore, issued an order that overflows would not be allowed to occur in future. He suggested to the Secretary of the Anjuman Intizamia Masajid that he should post men to divert Mahomedans to other mosques when the Gyan Bafi mosque was full.

On 24th January 1935, an application was made by the Anjuman Intizamia Masajid to the District Magistrate in which they said that the Gyan Bafi mosque was a central place of worship, that a large congregation assembled there, that people from outside Benares came there to offer their prayers under the impression that the bigger the congregation the more the merit of the prayers, that they had attempted to prevent an overflow on the occasion of Alvida but the order forbidding the overflow had been received too late and it had not been possible absolutely to prevent it and finally that they might be allowed to overflow on to the enclosure on such occasions, when the congregation was too large for the mosque, the ground being that they had always been in the habit of doing so. The District Magistrate replied to this application and said that he would post police at the mosque on future occasions to assist the committee in preventing an overflow and that the officer in charge of the police would have discretion to permit a limited number to say their prayers in the passage way to the north and north-east of the mosque if there was an overflow at a time when it was too late for intending worshippers to proceed to another mosque. In October 1935, the Anjuman Intizamia Masajid again made an application that the Musalmans should be allowed to use the enclosure round the mosque for the purposes of their prayers. They purported to set forth the history of the use of the mosque, but they made at least one incorrect statement in that they said that the Magistrate of Benares in 1810 had suggested that the Mahomedans should be excluded from the Gyan Bafi compound and that the Vice-President in Council had not agreed. As I have already shown, the suggestion of the Magistrate at that time was to exclude the Mahomedans from the mosque altogether and there was no question of excluding them only from the enclosure round the mosque. It was to the exclusion from the mosque that the Vice-President in Council expressed disagreement. He clearly intended that both parties should use the enclosure round the mosque. In his reply, the District Magistrate pointed out other inaccuracies and referred to the fact that the Anjuman Intizamia Masajid had not assisted in keeping the enclosure round the mosque clear of worshippers. He then definitely stated that he would not allow any further overflow into the enclosure.

Finally, in the year 1936, the District Magistrate recorded an order that he would allow the Musalmans to use the enclosure on the occasion of Alvida provided that the way was kept open for the use of other communities. He said in that order that it was not admitted that the Musalmans had any right to do this but that he was under the impression that they would make an attempt to consider the feelings of others and that they would restrict the overflow within reasonable limits. It seems to me that the history of the official action in the matter of the enclosure shows quite positively, whatever the original circumstances may have been that the enclosure round the mosque has never been in the exclusive possession of the Musalman community as a waqf during a period of well over a hundred years next before the institution of the suit. This enclosure has been treated as a public place to be used alike by all communities including Hindus and Musalmans and that in these circumstances it is impossible now to say that it is waqf property in the possession of the plaintiffs and other Musalmans of the Sunni sect.

Learned counsel for the appellants has argued strenuously that it is established that this land was originally waqf and that nothing which has happened since can change its character. That being so, it is necessary to consider what evidence there is to establish the allegation which has been made. Learned counsel has referred, in the first place, to a settlement khasra of the year 1291 F, that is, the year 1883 or 1884 A. D. A khasra is normally a field book containing a list of the tenants in occupation of agricultural land and it is not one of the registers which are included in the record of rights which carries with it a presumption that the statements made in it are true. Normally this register, at least in the year 1883 or 1884, would have dealt only with tenants of agricultural land because it would have been prepared for the purpose of assessing revenue which was not payable on urban sites. We, therefore, examined the settlement report of the Benares District of that year and discovered that certain urban areas were included in the khasra because they had been built over since the last settlement or revision of records and rents were still paid upon them. We presume that the khasra which has been produced was prepared in these circumstances, but it is not conclusive evidence of the facts stated therein. Learned counsel has based his argument upon the fact that the whole enclosure has been given one number in the map and that the entry in the register against that number shows that it is a mosque with its enclosure. The person who prepared the map and the person who made the entry were not concerned with the question whether the whole enclosure appertained to the mosque and they may naturally have supposed as there was an enclosure round the mosque that the

a plot could best be described as a mosque with its enclosure. In my judgment the entry does not prove that the plaintiffs' allegation is true.

Learned counsel has then referred to some legal proceedings which were held in the year 1823. It appears that at that time there was a house in the enclosure to the west of the mosque. The Government under Regulation 19 of 1810 had directed the Board of Revenue to supervise the expenditure of money held in trust for religious institutions and this supervision was exercised by local agents under the control of the Board of Revenue. The house in the enclosure was leased to a tenant and the question was whether the rent should be recovered by the local agent on behalf of the Board of Revenue so that the income should be expended for the general purposes of the mosque or whether it should be recovered by the mutwalli of the mosque for the b time being. It appears from the records which have been placed before us that the mutwalli claimed that the house had been given to him for his personal use as mutwalli and that it was no part of the general endowment of the mosque. His contention was upheld by the Court which directed that the house should not be included in the list of wakf properties belonging to the mosque. It does not seem to me that this decision in any way helps the plaintiffs-appellants. It would go to show, if anything, that the enclosure was not part of the wakf property belonging to the mosque, although the plot of land on which the house stood might be considered as dedicated to the use of the mutwalli, that is, might be treated as a separate wakf. There are records which indicate that this house was knocked down on one occasion in order to enable c some exalted personage to obtain a better view of the mosque as a whole and that in its place another house was erected which still is in the possession of the mutwallis.

Learned counsel has further referred to various exhibits in which the enclosure has been described as the compound of the mosque, but these are either applications by Musalmans made in their own interest or orders by District Magistrates or officials who have clearly said at the same time that the enclosure is a public place. Learned counsel has drawn our attention to the letter of 23rd March 1810, from a Secretary to Government to the acting Magistrate of Benares and has urged that the decision of the Vice-President in council amounted to an admission that the whole enclosure was wakf property, but I do not find that this is so. I have already explained that the Vice-President merely d stated that the Musalmans should not be excluded from the mosque itself and that his direction was that Hindus and Mahomedans should each be allowed to exercise their religious rights provided they did not interfere with the rights of others. Learned counsel has also suggested that the learned Judge of the Court below has himself found that the northern gate is part of the wakf property, but the finding merely is that this gate or house above it may be treated as wakf property because it has been in the possession of the mutwallis for more than 12 years. There is no finding that it was originally dedicated at the same time as the mosque.

There is a general argument that the mosque stands within an enclosure which was at one time surrounded with a wall and that it must be assumed that the whole enclosure was dedicated when the mosque was built. There does not seem to me to be any force in this contention. The learned Judge has found on the historic evidence which was produced before him that the wall with the enclosure originally appertained to a temple and the outer e wall was not erected at the time when the mosque was built. It is unnecessary to go into the question whether the finding is right or wrong. This much at least is certain that it has not been established that the wall was erected at the same time as the mosque and consequently one cannot presume that the whole enclosure was dedicated when the mosque was built. Learned counsel has argued that there were shops apppertaining to the mosque in the southern part of the enclosure before the year 1809. No doubt that is true as it appears that the houses were burnt down and compensation was paid to the mutwallis because they were not allowed to re-erect them, but we do not know exactly where these shops were and even if the land upon which they stood was part of the wakf, it is not established that that land is part of the subject-matter of the dispute. However, even if it were, it is obvious that f the land has not been in the possession of the mutwallis since 1809 and it would be too late for any person now to claim it as wakf property.

The only other evidence which has been produced before us is the statements of 18 witnesses who have said generally that the Musalmans have on occasions overflowed on to this enclosure on the last Friday of Ramzan for the purpose of saying their Friday prayers. The evidence does not seem to me to establish in any way that this enclosure is waqf property. The mere fact that a certain number of people overflowed on to the public land on certain occasions when they found it convenient so to do would not prove that that land belonged to those people. I am quite satisfied that the learned Judge of the Court below was right in his conclusion that it was not established that any part of the enclosure g about which he has refused to give a declaration to the plaintiffs was waqf property.

The result of this finding is that we must consider the second claim made by the plaintiffs-appellants. Learned counsel, in the first instance, suggested that the Musalmans had acquired a customary easement over the land but he admitted later that there was no dominant heritage for the better enjoyment of which this right could be claimed. He, therefore, fell back upon the contention that this was a customary right such as that mentioned in certain cases, as for instance, the cases in 6 All. 497,[1] 46 Mad. 866[2] and 1938 A.L.J. 1243.[3] It seems clear to me that a customary right of this nature is not a right acquired by prescription or user. It is a right acquired by custom or, in other words, there must be evidence to show that the existence of the right has been so long generally recognised that its existence has become a part of the law applicable to the place in which the right is claimed. Long user may be evidence of the existence of the custom, but it does not in itself create a custom. A custom which amounts to law is one which has obtained general recognition by those concerned, or, in other words, a customary rule becomes law when it is generally recognised that the rule should be applied to certain sets of circumstances. In the same way a customary right comes into existence when by the custom of the neighbourhood the right is recognised, or, in other words, when over a reasonable period of time h

1. ('84) 6 All. 497 : 1884 A. W. N. 186, Ashraf Ali v. Jagan Nath.
2. ('24) 11 A.I.R. 1924 Mad. 197 : 75 I. C. 38 : 46 Mad. 866 : 45 M. L. J. 333, Taluk Board, Dindigul v. Venkatrama Aiyer.
3. ('39) 26 A. I. R. 1939 All. 165 : 180 I. C. 233 : 1938 A. L. J. 1243, Lakhmi Chand v. Moti Lal.

an enquiry from any disinterested person in the neighbourhood would elicit that the right existed.

The question of law however is perhaps in this case of no great importance because in my judgment the decision can rest entirely upon an examination of the evidence as to the facts. There is nothing except the evidence of 18 witnesses to show that the Musalmans have over any period of time overflowed over this public enclosure on the occasion of the Alvida prayers. Some of the witnesses are perhaps of some respectability but, on the other hand, they are undoubtedly interested and they give no definite evidence about the many occasions when the overflow took place. They all say generally that there has been an overflow when they have been to the mosque over various periods according to their age. There is nothing in the evidence to suggest that it was always regarded as the right of the Musalmans to pray upon this enclosure. I very much doubt whether in the past there was an overflow. I am inclined to agree with the learned Judge of the Court below that the overflow was intentional in the sense that it was intended in recent years to establish some kind of claim over this land and that it was only about the year 1929 or 1930 that the overflow became so serious as to cause inconvenience to others. Even if a customary right could be acquired by user alone, there is not, in my judgment, any reliable evidence of continuous user over a long period to justify the conclusion that a right had accrued. Whether such a right could be obtained over a public lane or public way is a matter which I do not think it is necessary to discuss. I am satisfied that there is no force in this appeal and I would dismiss it with costs.

VERMA J. — I agree.

BY THE COURT. — The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Allahabad 358

ALLSOP AND VERMA JJ.

Ram Charan—Plaintiff—Appellant

v.

Bansidhar and others—Defendants—Respondents.

First Appeal No. 200 of 1935, Decided on 7th April 1942, from decision of Sub-Judge, Jhansi, D/- 4th August 1934.

(a) Limitation Act (1908), Arts. 109 and 120—Mesne profits — Suit for, against purchaser at court auction — Article 109 and not Art. 120 applies.

Article 109 and not Art. 120 applies to a suit for mesne profits where possession of the suit property was obtained by the defendant under the purchase at the court auction sale : ('18) 5 A.I.R. 1918 Cal. 360 (F.B.) and ('39) 26 A. I. R. 1939 P.C. 178, *Rel. on.* [P 360*e*]

Limitation Act —
('42) Chitaley, Art. 109, N. 2a Pts. 1-5.
('38) Rustomji, Page 958 Pt. 3.

(b) Cosharers — Suit for possession, mesne profits or compensation against trespasser—One of coparceners or co-owners can sue — Decree for recovery of possession of entire property or whole of mesne profits or compensation payable by trespasser can be passed.

Where property is held in coparcenary or co-ownership it is not necessary for all the coparceners or co-owners to join in a suit for the ejectment of trespassers and a decree for the recovery of possession of the entire property can be passed even when the suit is brought by only one of the several coparceners or co-owners. The principle on which the rule is based is that the right of each coparcener or co-owner extends to the whole property jointly with the others and the step taken to recover the property is for the obvious advantage of all the coparceners or co-owners : ('15) 2 A. I. R. 1915 Mad. 1214 and ('30) 17 A.I.R. 1930 All. 422, *Rel. on.* [P 360*e,f*]

The same rule applies to a claim for mesne profits or compensation and one of several co-owners is entitled to recover from the trespasser the whole of the profits which are payable by the trespasser on account of his wrongful possession, and the whole of the compensation payable on account of injury caused to the property : ('27) 14 A. I. R. 1927 Nag. 9, *Rel. on*; 26 Cal. 409 (F. B.) and 9 C. L. J. 331, *Disting.* [P 360*f*]

(c) Civil P. C. (1908), S. 2 (12) and O. 20, R. 12—Mesne profits—Claim against trespasser is different from claim founded on contract.

A claim for mesne profits against a trespasser stands on basis essentially different from a claim founded on contract. [P 360*g*]

C. P. C. —
('40) Chitaley, O. 20 R. 12, N. 5.
('41) Mulla, Page 726 Note "Mesne profits."

(d) Civil P. C. (1908), O. 22, Rr. 5 and 4 — Death of appellant pending appeal — One of heirs brought on record as representative of deceased — Heir represents entire inheritance coming into existence on death of appellant.

Where an appellant dies after filing the appeal and by an order passed by the Court one of his heirs is permitted to continue the appeal and is brought upon the record as a representative of the deceased entitled to continue the appeal filed by him, the heir represents the entire inheritance which came into being on the death of the appellant: ('28) 15 A.I.R. 1928 All. 532; ('25) 12 A. I. R. 1925 Pat. 123; ('27) 14 A. I. R. 1927 Mad. 1071; ('39) 26 A. I. R. 1939 Lah. 439 and ('42) 29 A.I.R. 1942 All. 324, *Rel. on*; ('33) 20 A.I.R. 1933 All. 91, *Disting.* [P 361*c,d*]

C. P. C. —
('40) Chitaley, O. 22 R. 4, N. 16; O. 22 R. 5, N. 7 Pt. 1.
('41) Mulla, Page 939 Note "Effect of order under this rule."

B. Malik—for Appellant.

B. Mukerji—for Respondents.

VERMA J. — This is a plaintiff's appeal and arises out of a suit for possession of certain buildings, one of which is described as house No. 74 and the rest as shops bearing various numbers. They are all situated in the town of Konch, district Jalaum. There were also claims for the recovery of certain sums of money on account of mesne profits and damages. The Court below passed a decree for possession, but only partially decreed the claims in respect of mesne profits and damages. The present appeal is concerned with those portions of the claims for mesne profits and damages which have been dismissed.

One Ram Lal was the owner of the property in suit. On his dying childless, his widow, Mt. Rani Dulhin, succeeded to the property for a Hindu widow's estate. A man called Balkishen, who was

the predecessor in title of defendants 1 to 7, had a decree against one Genda Lal. In execution of that decree, Balkishen had the property now in suit attached. Mt. Rani Dulhin objected to the attachment on the ground that the property belonged to her and not to Genda Lal. The execution Court disallowed Mt. Rani Dulhin's claim and maintained the attachment. Mt. Rani Dulhin thereupon instituted a suit under O. 21, R. 63, Civil P. C. This suit was dismissed by the Court of first instance on 25th October 1920. Mr. Rani Dulhin filed an appeal in this Court against that decree. She died during the pendency of that appeal. Thereupon, Ram Charan, who is the plaintiff in the present suit, made an application in this Court praying that he might be permitted to continue the appeal which had been filed by Mt. Rani Dulhin, and that his name might be brought on the record in Mt. Rani Dulhin's place. The application was based on the ground that the applicant, Ram Charan, was a reversioner of Mt. Rani Dulhin's husband, Ram Lal. That application was granted by this Court and Ram Charan was substituted for Mt. Rani Dulhin as appellant and was permitted to continue the appeal. On 28th May 1924, this Court allowed that appeal and, setting aside the decree of the trial Court, passed a decree declaring that the property in question formed part of Ram Lal's estate and did not belong to the judgment-debtor, Genda Lal, and that it was consequently not attachable and saleable in execution of Balkishen's decree against Genda Lal. In the meantime, however, the property had been put to sale at the instance of the decree-holder, Balkishen, in various lots on 31st March and 30th May 1921. House No. 74 was purchased by the decree-holder, Balkishen, himself. Of the shops, four were purchased by Sadhu Ram who is defendant 8 in the present action, and three were purchased by Kalka Prasad Tiwari, who is defendant 9.

After the decision of this Court allowing the appeal and decreeing the suit filed under O. 21, R. 63, Ram Charan filed an application for restitution of the property under S. 144, Civil P. C. That application was dismissed by the Subordinate Judge on 14th June 1927, and an appeal to this Court against the decision of the Subordinate Judge was unsuccessful. The judgment of this Court was pronounced on 19th January 1932, and it was pointed out that Ram Charan had misconceived his remedy in that an application for restitution did not lie under the law, but a suit for recovery of possession should be brought. Ram Charan, thereupon, on 15th July 1932, instituted the suit giving rise to this appeal asking for the reliefs indicated above. Balkishen, the decree-holder purchaser of house No. 74, having died, defendants 1 to 7 were impleaded as his successors in interest, and the two purchasers of the shops were made defendants 8 and 9, as already stated. The suit having resulted in a partial dismissal by the Court below of the plaintiff's claims in respect of mesne profits and damages, the plaintiff preferred this appeal. The decree for possession over the property is no longer in controversy.

A pedigree is given in the plaint, and according to that pedigree, the plaintiff, Ram Charan, was not the sole reversioner of Ram Lal. There are two other persons, Hari Ram and Mata Din, who are reversioners of equal degree. In para. 3 of the plaint it was stated that Ram Charan alone was substituted for Mt. Rani Dulhin as appellant in the appeal in this Court because Hari Ram and Mata Din had "relinquished the right of heirship"; and that according to Ram Charan, was apparently the reason for the application under S. 144 and the present suit being filed by Ram Charan alone. A plea of non-joinder having been raised by defendants 1 to 7—who alone contested the suit—Ram Charan made an application that Hari Ram and Mata Din be impleaded as pro forma defendants, and that application having been granted, they were so added and became defendants 10 and 11. One of the issues raised was whether Ram Charan was entitled to a decree for possession over the entire property or only to the extent of his one-third share. A similar question was raised with regard to the claims for mesne profits and damages. The Court below held that the defendants being trespassers, Ram Charan alone was entitled to eject them and to recover possession of the whole property. That matter, as already stated, is not before us and the decree for possession over the entire property has become final. With regard to the mesne profits and the damages, however, the Court below held that Ram Charan could recover only one-third of such amounts as were proved. It may be mentioned that the allegation as to the relinquishment of their rights by Hari Ram and Mata Din does not appear to have been persisted in. In any event the judgment of the Court below proceeds on the footing that their rights subsist and no contention has been raised before us with regard to it.

It is now necessary to give the details of the claims with which the appeal is concerned. It was claimed that the plaintiff was entitled, in respect of each set of the properties, to mesne profits from the date on which the auction sale took place to the date on which the present suit was instituted. Taking the claim against defendants 1 to 7, first, it was alleged by the plaintiff that he was entitled to mesne profits in respect of the property in their possession—house No. 74 at the rate of Rs. 300 per annum from 30th May 1921—the date on which that house was sold and was purchased by Balkishen—to 15th July 1932, when the present suit was instituted. A sum of Rs. 3300 was claimed on this account. Interest on the mesne profits at the rate of 6 per cent. per annum was claimed. It was further alleged that the building had been damaged in various ways by the decree-holder purchaser Balkishen and that the plaintiff was entitled to a sum of Rs. 1000 as compensation. The Court below found that the plaintiff was entitled to mesne profits for the period of only three years next preceding the suit. It further found that the house in question could fetch only Rs. 50 and not Rs. 300, per annum. Having held, as already stated, that the plaintiff was entitled only to a one-third of the amount proved, the Court gave a decree for a total sum of Rs. 50 and allowed interest at the rate claimed. With regard to the damages, the finding of the Court below was that the plaintiff had failed to prove that any damage had been caused to the property in question. It accordingly came to the conclusion that the plaintiff was entitled to nothing under this head.

We come now to the claims against the two purchasers of the shops. These shops were sold on 31st March 1921. As against defendant 8, Sadhu Ram, mesne profits in respect of the four shops purchased by him were claimed at the rate of Rs. 150 per annum from 31st March 1921 to 15th July 1932, the total amount claimed being Rs. 1650. Interest on this amount was claimed at the rate mentioned above. It was further alleged by the plaintiff that two out of the four shops had fallen down owing to the negligence of Sadhu Ram and that he had appropriated the materials. A sum of Rs. 1000 was claimed as damages. The Court below held that

a mesne profits in respect of these four shops should be allowed at the rate of Rs. 125 per annum. Having held that the plaintiff could recover only a one-third share, and holding further that a decree could be granted only for a period of three years ending with the institution of the suit, the Court passed a decree for Rs. 125, and allowed interest at the rate claimed. It further found that the allegation of the plaintiff that two of the shops had fallen down owing to the negligence of Sadhu Ram and that Sadhu Ram had appropriated their materials was correct. It further found that the plaintiff had proved that the proper amount of compensation for the injury caused was Rs. 1000. A decree for the recovery of one-third of Rs. 1000 was passed in favour of the plaintiff.

Defendant 9, Kalka Prasad Tiwari as already stated, had purchased three shops. Mesne profits in b respect of these shops were claimed at the rate of Rs. 96 per annum from the date of the sale to the date of the institution of the suit, the total amount claimed being Rs. 1056 ; interest was claimed on this amount at the rate already mentioned. It was further alleged that one of the three shops had fallen down owing to the negligence of Kalka Prasad Tiwari and that the plaintiff was entitled to Rs. 600 as damages. On this part of the case, the findings of the Court below, so far as the allegations of facts, went were in favour of the plaintiff. It was held that the plaintiff was entitled to mesne profits at the rate of Rs. 96 per annum. It was further found that one of the shops had fallen down owing to the negligence of Kalka Prasad Tiwari and that the amount of compensation was proved to be Rs. 600. In accordance with the views held by the c Court below on the questions of law, a decree for Rs. 96 on account of mesne profits was granted and interest was allowed at the rate claimed. A decree was further passed in favour of the plaintiff for the recovery of a sum of Rs. 200 on account of damages.

The first point raised by learned counsel for the appellant is that the Court below was wrong in holding that the plaintiff could recover mesne profits only for a period of three years before the institution of the suit. It has been argued that Art. 109 of Sch. 1, Limitation Act, which is the article applied by the Court below, is not applicable. The plaintiff's argument in the Court below was that the claim for mesne profits was governed by Art. 144. That argument has not, for obvious reasons, been repeated by learned counsel in this Court. But it has been strenuously urged that, although the plaintiff was not entitled to claim mesne profits for d a period of 11 years next preceding the suit as set out in the plaint, he was entitled to recover for a period of six years before the suit because, learned counsel argues, there is no specific article in the Limitation Act which can be made applicable to such a claim and that therefore it must be governed by Art. 120. The argument is that the defendants having come into possession by virtue of purchases made at auction sales held under the orders of a Court, they could not be held to have appropriated the profits "wrongfully" within the meaning of Art. 109 and that therefore, the article was inapplicable, and there being no other article which could be applied, the claim could come only under the residuary Art. 120. Reliance has been placed on 3 C. L. J. 182.[1] With great respect to the learned Judges who decided that case, we would have found it difficult to follow it, even if it had not already come up for consideration in other cases. As matters stand, however, it is sufficient for us to refer to e 22 C. W. N. 263,[2] and to the decision of their Lordships of the Privy Council in 43 C. W. N. 897 = A. I. R. 1939 P. C. 178.[3]

The next point urged by learned counsel for plaintiff-appellant is that the Court below was not justified in holding that the plaintiff was entitled only to his share, namely, 1/3rd of the sums for which the various defendants might be found liable on account of mesne profits and damages. The contention is that a decree should have been passed for the recovery of the whole amount found to be payable by the defendants. In our judgment this contention is well founded. Learned counsel for defendants-respondents agrees that where property is held in coparcenary or in co-ownership it is not necessary for all the coparceners or co-owners to f join in a suit for the ejectment of trespassers and that a decree for the recovery of possession of the entire property can be passed even when the suit is brought by only one of the several coparceners or co-owners. The principle on which the rule is based may be thus stated. The right of each coparcener or co-owner extends to the whole property jointly with the others and the step taken to recover the property is for the obvious advantage of all the coparceners or co-owners. It is hardly necessary to cite authorities on this point. We may, however, mention 39 Mad. 501,[4] where some of the cases bearing on the subject are mentioned, and A. I. R. 1930 All. 422.[5] We are unable to see any reason why one of several co-owners should not also be entitled to recover from the trespasser the whole of the profits which are payable by the trespasser on account of his wrongful possession, and the whole g of the compensation payable on account of injury caused to the property. No valid reason has been shown for applying a different rule to a claim for mesne profits or compensation, for that applied to a claim for possession. Learned counsel for defendants-respondents has, by way of analogy, referred to S. 45, Contract Act (9 of 1872). Our attention has also been drawn to the cases in 26 Cal. 409[6] and 9 C. L. J. 331.[7] A claim for mesne profits against a trespasser stands on a basis essentially different from a claim founded on contract. It is, therefore, wholly unnecessary for us to deal with the section or the cases just mentioned. We may, however, mention that these cases do not support the arguments put forward on behalf of the defendants-respondents. Learned counsel for plaintiff-appellant has cited a decision of the Nagpur Chief h Court in A.I.R. 1927 Nag. 9.[8] We agree with that decision. Accordingly, we hold that the Court below was wrong in coming to the conclusion that the

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1. ('06) 3 C.L.J. 182, F. H. Holloway v. Guneshwar Singh.
2. ('18) 5 A. I. R. 1918 Cal. 360 : 43 I. C. 781 : 27 C.L.J. 257 : 22 C.W.N. 263 (F. B.), Saraj Ranjan v. Prem Chand.
3. ('39) 26 A.I.R. 1939 P.C. 178 : 182 I.C. 548 : 43 C. W. N. 897 (P. C.), Feroz Shah v. Mohammad Akbar Khan.
4. ('15) 2 A.I.R. 1915 Mad. 1214 : 29 I. C. 60 : 39 Mad. 501 : 28 M.L.J. 598, Ahmad Sahib v. Magnesite Syndicate, Ltd.
5. ('30) 17 A. I. R. 1930 All. 422 : 124 I. C. 413, Sheotahal Dube v. Lal Narain Prasad Chand.
6. ('99) 26 Cal. 409 : 3 C. W. N. 271 (F.B.), Pyare Mohun Bose v. Kedar Nath.
7. ('09) 9 C.L.J. 331 : 1 I.C. 254 : 13 C.W.N. 509, Shital Chandra v. Manik Chandra.
8. ('27) 14 A.I.R. 1927 Nag. 9 : 97 I.C. 1028, Nago v. Multanmal.

plaintiff could be granted a decree for only 1/3rd of the amounts proved on account of mesne profits and damages.

Learned counsel for plaintiff-appellant has also questioned the correctness of the findings of the Court below on the questions of fact, and has argued that the Court below was wrong in holding that the plaintiff had failed to prove as against defendants 1 to 7 that he was entitled to any damages on account of injuries caused to the building and in holding that the rate of mesne profits recoverable from those defendants was proved to be only Rs. 50 per annum. It has also been argued that the mesne profits recoverable from defendant 8 should have been held to be Rs. 150 per annum, as claimed, and that the Court below erred in fixing the mesne profits at Rs. 125 per annum. On an examination of the evidence, however, we have come to the conclusion that it is not possible to hold that the findings of the Court below are wrong. The balance of evidence is clearly in favour of the conclusions reached by the Court below. Accordingly we uphold the findings of fact recorded by the Court below on the points mentioned above.

The last point which has arisen for consideration is one urged on behalf of the defendants-respondents on the basis of a fact which has not yet been mentioned in this judgment. It appears that, some time after filing this appeal, the plaintiff-appellant, Ram Charan died. It further appears that he was survived by two daughters, Mt. Lachho and Mt. Mankuer, who were his heirs under the Hindu law. Mt. Lachho alone applied to this Court for permission to continue the appeal filed by her father, Ram Charan, and for substitution of her name as plaintiff-appellant in place of Ram Charan. This application was granted by an order passed by this Court on 13th December 1941. It has been urged by learned counsel for defendants-respondents that the appeal must, in the circumstances just mentioned, be held to have abated to the extent of half, that is, to the extent of the share of Mt. Man Kuer in the inheritance. Reliance has been placed on the case in 1932 A.L J. 1029.[9] We consider it sufficient for our present purpose to say that that case is distinguishable on the ground that the death of the plaintiff in that litigation had taken place before the case had come up to this Court, and that the point raised and decided was that the decree of the lower appellate Court was wrong inasmuch as it should have held that the suit had abated to a certain extent. The position in the case before us is different. Here the appellant died after filing the appeal in this Court and by an order passed by this Court on 13th December 1941, Mt. Lachho has been permitted to continue the appeal filed by Ram Charan and has been brought upon the record as a representative of Ram Charan, entitled to continue the appeal filed by him. That must be held to be for the benefit of the entire inheritance which came into being on the death of Ram Charan. Reference may be made to the decisions in 50 All. 857,[10] 3 Pat. 853,[11] A. I. R. 1927 Mad. 1071[12] and I.L.R. (1939) Lah. 433.[13] We may also refer to our judgment in First Appeal No. 362 of 1935 decided on 17th February 1942.[14] The contention put forward on behalf of the defendants-respondents cannot, therefore, be accepted.

The result is that the appeal must be allowed in part. Accordingly, we modify the decree of the Court below and direct that the amount of mesne profits recoverable from defendants-respondents 1 to 7 shall be Rs. 150, and not Rs. 50 as decreed by the Court below. We further direct that the interest on such mesne profits shall be calculated on the footing that the mesne profits recoverable by the appellant from defendants 1 to 7 amount to Rs. 50 per annum. We further direct that the amount recoverable from defendant-respondent 8, Sadhu Ram, on account of mesne profits shall be Rs. 375, and not Rs. 125 as decreed by the Court below. Interest on the amount of these profits shall be calculated on the footing that the appellant is entitled to recover mesne profits from Sadhu Ram at the rate of Rs. 125 per annum during the three years preceding the suit. It is also ordered that the appellant is entitled to recover from defendant-respondent Sadhu Ram the full amount of Rs. 1000 on account of damages and not only 1/3rd of that amount. We further order that the decree for mesne profits against defendant-respondent 9, Kalka Prasad Tiwari, shall be for Rs. 288, instead of Rs. 96 as ordered by the Court below, and that the decree for damages against Kalka Prasad Tiwari shall be for Rs. 600, and not for Rs. 200 as directed by the Court below. Interest on the mesne profits decreed against Kalka Prasad Tiwari shall be calculated on the footing that the appellant is entitled to mesne profits for the three years next preceding the suit at the rate of Rs. 96 per annum. The rest of the appeal is dismissed. Parties shall pay and receive costs in proportion to success and failure.

G.N./R.K. *Order accordingly.*

9. ('33) 20 A.I.R. 1933 All. 91 : 143 I.C. 33 : 1932 A.L.J. 1029, Sherpal Singh v. Mt. Aijaz Fatima.
10. ('28) 15 A. I. R. 1928 All. 532 : 111 I.C. 238 : 50 All. 857 : 26 A.L.J. 820, Mohammad Zafaryab Khan v. Abdul Razzac Khan.
11. ('25) 12 A. I. R. 1925 Pat. 123 : 85 I. C. 25 : 3 Pat. 853 : 6 P. L. T. 313, Lilo Sonar v. Jhagru Sahu.
12. ('27) 14 A.I.R. 1927 Mad. 1071 : 107 I. C. 805, Govindaswami v. Annamalai.
13. ('39) 26 A. I. R. 1939 Lah. 439 : 186 I.C. 77 : I. L. R. (1939) Lah. 433 : 41 P. L. R. 843, Mt. Umrao Begum v. Rahmat Ilahi.
14. *Reported in* ('42) 29 A. I. R. 1942 All. 324 : 1942 A. L. J. 329, Mohammad Hammad v. Tej Narain Lal.

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COLLISTER AND BAJPAI JJ.

Mahabir and others — Plaintiffs — Appellants

v.

Sukh Ram and others — Defendants — Respondents.

First Appeal No. 545 of 1934, Decided on 25th March 1942, from decision of Civil Judge, Allahabad, D/- 3rd October 1934.

(a) Hindu law — Joint family — Mortgage — Family consisting of uncle *R* and his nephews *S*, *K*, *N* and *L* who were brothers — Mortgage of ancestral property by *R*, *K*, *N* and *L* in 1922 to pay off consideration due under sale deeds of 1919 and 1921 — Between sale deed of 1921 and mortgage of 1922 there was held no dissociation in fact but there was clear antecedency between sale deed of 1919 and mortgage of 1922 — Sale deed of 1919 in favour of *R* and *S* only—Assuming consideration under sale deed of 1919 to be due from *R* alone, *R* held could bind his son and not his nephews *K*, *N* and *L* — Nephews

K, *N* and *L* held could not bind their sons for antecedent debt due from their uncle *R* — Fact that *R* and *S* were vendees under sale deed of 1919 held not sufficient to show that they were jointly and severally liable for purchase money —Onus held was on mortgagee to prove what proportion of consideration was due from *R* and *S* — In absence of such proof mortgagee held could not claim that mortgage was good quoad interest of *R's* son.

On 30th July 1919, *K* sold a sixteen anna share in a mahal to eight persons for Rs. 12,000. Among the vendees were *R* and his nephew *S* who among others were members of a joint Hindu family. Under the sale deed, *R* and *S* incurred a liability to pay Rs. 3000 to the vendor out of a total consideration of Rs. 12,000. The money due was left with the vendees *R* and *S* for payment to the vendor's creditor *D*. In order to raise the money due from them *R* and *S* pawned jewellery for Rs. 2250 but they still had Rs. 750 to pay with interest. One of the vendees under the sale deed of 30th July 1919 sold his two annas share on 19th November 1921 to *K*, *N* and *L* who were brothers and to minor son of *S* and son of *R*. The consideration was left with the vendees for payment to *D*. *S* was a brother of *K*, *N* and *L* and *R* was their uncle and all of them were members of a joint Hindu family. To pay off the amounts due to *D* under the two sale deeds, on 16th January 1922 *R* and his three nephews *K*, *N* and *L* executed a mortgage of ancestral property and on 19th January 1922 the mortgagors paid Rs. 2469 to *D* and the balance for legal necessity to a creditor. In the suit by the mortgagee to enforce the mortgage of 16th January 1922 :

Held that (1) there was no dissociation in fact between the sale deed of 19th November 1921 and the mortgage bond of 1922 as in view of the circumstances in which the family stood, the vendees on 19th November 1921, had no prospect whatsoever of paying off the consideration for the sale deed of that date except by alienating the ancestral estate, and must have had the mortgage bond in suit in contemplation. [P 364*b*]

(2) There was clear antecedency in time and also dissociation in fact between the sale deed of 30th July 1919 and the mortgage bond of 16th January 1922. [P 364*b*, *c*]

(3) Assuming that whole of the amount of Rs. 750 due under the sale deed of 1919 was a debt due from *R* alone *R* could bind only his son and not his nephews *K*, *N* and *L* and the latter were not competent to bind their sons for an antecedent debt due from their uncle *R*. Only a father could alienate ancestral property for his antecedent debt. The mortgage bond, therefore, would be good to the extent of the share of *R*'s son : ('33) 20 A. I. R. 1933 All. 273 (F.B.) and ('24) 11 A. I. R. 1924 All. 465, *Rel. on.* [P 364*d*]

(4) The fact that *R* and *S* were both vendees under the sale deed of 30th July 1919 did not compel the view that they were jointly and severally liable for the purchase money. The onus was on the mortgagee to prove that *R* was liable for the whole consideration or in the alternative to show what proportion was due from *R* and *S*. But since he had made no attempt to show that and it was impossible to say what proportion of the sale consideration of Rs. 750 due under the sale deed of 30th July 1919 represented antecedent debt due from *R*, the mortgagee could not claim that the mortgage in suit was good quoad the interest of *R*'s son. [P 364*h*; P 365*a*]

Hindu law —

('40) Mulla, Page 359 Pt. (a); Page 362 Pts. (q) and (r).

(b) Practice—New plea—Appeal — Mortgage suit — Plea that defendants having enjoyed benefit of mortgage cannot repudiate its validity held not entertainable for first time in appeal as it involved consideration of various facts.

In a mortgage suit the plea that the defendants having enjoyed the benefit of the mortgage could not repudiate the validity of the mortgage deed was not taken in the trial Court nor in the memo of appeal :

Held that the plea involved a consideration of various facts and could not therefore be entertained in appeal. [P 365*b*]

C. P. C. —

('40) Chitaley, O. 41 R. 1 N. 12 Pt. 7a.

('41) Mulla, Page 1154 Note "Grounds of objection."

S. N. Sen, K. N. Katju, Ambica Prasad Dube and S. N. Katju — for Appellants.

G. S. Pathak, L. N. Gupta and Ram Narain Verma — for Respondents.

JUDGMENT.—This is a plaintiff's appeal. The suit was for recovery of Rs. 6000 by enforcement of a mortgage bond which was executed on 16th January 1922. The amount advanced was Rs. 3000 with interest at 6 per cent. compoundable annually. The mortgagors were Baldi Ram and his three nephews, namely, Sukh Ram, defendant 1, Sheo Mohan, defendant 2, and Murli, now deceased. There were 16 defendants to the suit. The relationship between defendants 1 to 8 will appear from the pedigree in the judgment of the Court below. It will be seen that defendants 3, 4 and 5 are the minor sons of Sukh Ram, defendant 1, that defendant 6 is the minor son of Sheo Mohan, defendant 2, that defendant 7 is the son of Murli, deceased and that defendant 8 is the grandson of Baldi Ram, deceased. Defendants 9 to 16 were alleged to be subsequent transferees.

The allegation in the plaint was that the mortgage was executed for legal necessity, for the benefit of the family and to pay antecedent debts. The suit was contested by defendants 3 to 8 and their defence was that the loan was not taken either for legal necessity or for the benefit of the family or for paying off any antecedent debt. The learned Judge of the Court below has found for the defendants and has dismissed the suit. The property mortgaged was a 9 annas odd share in Andhanwan Mahal Ghair Khwahindgan. It was ancestral property and the family was joint at the material time. There is no controversy before us on these points. In order to understand the matters in dispute it is necessary to state certain facts. On 30th July 1919, Mt. Sheo Kunwar sold a 16 anna share in Mahal Ganga Prasad to 8 persons for Rs. 12,000. Among the vendees were Baldi Ram, deceased, and his nephew Suraj Pal, and from the pedigree it will be seen that Suraj Pal is a brother of defendants 1 and 2 and of Murli, deceased. Under the sale deed Baldi Ram and Suraj Pal incurred a liability to pay Rs. 3000 to the vendor out of the total consideration of Rs. 12,000 that is to say 4 annas out of 16 annas. The money due under the sale deed was left with the vendees for payment to the vendor's creditor, a man named Bishun Dat, who had taken out execution of a

decree which he had obtained against the vendor; in order to raise the money due from them Baldi Ram and Suraj Pal pawned jewellery for Rs. 2250 and this they deposited by means of a tender dated 17th July 1920, but they still had Rs. 750 to pay with interest accruing upon it.

One of the vendees under the sale deed of 30th July 1919, was a man named Suraj Din. His share was 2 annas and his liability was for Rs. 1500, but he died without making any payment. On 19th November 1921 his son Brahm Din sold this 2 anna share to Sukh Ram, defendant 1, Sheo Mohan, defendant 2, Murli, the deceased father of Ram Kirpal, defendant 7, Sitla Prasad, a minor son of Suraj Pal, and Ishwar Din, son of Baldi Ram deceased. The consideration was left for payment to Bishun Dat. On this date, therefore, Baldi Ram and Suraj Pal owed Rs. 750 plus interest to Bishun Dat under the sale deed of 30th July 1919 and Sukh Ram and others owed him Rs. 1500 under the sale deed of 19th November 1921. On 16th January 1922 the mortgage bond in suit was executed for Rs. 3000 in respect to ancestral property and on 19th January the mortgagors paid Rs. 2469-10-0 to Bishun Dat in liquidation of Mt. Sheo Kunwar's mortgage, and it was said that they paid the balance of Rs. 500 odd for legal necessity to a creditor named Suraj Pal. As regards this last named amount the only evidence is to be found in the deposition of Mr. Mahabir, one of the plaintiffs, who says :

"The balance Baldi Ram had paid to Suraj Pal, as it was due to Suraj Pal. One Birga Sonar was telling me that Baldi Ram had paid nearly Rs. 500 to Suraj Pal."

This evidence is obviously worthless to prove legal necessity. The first plea taken on behalf of the appellants is that antecedent debts were created by the sale deeds of 30th July 1919 and 19th November 1921 and the mortgage bond in suit was therefore good, at least quoad Rs. 2469-10-0. This plea is contested on various grounds. It is contended (1) that when property is purchased and the sale consideration is not paid, there is no debt such as contemplated by Hindu law, (2) that the money due from Mt. Sheo Kunwar to Bishun Dat was upon a mortgage and that the former was not competent to recover it by suit from her vendees as a debt and therefore from this point of view also it must be held that there was no debt to justify the mortgaging of ancestral property and (3) that if debts were created by the sale deeds of 30th July 1919 and 19th November 1921, there was no antecedency or dissociation in fact, and as regards the second sale deed there was no real antecedency in time. We will first deal with the second sale deed, that is to say the sale deed of 19th November 1921, for we are clearly of opinion that apart from any other considerations which might arise, there was no dissociation in fact between this sale deed and the mortgage bond of 16th January 1922. It will be recalled that in order to raise money to pay the consideration for the sale deed of 30th July 1919 Baldi Ram and Suraj Pal had to pawn their jewellery, and even then the amount so fetched fell short of the amount due by Rs. 750. There is nothing to indicate that by 19th November 1921 the fortunes of the family had improved, on the contrary there is evidence to show that they were continuously falling. The learned Judge says :

"Mahabir Prasad, plaintiff 1 has admitted that nearly Rs. 1000 were due from the family prior to 1919 . . . in lieu of the old family debts the zamindari of mahal Ganga Prasad had been mortgaged with Mt. Anandi Kunwar in 1923. Mt. Anandi Kunwar had now obtained a decree and the zamindari of Mahal Ganga Prasad had been put up for sale. On 5th September 1923 Baldi Ram Sukh Ram, Murli and Sheo Mohan had executed a mortgage deed for Rs. 2324 in favour of Brahm Din hyphothecating this very property which is now in suit . . . The mortgage deed of 1923 was executed in lieu of old debts. Part of the consideration of the mortgage deed of 1923 consisted of a mortgage debt of 1909. It is, therefore, abundantly clear that when zamindari of Mahal Ganga Prasad was purchased, the family of the defendants 1 to 8 was heavily in debt and was not in a well off financial condition."

Further on he says :

"There can be no doubt that when two shares in Mahal Ganga Prasad were purchased on 30th July 1919 for Rs. 3000 there was no money available to the family of defendants 1 to 8. Rs. 2250 had been raised by pawning family golden ornaments and had been deposited in Court in favour of Bishun Dat on 19th July 1920. The ornaments could not be redeemed and they are now lost to the family for ever. The sons of Ram Bharos that is to say, defendants 1 and 2 and Murli although they had no money and were actually in debt, yet they did not remain satisfied by purchasing only 4 annas share. On 21st November 1921 Sukh Ram and others purchased another two annas shares from Brahm Din, son of Suraj Din. They had now to pay Rs. 2250, the balance of the purchase price, and in order to obtain this amount ancestral property had to be mortgaged on 16th January 1922. The low financial condition of the family of defendants 1 to 8 is apparent from the fact that more than Rs. 200 had to be paid only on account of interest as the dues of Bishun Dat could not be deposited in time."

These facts and the observations of the learned Judge are not controverted, and in this connection we may refer to the evidence of Ram Kirpal, defendant 8, who says :

"When the property was purchased from Mt. Sheo Kunwar there was a debt of nearly Rs. 4000 due from the joint family. Rs. 1100 were due to Brahm Din Pandey; Rs. 900 were due to Ram Nihorey. About Rs. 1000 were due to Ram Parpan. Interest at the rate of about Re. 1 per cent. per mensem used to be paid on these debts. The family income was not sufficient to meet the payment of interest. In lieu of the debt of Mt. Anandi Kunwar, the zamindari of Mahal Ganga Prasad had been mortgaged. Mt. Anandi Kunwar has obtained a decree and she has put up the mortgaged property to sale. The debts of Ram Nihorey, Ram Parpan and Brahm Din have also not yet been paid. Even the ancestral property has gone away on account of purchasing the property from Mt. Sheo Kunwar. Rs. 2250 were raised by pawning gold belonging to the family. That money has not been paid so far."

In A. I. R. 1928 Pat. 83[1] two persons sold a certain property on 16th January 1911 to a person named Modnarayan. The vendee did not pay the consideration money but undertook to discharge the liability of the vendors to the extent of Rs. 5500 and to enable him to do this the vendee executed a mortgage of ancestral property on 21st January 1911. On p. 84 Das J. observed :

"Now in this case Modnarayan had obviously no money to discharge the obligation under the transaction of 16th January 1911 and, in my opinion, it is impossible to say that at the date when he entered

1. ('28) 15 A. I. R. 1928 Pat. 83 : 105 I. C. 1 : 9 P. L. T. 142, Raghunath Singh v. Modnarayan Singh.

into the transaction of 16th January 1911 he did not know that he could only discharge his obligation by borrowing money on the security of the joint family properties."

Further on he says :

"I hold that there was no real dissociation in fact between the two transactions and that the plaintiffs cannot rely upon the doctrine of antecedent debt in this case."

It is true that in that case there was an interval of five days only, whereas, in the present case, there was an interval of nearly two months, but having regard to the circumstances in which the family stood we are of opinion that on 19th November 1921 the vendees had no prospect whatsoever of paying off the consideration for the sale deed of that date except by alienating the ancestral estate. The burden of proving the contrary lay on the appellants and they have not discharged it, and, in the circumstances, we think it is reasonable to hold that on 19th November 1921 the vendees must have had the mortgage bond in suit in contemplation. This being so, we find that there was no dissociation and no real antecedency in fact between the two transactions. These considerations do not however apply to the sale deed of 30th July 1919, which was executed $2\frac{1}{2}$ years before the mortgage bond in suit, and it is not unreasonable to suppose that at the time when this sale deed was executed the vendees thought that they would be able to pay up the consideration money. They pawned their jewellery for this purpose. It is true that by so doing they only obtained Rs. 2250 instead of Rs. 3000, but they may well have anticipated that they would be able to secure the full amount required. There was clear antecedency in time and in our opinion there was also dissociation in fact between the sale deed of 30th July 1919 and the mortgage bond of 16th January 1922.

One of the contentions on behalf of the respondents is that the mortgagors had no power under the Hindu law to bind the interests of certain members of the family and that the mortgage is therefore invalid in its entirety. As we know, the vendees under the sale deed of 30th July 1919 were Baldi Ram and his nephew Suraj Pal. The mortgagors in respect to the mortgage bond in suit were Baldi Ram, deceased, Sukh Ram, defendant 1, Sheo Mohan, defendant 2 and Murli the deceased father of Ram Kirpal, defendant 7. The debt remaining due under the sale deed of 30th July 1919 was Rs. 750. We do not know what proportion of this was due from Baldi Ram and what proportion was due from Suraj Pal, but learned counsel for the appellants contends that these two were jointly and severally liable and that the whole sum of Rs. 750 was therefore a debt due from Baldi Ram. We will first consider the matter on the assumption that this is correct. Suraj Pal was not a party to the mortgage bond in suit and Baldi Ram could only bind his son Ishwar Din, who is now represented by his son Kesho Ram, defendant 8. Baldi Ram could not bind his nephews Sukh Ram, Sheo Mohan and Murli, and the latter were not competent to bind their sons, defendants 3 to 6, for an antecedent debt due from their uncle Baldi Ram. Only a father can alienate ancestral property for his antecedent debt : *vide* 55 All. 370.[2] In the last named case the two uncles and the mother of the plaintiff executed a mortgage to pay off the antecedent debts of the plaintiff's father and grandfather and it was held by a Full Bench of this Court that the uncles could not create a valid mortgage binding on the estate in order to liquidate a debt incurred by the grandfather or father of the plaintiff. At page 125 after mentioning the case in 46 All. 95[3] Mukerji A. C. J. who delivered the judgment said :

"It will be noticed that it is the privilege of the father alone to burden the family estate by a mortgage, by discharging an antecedent debt, which must be a debt of his own. A manager of the family who is not the father cannot bind the estate merely by discharging a pre-existing debt of the family."

Learned counsel for the respondents points out, however, that the learned Judges affirmed the decision in 46 All. 295.[4] In that case there were two brothers Jagat and Sahadeo. Jagat had two sons, Ram Das and Ram Prasad, and Sahadeo also had two sons, Ram Rup and Lalji. Sahadeo and Ram Das executed a sale deed in respect to ancestral property. Thereafter the two sons of Sahadeo and also Ram Prasad sued for a declaration that the sale deed was not binding on them for the reason that it was not executed for any legal necessity. This Court found that the transfer by Sahadeo and Ram Das had liquidated a mortgage previously executed by Sahadeo and Jagat and that, therefore, the sale by Sahadeo was to pay off his antecedent debt and it was, therefore, binding on the latter's two sons. As regards Ram Das it was held that he was bound by his own transfer, but that Ram Prasad was entitled to recover his own fourth share. On the strength of this decision, affirmed by the Full Bench in 55 All. 370[2] it is contended on behalf of the appellants that the mortgage bond in suit if not good in its entirety, is at least good quoad the share of Kesho Ram, defendant 8. In reply to this contention learned counsel for the respondents pleads that the learned Judges were probably misled by an incorrect report of the Privy Council case in 46 All. 95.[3] When first reported in 21 A. L. J. 934, proposition (3) at the end of the judgment read as follows:

"If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest."

The correct reading is :

"If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate."

It is conceivable that in 46 All. 295[4] the learned Judges may have been misled, but we cannot say with any certainty that this was so, and it is difficult to see how there can have been any misunderstanding in 1933 when the Full Bench affirmed that decision, and we must accept the view which was expressed by the Full Bench. This, however, is on the assumption that Baldi Ram and Suraj Pal were jointly and severally liable for the sum of Rs. 750; but the mere fact that they were both vendees under the sale deed of 30th July 1919 does not compel the view that there was a joint and several liability as between themselves. The onus lay on the appellants and they have made no attempt to show that Baldi Ram was liable for the whole consideration of the sale deed or alternatively to show what proportion was due from Baldi Ram and

2. ('33) 20 A.I.R. 1933 All. 273 : 142 I.C. 333 : 55 All. 370 : 1933 A. L. J. 123 (F. B.), Chiranji Lal v. Bankey Lal.

3. ('24) 11 A.I.R. 1924 P. C. 50 : 77 I. C. 689 : 46 All. 95 : 51 I. A. 129 : 21 A. L. J. 934 (P. C.), Brij Narain Rai v. Mangla Prasad Rai.

4. ('24) 11 A.I.R. 1924 All. 465 : 78 I. C. 619 : 46 All. 295 : 22 A. L. J. 182, Anantu Kalwar v. Ram Prasad Tewari.

what proportion was due from Suraj Pal. They could easily have had a recital in the mortgage bond in suit, but there is no such recital. Since, therefore, it is impossible to say what proportion of the sale consideration represented an antecedent debt due from Baldi Ram the appellants cannot claim on the basis of the Full Bench decision affirming the decision in 46 All. 295[4] that the mortgage bond in suit is good quoad the interest of Kesho Ram, defendant 8, the grandson of Baldi Ram. According to the ages stated in the plaint, none of the minor defendants were in existence at the time when the mortgage bond in suit was executed, but leaving aside the four mortgagors, Ram Kirpal, defendant 7, was then 13 years of age according to the age which he gave at the time of his deposition in 1934 and it was therefore open to him to impeach the validity of this mortgage bond on the ground that even as regards the interest of defendant 8, there was no antecedent debt justifying the transfer For the reasons which we have given we are of opinion that the mortgage bond in suit cannot be held valid even to the extent of Kesho Ram's interest in the ancestral estate. The other plea advanced on behalf of the appellants is that the respondents have enjoyed the benefit of the property and cannot now be heard to repudiate the validity of the mortgage bond in suit. This plea was not taken in the Court below and it finds no place in the memorandum of appeal before us. In order to determine the question which is raised by this plea we shall have to consider various facts and we do not therefore think that the plea is entertainable. We may, however, say that even if we did entertain it, it would not prevail. The income from the six anna share of Mahal Ganga Prasad was Rs. 120 per annum and our attention has been drawn on behalf of the appellants to an admission in the cross-examination of Ram Kirpal, defendant 8, who says:

"Ever since the 3/8th share of Mahal Ganga Prasad had been purchased who had been realising Rs. 120 more or less in excess of the income from our ancestral property."

The purchased property was mortgaged to Mt. Anandi Kunwar 11 years before the suit: *vide* the statement of this same defendant at page 11. This was presumably a simple mortgage and Ram Kirpal has admitted that the property was still in the possession of the family at the date of his deposition. Against this there is the admission of Mahabir, plaintiff 1 who says:

"After the property of Mahal Ganga Prasad of village Andhanwan had been purchased, Bali Ram and others used to derive benefit from that property until it had passed away from their hands by various transfers."

The learned Judge says:

"As I have said above, the income from the six anna share of Mahal Ganga Prasad used to be Rs. 120 in a year and although the mortgage deed in suit carried a very low rate of interest, yet the total interest on Rs. 3,000 used to come to Rs. 180 annually. Thus, Sheo Mohan and others, the mortgagors, had to pay more on account of interest on the money which they had borrowed to purchase property than what this property purchased itself brought in a year as profit."

This finding is not challenged, and, in the circumstances, we are unable to see that the family has derived any benefit whatsoever from possession of the property purchased from Mt. Sheo Kunwar. It is true that the plea is not based on the ground that the transaction was beneficial to the family, but is based on the ground that a person who has received by possession such benefit as is derivable from the property cannot be heard to repudiate the transaction, but this plea cannot prevail where no benefit of any kind is proved and on the contrary the transaction is shown to have been detrimental. Moreover, having regard to the conflicting admissions which have been made by Ram Kirpal, defendant 8, and by Mahabir, plaintiff 1, we cannot even say with any certainty how long the property remained in the actual possession of the family. For the reasons given in this judgment we dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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* A. I. R. (29) 1942 Allahabad 365

VERMA AND YORKE JJ.

Kunwar Krishna Pratap Singh minor through Kunwar Bahadur Singh — Defendant — Appellant

v.

Smt. Kunwar Rani Prembada Kunwar, Plaintiff and others, Defendants — Respondents.

First Appeals Nos. 90 and 87 of 1939, Decided on 12th February 1942, from decree of Addl. Civil Judge, Etah, D/- 29th September 1938.

(a) Hindu law—Widow—Co-widows—Whether one of co-widows can surrender her right of survivorship in favour of other *(Quære)*.

Whether a co-widow of a sonless Hindu can surrender her right of survivorship in favour of the other co-widow. [P 369*b*]

* (b) Hindu law — Alienation—Widow—Co-widows—Necessity — Sonless Hindu survived by more than one widow — Alienation even for necessity or spiritual benefit of deceased husband is invalid unless all widows act together —Fact that widows have taken separate portions of estate has no effect.

Where a sonless Hindu is survived by more than one widow, alienation of any part of the estate, even for legal necessity or conferring spiritual benefit on the deceased husband is not valid unless all the widows act together. The fact that the widows have divided, and have taken possession of separate portions of the estate is of no effect: 11 M. I. A. 487 (P.C.); 16 Mad. 1 (P.C.) and ('28) 15 A. I. R. 1928 P. C. 251, *Rel. on.* [P 374*e,f*]

Hindu law—
('40) Mulla, Page 37 Pt. (t); Page 183 Pt. (e).
('40) Mayne, Page 653 Pts. (e), (f).

* (c) Hindu law — Widow — Daughter's marriage — Widow is entitled to spend out of deceased husband's estate what is reasonable in circumstances of case — Texts mentioning that daughter is entitled to one-fourth of her deceased father's estate on occasion of her marriage are only directory.

Although it is the duty of a Hindu widow to provide funds out of the estate of the deceased husband for the marriage of a daughter, her duty merely is to spend, or to give, what is reasonable in the circumstances of the particular case. She is competent to do all acts proper and incidental to the marriage of a daughter, according to the general practice of the community to which she belongs. The Hindu law texts which mention that the daughter is entitled to a one-fourth share of her deceased father's estate on the occasion of her mar-

riage are not imperative but only directory. The
a question whether the gift by the widow to her daughter on the occasion of her marriage was reasonable depends on the facts and circumstances of each particular case: 22 Mad. 113 and 22 Mad. 398 (P.C.), *Rel. on*; *Case law discussed.* [P 377*d*; P 378*a*,*d*]

Hindu law—
('40) Mulla, Page 182 Pts. (z), (a).
('38) Mayne, Page 785 Pt. (v).

(d) Practice—New plea—Appeal — Plea not raised in trial Court—No issue framed — Plea not raised in memo of appeal — Point was allowed to be argued for first time in appeal as it involved pure question of law and respondent's counsel did not object to it.

A plea which was not raised in the written statement, and on which no issue was framed, and
b which was not clearly raised even in the memorandum of appeal was allowed to be argued for the first time in appeal as it involved a pure question of law and as no objection was raised by respondent's counsel. [P 375*b*]

C. P. C.—
('40) Chitaley, O. 41 R. 2 N. 4 P. 5; N. 7 Pt. 10.
('41) Mulla, Page 1155 Pt. (q).

K. N. Katju, Shiva Prasad Sinha and L. N. Gupta — for Appellant.

Sir Tej Bahadur Sapru, B. Malik and M. L. Chaturvedi — for Respondents.

VERMA J.—These two appeals have arisen out of a suit instituted by the plaintiff respondent, Srimati Kunwar Rani Prembada Kunwar, for the recovery of possession over certain zamindari and house property and for mesne profits. First Appeal
c No. 87 of 1939 is by defendant 2, Sri Thakur Radha Krishnaji, an idol, and First Appeal No. 90 of 1939 is by defendant 1, Kunwar Krishna Pratap Singh. The Court below has decreed the suit for possession and for the recovery of certain mesne profits and has also declared that the plaintiff is entitled to recover pendente lite and future mesne profits. Apart from the two appellants, there were certain other defendants. Defendant 3 was Srimati Beti Govind Kunwar, the elder sister of defendant 1's deceased mother. She pleaded that she was not in possession of any portion of the property in dispute in her own right, that no relief was claimed against her in the plaint and that she had been improperly impleaded. This was found in her favour and the Court below has accordingly ordered that the suit as against defendant 3 was to stand dismissed with costs. The remaining defendants were interested in
d certain portions of the property in suit, but they never appeared in the Court below and have submitted to the decree passed by that Court against them. The following pedigree will be helpful:

RAJA KHUSHAL SINGH

Raja Sanwal Singh	=Kunwar Dharam Singh=	
	(1) Inder Kunwar	(2) Prembada Kunwar plaintiff
Govind Kunwar D. 3 =Moti Singh		Jot Kunwar =Bahadur Singh
		Krishna Pratap Singh D. 1 appellant.

Raja Khushal Singh was the holder of an estate known as the Rajor Raj in the District of Etah. He died in 1901 and was succeeded by his elder son Sanwal Singh. We are not concerned in these appeals with the Rajor Raj. The younger son, Dharam Singh, was the owner of a number of villages and shares in certain villages and of two houses described as garhis. He used to reside at a village called Kharaua in the District of Etah. As shown above, he had two wives, the senior being Inder Kunwar and the junior being the plaintiff, Prembada Kunwar. As is indicated in the pedigree given above, his two daughters, Govind Kunwar and Jot Kunwar, were born of the senior wife, Inder Kunwar. Dharam Singh died in 1912 leaving him surviving the two widows, Inder Kunwar and the plaintiff, Prembada Kunwar, and the two daughters, Govind Kunwar and Jot Kunwar. The elder girl, Govind Kunwar, was married to Moti Singh in 1921 or 1922 and the younger girl, Jot Kunwar, was married to Moti Singh's younger brother, Bahadur
f Singh, in 1926. Jot Kunwar died in 1932 leaving a son, Krishna Pratap Singh, who is the first defendant and appellant in First Appeal No. 90 of 1939. Inder Kunwar died on 28th November 1934, and the present suit was commenced by the surviving co-widow, Prembada Kunwar, on 18th November 1935.

Among the properties owned by Dharam Singh was the village Kharaua. One of the pleas taken in the plaint was that the village Kharaua was a part of the Rajor Raj, that Dharam Singh had been in possession thereof as a guzaradar, and that he and his successors in interest had no power to transfer it. It was alternatively averred by the plaintiff that, even if it was found that Kharaua had not been a part of the Raj and that Dharam Singh had been in possession of that village as full owner and not
g merely as a guzaradar, the suit would not be affected and that the plaintiff's claim with regard to village Kharaua would stand on the same footing as the claim in respect of the remaining items of property. The defendants did not admit the allegations as to the inalienability of village Kharaua and the questions thus raised formed the subject-matter of the first two issues framed in the Court below. The Court, however, having subsequently found that the plaintiff's suit was based on the right of survivorship given by Hindu law to a surviving co-widow, and not on any custom of inalienability of any part of the property in suit, came to the conclusion that issues 1 and 2 did not arise and, by an order dated 10th February 1938, directed that no evidence on the questions involved in those issues was to be adduced. The suit thereafter proceeded on
h the footing that Dharam Singh was the owner of the entire property claimed by the plaintiff, and the appeals have been argued before us on either side on that footing and no question has been raised as to Dharam Singh's title to Kharaua having been only a qualified one.

The case of the plaintiff was that, on Dharam Singh's death in 1912, his two widows — Inder Kunwar and the plaintiff—succeeded as joint tenants with a right of survivorship; that they remained in joint possession and management for a few years; that a dispute having arisen between the widows in connexion with the enjoyment of the rents and profits, their deceased husband's elder brother, Raja Sanwal Singh, made a division of Dharam Singh's estate into two equal portions and put each widow in possession of a half, though no change was made in the entry of names in the Government records; that Inder Kunwar had disposed of the moiety of the estate in her possession by means of certain transfers; that these transfers were

of no effect beyond the life time of Inder Kunwar and that the plaintiff, as the surviving widow, was entitled to recover possession of the properties, of which the defendants were in possession by virtue of the transfers made by Inder Kunwar, as the plaintiff, by right of survivorship, was, on Inder Kunwar's death, entitled to the possession of the whole estate.

For some reason or other, there was considerable delay in the appearance of the defendants, and the written statement of defendant 1 was not filed until 8th October 1936 and that of defendant 2 until 3rd November 1936. Defendant 3 appeared as late as 8th February 1938. Before dealing with the pleas raised by the defendants, it will be convenient to give a list of the transfers made by Inder Kunwar under which the various defendants had come into possession of portions of the estate and which the plaintiff impugned. This list is to be found in the statement made by the plaintiff's pleader under O. 10, R. 2, Civil P. C., on 8th October 1936. In chronological order the transfers were as detailed below :

(1) A deed of gift, executed on 5th July 1926, in favour of Jot Kunwar in respect of 10 biswas, in other words, half, of village Kharaua. Defendant 1 claimed to have succeeded to this property on the death of his mother, Jot Kunwar.

(2) A deed of sale, executed on 17th August 1929, in favour of defendants 4 to 7. It is not necessary to give any further particulars of this transfer as defendants 4 to 7 have, as already stated, submitted to the decree and the transaction is no longer in question.

(3) A deed of gift, executed on 23rd October 1934, in favour of defendant 2, Sri Thakur Radha Krishnaji, by means of which the moiety share held by Inder Kunwar in two villages — Chhaprai, Secunderabad and Harnaoli — and in the residential house at Kharaua was endowed.

(4) A will, executed on 23rd October 1934, by means of which Inder Kunwar bequeathed the rest of the property in her possession to defendant 1, Krishna Pratap Singh. Among other things, it was stated in this deed of will that the testator's junior co-widow, Prembada Kunwar, was in possession "as a life tenant" of half of Dharam Singh's estate in accordance with a division made by Raja Sanwal Singh, and that Krishna Pratap Singh, as the lawful reversioner, would come into possession of that portion of the estate also on the death of Prembada Kunwar.

Defendant 1, by his written statement, raised a number of pleas. We are, however, concerned with only two of those pleas, as learned counsel appearing in this Court for Krishna Pratap Singh has confined himself only to those two pleas. The paragraphs of the written statement which relate to these pleas are paras. 7 and 11. The manner in which learned counsel has put the points before us are as given below :

(1) At the time of the division between the widows, which was made in 1915, with the help of Raja Sanwal Singh, the widows did not merely divide the estate for purposes of separate management and enjoyment, but each of the two widows relinquished in favour of the other her right of survivorship, and consequently the plaintiff was debarred from claiming the property by right of survivorship.

(2) The gift of 5th July 1926, of the half share of village Kharaua in favour of Jot Kunwar was valid for the following reasons : (a) It was made with the consent of the plaintiff. (b) In any event, the gift having been made as a dowry on the occasion of Jot Kunwar's marriage and being in respect of property which was not more than one quarter of Dharam Singh's estate, Inder Kunwar was competent under the law to make the gift even without the consent of her co-widow. (c) Dharam Singh before his death had given a direction that his daughters should be married in a respectable family and that village Kharaua should be given to them in dowry, and so the gift was in accordance with an oral will made by Dharam Singh. (d) It was necessary, in fulfilment of the wishes of Dharam Singh, to marry Jot Kunwar to a boy belonging to a highly respectable family ; Bahadur Singh was such a boy, but Bahadur Singh's father insisted on a substantial dowry and Inder Kunwar had no money at that time, and Bahadur Singh's father was prevailed upon with difficulty to agree to the marriage on condition that half of village Kharaua was given as a dowry. The point raised is that the gift was made in circumstances which amounted to pressure and legal necessity.

By his written statement filed on 3rd November 1936, defendant 2 raised substantially the same pleas as had been raised by defendant 1. An application was, however, subsequently made on his behalf on 5th January 1937, praying that a further plea be added and this application was allowed. The plea thus raised was that one Khiali Singh had, on Dharam Singh's death, become entitled to the estate left by Dharam Singh "in accordance with the deed of adoption dated 5th November 1909," that Inder Kunwar had taken adverse possession of the property, not allowing Khiali Singh to get into possession, and that Inder Kunwar had consequently acquired an absolute title to the property by adverse possession, and was therefore entitled to make transfers and to confer a good title on her transferees. It was urged that, whatever the rights of the heirs of Khiali Singh might be, the plaintiff had no right whatsoever to challenge the transfers made by Inder Kunwar. Learned counsel appearing for the appellant in First Appeal No. 87 of 1939 has raised the points raised by learned counsel for Krishna Pratap Singh, as mentioned above, and has further urged this plea based on the alleged adverse possession of Inder Kunwar. It has been conceded that if this plea is accepted, the plaintiff, Prembada Kunwar, also must be held to have acquired an absolute title to the moiety share of the estate of which she has been in possession. A further point raised on behalf of the idol is that the endowment was made in accordance with the wishes of Dharam Singh and so must be upheld. Lastly, it has been argued that, in any event, the endowment was for the benefit of Dharam Singh's soul and was in respect of a very small fraction of the estate and is consequently valid.

We take up the appeal of Krishna Pratap Singh first. Learned counsel has pointed out that if the first point raised by him, namely, the relinquishment of the right of survivorship by each widow in favour of the other at the time of the division in 1915, is accepted, no other question need be considered as the suit must of necessity be dismissed in that case. On the other hand, it is conceded that, if that contention of the appellant is not accepted, the will of 23rd October 1934 must be held to be invalid and inoperative and the properties covered by that will must be decreed to the plaintiff. But, even if that point of the appellant fails, the gift of the 10 biswas of Kharaua made on 5th July 1926 and the endowment created by the deed of 23rd October 1934 will have to be considered on their own merits

in the light of the particular contentions raised with regard to them as indicated above.

Dr. K. N. Katju, who has appeared for the appellant Krishna Pratap Singh, has argued the case with fairness and ability. Having heard him at length, we have come to the conclusion that the first point raised by him need not detain us long. The question raised is one of fact, and as we are in complete agreement with the decision on this point of the learned Judge of the Court below, who has written an able and exhaustive judgment and has examined the evidence in detail and with care, we are relieved of the necessity of dealing with the evidence in any great detail. The evidence relied upon in support of this contention is, in our judgment, wholly valueless. Learned counsel has referred to certain documents, but none of them supports his contention in any manner whatsoever. [After going through the documentary evidence their Lordships proceeded.] So far as oral evidence is concerned, reliance has been placed on the evidence of four witnesses, Himanchal Singh, Man Khan, Tota Ram and Ram Lal. We have been taken through the evidence of these witnesses and we have no hesitation in agreeing with the Court below that these are not witnesses on whose testimony any reliance can be placed. We also agree with the Court below that the evidence given by the plaintiff, Prembada Kunwar, is reliable. In our judgment the finding of the Court below that there has never been any surrender or relinquishment by the plaintiff of her right of survivorship, that no such question was raised at the time of the division in 1915 and that Raja Sanwal Singh never gave any decision on any such point, is correct. It may be pointed out that Raja Sanwal Singh was really not an arbitrator, formally appointed, and no formal reference of any disputes had been made to him. All that happened was that quarrels had arisen between the two widows of Dharam Singh in the matter of the division of the rents and profits and Sanwal Singh advised them to divide the property into two halves and came and prepared two lots. There was no other dispute and no other questions arose. We are satisfied that the witnesses mentioned above, produced on behalf of the appellant in support of this story of the abandonment of the right of survivorship, gave false and tutored evidence when they stated in examination in chief that questions as to succession on the death of either of the Kunwar Ranis and as to the expenses of the marriages of the daughters were raised, and decided by Sanwal Singh, at the time of the division in 1915. Some of the statements made by these witnesses in cross-examination put the matter beyond doubt. [Their Lordships discussed the oral evidence and proceeded.] Our conclusion is, as has already been stated, that the learned Judge below was perfectly right in declining to place any reliance on these witnesses.

It is also noteworthy that, before the written statements in the present suit were filed, no one had ever alleged that there had been a surrender on the part of the widows of the right of survivorship. There is no such allegation in any of the various deeds executed by Inder Kunwar. It appears to have been argued in the Court below that there was something in the language of the sale deed of 17th August 1929, Ex. 39, executed by Inder Kunwar in favour of defendants 4 to 7, which lent some support to the defendants' allegation. Having examined the document carefully, we have no hesitation in agreeing with the Court below that the contention was without foundation. On the contrary, the recitals in the other deeds executed by Inder Kunwar—viz., the deed of gift dated 5th October 1922, Ex. E; the deed of gift dated 5th July 1926, Ex. P; the deed of endowment dated 23rd October 1934, Ex. Q, and, particularly, the will dated 23rd October 1934, Ex. R—militate against the truth of the defendants' allegation. Learned counsel for the plaintiff-respondent has attempted an explanation of the invention for the first time of this story by the defendants in the present suit and has said that it is possible that the plea was suggested to the defendants and their advisers by the decision of the High Court of Patna in 14 Pat. 518,[1] which must have been published shortly before the institution of the present suit. In view of all the circumstances, the suggestion of respondent's learned counsel appears to be not without basis.

It has been contended on behalf of the appellant that the story put forward by the defendants is not an improbable one. Learned counsel recognises the force of the objection that it is unlikely that such an important transaction as the abandonment of the right of survivorship, which a co-widow has on the death of the other widow, could have been carried out orally, particularly as the division of the property was admittedly reduced to writing in the shape of lots prepared by Sanwal Singh to which he got the ladies to affix their signatures, and it is the defendants' case that it was on the occasion of that division that the surrender of the right of survivorship also took place. But he advanced two arguments which he says minimise the force of the objection. He points out that Sanwal Singh admittedly allotted different portions of the residential house to each of the two ladies but this allotment was not mentioned in the written lots prepared by him. He next refers to Ex. D., the deposition of Prembada Kunwar in Suit No. 156 of 1933, of the Court of the Munsif of Etah, in which she stated that the ornaments were distributed by the Collector and that the distribution had been "according to the writing left by Raja Sanwal Singh", and argues that this distribution of the ornaments was also not reduced to writing. We do not, however, agree with learned counsel that the circumstances relied upon by him in any manner detract from the force of the respondent's argument that it is highly improbable that the surrender of the right of survivorship could have been oral.

So far as the matter of the residential house is concerned, it must be borne in mind that Sanwal Singh really made no division. The house was already divided into a mardana portion (portion used by males) and a zanana portion (portion occupied by females), and all that Sanwal Singh did was to give the direction that Inder Kunwar should occupy the portion known as zanana and that Prembada Kunwar should live in the portion known as mardana. We agree with the Court below that the surrender of the right of survivorship was a much more important matter than the giving of directions as to the portion of the house which each of the ladies was to occupy. With regard to the distribution of the ornaments, it is to be noted that the passage in Ex D on which reliance is placed shows that Prembada Kunwar spoke of a "writing left by Raja Sanwal Singh." That writing must obviously have been retained by the Collector. All that the Collector did was to distribute the ornaments in accordance with that writing. It is, thus,

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1. ('36) 23 A. I. R. 1936 Pat. 200 : 155 I. C. 213 : 14 Pat. 518 : 16 P. L. T. 713, Parbati Kuer v. Baijnath Prasad Narain Singh.

not correct to say that there was no writing with regard to the distribution of the ornaments. Ex. D is the only piece of evidence to which our attention has been drawn in connection with this argument with regard to the distribution of ornaments. As shown above, the very statement in Ex. D on which reliance is placed in support of the argument destroys that argument. It may be pointed out that we have dealt with this point of the absence of any writing, embodying the alleged surrender or abandonment, as a question of fact—as one raising the question that the defendant's story is not probable —and not as a question of law, namely, whether such a surrender or abandonment can be made orally or must, in order to be valid, be in writing, duly stamped and registered. In view of the decision at which we have arrived on the question of fact, we do not consider it necessary to deal with the question of law.

The result is that in our judgment the story of the surrender of her right of survivorship by Prembada Kunwar, put forward on behalf of the defendants, is not only not proved, but is highly improbable and cannot be believed. In view of the decision recorded above, the will executed by Inder Kunwar on 23rd October 1934, must, as is conceded by learned counsel for the appellant, be held to be ineffectual and the plaintiff must be held to have established her claim to the properties covered by the will.

It may be mentioned that the question of law, namely, whether such a surrender or abandonment of a Hindu co-widow's right of survivorship as is contended for by the appellant is permissible under the law, has also been debated at the bar. For the appellant strong reliance has been placed on the Patna case already mentioned : 14 Pat. 518.[1] On the other hand, learned counsel for the plaintiff-respondent has contended, firstly, that the opinion expressed in that judgment, that a surrender by Hindu co-widows of their right of survivorship could validly be made, was, in view of the facts of that case, wholly obiter. The suit was by the reversioners of one Raghubans Narain Singh who on his death left two widows, Deo Murat Kuer and Birita Kuer, and two daughters by Deo Murat Kuer, Bhagwati Kuer and Asturan Kuer. It was instituted during the life-time of one of the widows, Birita Kuer. The other widow, Deo Murat Kuer, had died and the moiety held by her had come into the sole possession of one of her two daughters, Asturan Kuer, with the consent of the other daughter, Bhagwati Kuer. The suit was brought on Asturan Kuer's death and it was claimed that the plaintiffs were entitled to immediate possession of the properties which had been in Deo Murat Kunwar's possession and which had, on her death, come into Asturan Kunwar's posssession, on the allegations that each of the widows had surrendered her right of survivorship, that Birita Kuer must therefore be treated as non-existent so far as the share in Deo Murat Kuer's possession was concerned, and that succession to that share must be held to have opened to the reversioners of Raghubans Narain upon the death of his daughter, Asturan Kuer, who had been in sole possession with the consent of her sister. It was prayed in the alternative that, if the Court was of opinion that the plaintiffs were not entitled to possession as long as Birita Kuer was alive, a declaratory decree be granted that a deed of sale which had been executed by Asturan Kuer in favour of the defendant, Dulhin Parbati Kuer, would not be binding on the reversioners on Birita Kuer's death. The trial Court had decreed the claim for possession, and the only contention, on this part of the case, raised by the defendant-appellant was that one of the widows, Birita Kuer, being alive, succession to the estate of her husband had not opened and that the only decree which the plaintiff could get was a declaration that the sale deed executed by Asturan Kuer would not bind the reversioners when the succession opens on the death of Birita Kuer.

It is pointed out that the learned Judges came to the conclusion that, as a matter of fact, the alleged surrender by the widows of the right of survivorship had not been established, and that they went on to hold that, even if the surrender had been proved, the plaintiffs could not get a decree for possession as succession to the estate could not open as long as Birita Kuer was alive. It is urged by learned counsel for the respondent that, in these circumstances, the question of law mentioned above did not arise for decision. It has next been contended that the decision is wrong. Learned counsel points out that where a sonless Hindu dies, leaving more widows than one surviving, the widows succeed by inheritance to their husband's property as one joint estate in coparcenary, with a right of survivorship : 11 M.I.A. 487.[2] They can, if they so desire, divide the property, and take possession of separate parcels, for the purposes of convenient management and enjoyment (55 I.A. 399[3]), but that is only a mode of enjoyment, and there can be no severance of title. It is urged that the right of survivorship, depending as it does on the chance of one of the widows surviving the other or others, is a mere spes successionis, or, to borrow the expression used by the Judicial Committee in 25 I. A. 183,[4] an expectant interest and cannot be the subject of any bargaining.

It is further argued that, if one of the widows makes a valid adoption, the rights of the adopted son would be affected if a surrender of the right of survivorship by the widows is held to be valid. Learned counsel next contends that such surrender amounts to an alteration, by agreement, of the nature of the estate, as fixed by Hindu law, to which the widows succeed, and that such an alteration of the course of devolution is not permissible. In rejoinder, learned counsel for the appellant has referred to the case in 59 I.A. 331,[5] and has relied on the decision of their Lordships that the birth right of the senior member of a family holding an impartible estate, to take by survivorship is not a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate, but that it is a right which is capable of being renounced and surrendered. It is argued that the doctrine of spes successionis must be confined to the right which a reversioner, succeeding on the death of a Hindu widow to her husband's estate has, and should not be extended to other cases of expectant interest. Reliance is further placed on A. I. R. 1938 Cal. 689,[6] 74 I. C. 58[7]

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2. ('66-67) 11 M.I.A.487 : 9 W.R.23 : 2 Suther. 124: 2 Sar. 327 (P.C.), Bhugwandeen Doobey v. Myna Baee.
3. ('28) 15 A.I.R. 1928 P.C. 251 : 111 I.C. 485 : 55 I.A. 399 (P. C.), Gauri Nath v. Mt. Gaya Kuar.
4. ('98) 21 All. 71 : 25 I.A. 183 : 7 Sar. 417 (P.C.), Sham Sundar Lal v. Achhan Kunwar.
5. ('32) 19 A. I. R. 1932 P.C. 216 : 138 I. C. 861 : 59 Cal. 1399 : 59 I. A. 331 (P. C.), Shibaprasad Singh v. Prayagkumari Debee.
6. ('38) 25 A.I.R. 1938 Cal. 689 : 178 I.C. 846 : 67 C.L.J. 115, Uchmatan Bibi v. Rajendra Nath.
7. ('24) 11 A.I.R. 1924 Mad. 75 : 74 I. C. 58 : 45 M.L.J. 1, Ammani Ammal v. Periasami Udayan.

and 49 M. L. J. 479.[8] Interesting and thought-
a provoking as these arguments are, we do not, in view of our decision that as a matter of fact no surrender ever took place in the present case, wish to express any opinion on their respective merits.

We come now to the second point raised by Dr. Katju on behalf of the appellant Krishna Pratap. We consider it desirable at this stage to examine the written statement of the appellant and see what his allegations were with regard to the deed of gift in question. An analysis of the relevant portion of the written statement which is para. 11 yields the following result : (i) It was the desire of Dharam Singh that Govind Kunwar and Jot Kunwar should be married "in some high family according to the custom of the family." (ii) It was also the desire of Dharam Singh that mauza Kharaua should be given to Govind Kunwar and Jot Kunwar
b as dowry. (iii) Dharam Singh made an oral will directing that his desires mentioned in (i) and (ii) above should be carried out. (iv) "Accordingly" Inder Kunwar celebrated the marriage of Govind Kunwar with Moti Singh, son of Raja Bahadur Raja Lakhpat Singh, Rais of Karauli, and "spent Rs. 50,000." (v) "With the same consideration" Inder Kunwar settled the marriage of Jot Kunwar with Bahadur Singh, another son of Raja Bahadur Raja Lakhpat Singh. (vi) As, however, Inder Kunwar "had no cash to present," she gave half of village Kharaua as dowry to Jot Kunwar at the time of her marriage in accordance with the desire of Dharam Singh and executed the deed of gift dated 5th July 1926 in favour of Jot Kunwar. (vii) That the gift was made with the consent of the plaintiff and the members of the family. (viii) The gift is "valid according to law and shastra and was executed for
c lawful necessity and the necessity of the family." (ix) The plaintiff has "all along been admitting the said deed of gift to be valid and correct" and so she is estopped from taking any objection to it. Two matters may be disposed of at once. The plea of estoppel mentioned above has not been raised before us and does not appear to have been argued before the Court below. It has also not been stated what other "members of the family" than the plaintiff there were whose consent to the gift in question was taken. The case has been argued before us, and appears to have been argued before the Court below on the footing that the consent of the plaintiff alone was obtained. It is obvious that there were no other members of the family whose consent was necessary and that the plaintiff's consent was all that was required and, if established, would be sufficient so
d far as a suit by the plaintiff is concerned.

It would be convenient now to examine the recitals made in the deed of gift in question. These recitals may be summarised as follows :

(i) The entire 20 biswa zamindari of mauza Kharaua is part of the estate left by Dharam Singh, the husband of the executant, Inder Kunwar.

(ii) Half of the village aforesaid is "owned, possessed and enjoyed" by the executant, who is also the lambardar of the entire village.

(iii) The executant has two daughters, Govind Kunwar and Jot Kunwar, of whom Govind Kunwar has already been married by the executant into a very respectable and big family, namely, to Moti Singh, son of Raja Bahadur Raja Lakhpat Singh, Rais of Karauli, "at an expense of Rs. 30,000."

(iv) Jot Kunwar has now reached marriageable age. It is the duty of the executant to perform her marriage and it has been settled with Bahadur e Singh, the younger son of Raja Bahadur Raja Lakhpat Singh aforesaid.

(v) "But I have not got enough money in cash to give Beti Jodha Cunwar in dowry as I gave to Govind Kunwar."

(vi) Besides mauza Kharaua, the executant has got other zamindari properties, inherited from her husband, which are quite sufficient for her maintenance.

(vii) It was the desire of the executant's husband that his daughters "should be married into some respectable family, higher than his and, if possible, in some riyasat."

(viii) In accordance with the desire of her husband the executant has already married one daughter at considerable expense and now wants to marry the other daughter also "in some respect-
f able family in a decent way according to the desire and wishes of" her deceased husband.

(ix) "But now I have not got enough money in cash to give Beti Jot Kunwar as dowry as is necessary for marrying a girl into a respectable family according to status."

(x) "Therefore, I, the executant . . . . . out of natural love and also according to the desire of my husband, make a gift of 10 biswas out of the 20 biswa zamindari share in mauza Kharaua . . . . in favour of my minor daughter, Beti Jot Kunwar, under my own sarbarahkarship."

(xi) The property gifted shall be the stridhan of the donee, Mt. Jot Kunwar.

(xii) The value of the property gifted is rupees 40,000.

Certain points emerge from a comparison of the
g above recitals with the allegations made in para. 11 of the appellant's written statement. In the first place, it will be noticed that no oral will of Dharam Singh is mentioned in the deed of gift. In the second place, the only desire of Dharam Singh which is specifically mentioned in the deed of gift is that his daughters should be married into some respectable family of a higher status than his own and, if possible, in some riyasat. It is not recited there that it was the desire of Dharam Singh that village Kharaua should be given to his two daughters as a dowry. In the third place, it is not stated in the deed that the gift was made with the consent of the executant's co-widow, Prembada Kunwar, or, for the matter of that, of anybody else. On the contrary, the whole tone of the document creates the impression on one's mind that the executant considered herself fully entitled to make the
h gift and that she did not stand in need of anybody's consent. The justifications for the gift mentioned in the deed are that Jot Kunwar's marriage has got to be performed "in a respectable family in a decent way," and "according to status," that that cannot be done without funds which the executant did not possess, and that even after making a gift of the village in question the executant would be left with sufficient property for her maintenance.

Of the four sub-heads under which learned counsel for the appellant has advanced his arguments on this part of the case, it would be convenient first to dispose of those which involve questions of fact, namely, (a), (c) and (d). Of these latter, we propose to take up (c) first.

The allegation is that Dharam Singh had made an oral will directing that village Kharaua should be given to his two daughters as dowry when their marriages were performed, and the question is whether the appellant has succeeded in establishing that allegation. The first objection to the story is

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8. ('26) 13 A.I.R. 1926 Mad. 6 : 90 I. C. 881 : 49 M.L.J. 479, Appalasuri v. Kanamma.

a that no such oral will — or any oral will at all—is mentioned in the deed of gift itself, the recitals of which appear to have been prepared with considerable care and forethought. The second objection is that, if there had been any such oral will of Dharam Singh, it would have been mentioned at the time of the division in 1915. We have not been referred to any evidence showing that any mention of such an oral will was made at the time of the division. On the contrary, village Kharaua was divided between the two ladies just as the other properties were divided. Further, the story that, at the time of the division of 1915, Inder Kunwar said that "she had two daughters and some arrangement should be made for their marriages" and that Sanwal Singh "settled that the entire income from Fatehpur Chaurasi and Jamaina Kachh should be set apart for the marriages"—to quote the words of the wit-
b ness Tota Ram—negatives the story that Dharam Singh had made a will that village Kharaua should be given to his daughters on the occasion of their marriage. If the allegation that Dharam Singh had made a will as mentioned above were true, the necessary "arrangement" had already been made by no less a person than the last male owner of the property, and so there would have been no occasion for Inder Kunwar to raise the question again at the time of the division in 1915. The two allegations of the appellant are inconsistent with each other. The fact of the matter is that neither allegation is true. In the anxiety to defeat the just claim of the plaintiff, a number of groundless stories have been invented and, as experience shows, those embarking upon such an undertaking are often landed in inconsistencies. Dharam Singh was not more than 28
c at the time of his death in May 1912 (*vide* Tota Ram). There can be no doubt on the evidence that he was addicted to drink. Apart from the evidence adduced by the plaintiff, such of the witnesses of the defendants as were questioned on the subject admit that Dharam Singh was given to drinking. Ram Lal states :

"Kunwar Dharam Singh did not first use to drink but he started drinking on marrying the Karhar girl namely the plaintiff. It is possible that ever since I took up employment under Kunwar Dharam Singh drinking expenses were daily shown at Re. 1 or Rs. 2 in Dharam Singh's accounts, but I do not remember about this."

The then Collector of the district, Mr. F. J. Cooke, in his appellate order dated 17th December 1912 passed in the mutation case which, on the death of Dharam Singh, arose between Khiali Singh
d — who alleged that he was an adopted son of Dharam Singh—on the one side, and Inder Kunwar and Prembada Kunwar on the other, states "the late Kunwar Dharam Singh was, it is admitted, a hard drinker and he was evidently a man of very weak character," and lower down employs the adjective 'besotted' to Dharam Singh. The plaintiff herself, not unnaturally, speaks with some reserve on the subject and states that Dharam Singh "used to take wine" and that he "used to take liquor" at the time of her marriage. Her witness, Megh Singh, who is a relative of the family, puts the matter clearly and states that "Kunwar Dharam Singh used to drink wine excessively." He does not appear to have been cross-examined on this point, and no reason has been shown for disbelieving him. Lastly, we have Dharam Singh's own declarations in a deed executed by him on 18th January 1910 (Ex. 44) which show beyond doubt that he was a man of intemperate habits. Considering his age and his character, it is in our judgment, highly improbable that he had the foresight and wisdom attributed to him. The improbability becomes still e greater when it is remembered that, at the time of his death, his two daughters were mere infants, Govind Kunwar being about 2½—having been born on 18th December 1909 (*vide* Ex. 44) — and Jot Kunwar still younger. It is impossible to believe that Dharam Singh, being what he was, ever gave any thought to the question of the marriage of his infant daughters. We have therefore no hesitation in agreeing with the finding of the Court below that it has not been established that Dharam Singh had made a will that village Kharaua should be given as dowry to his daughters. The learned Judge of the Court below is perfectly right in holding that Sardar Singh and Kashi Ram are wholly unreliable witnesses. The falsity of the story, that Dharam Singh had made a will that village Kharaua should be given as dowry to his two daughters, is established f by the admitted fact that when Govind Kunwar was married she was not given any portion of village Kharaua, but money in cash, as dowry, and by the recital in the deed of gift that half of village Kharaua was being gifted to Jot Kunwar as Inder Kunwar had "not got enough money in cash to give Beti Jot Kunwar in dowry."

We come now to sub-head (d). The argument is that if Inder Kunwar had not made a gift of the 10 biswa share of village Kharaua in favour of Jot Kunwar, the girl would have remained unmarried, or would have had to be married to a boy the status of whose family was not as high as it had to be in fulfilment of the wishes of Dharam Singh. We have held above that the story that Dharam Singh had expressed any wishes on the subject of the marriages of these girls is not true. That being so, g the whole basis of the contention that Inder Kunwar had no option but to marry Jot Kunwar to the younger son of Raja Bahadur Raja Lakhpat Singh, or someone of that type, disappears. The admitted fact that in 1922 Jot Kunwar had been betrothed to Ram Chandra Singh, son of Madho Singh, who, on his own showing, pays only Rs. 200 per annum as land revenue, clearly shows that Inder Kunwar was under no such compulsion in the matter of Jot Kunwar's marriage as is now alleged. There must be thousands of pure blooded and highly respectable Rajput families into which Jot Kunwar could easily have been married without any necessity arising for the gift of a portion of the estate. The fact that the engagement of Jot Kunwar to Ram Chandra Singh was subsequently cancelled is relied upon as showing that Inder Kunwar was helpless and had to settle the marriage of Jot Kunwar with Lakhpat Singh's h younger son on the terms imposed by Lakhpat Singh. Reference is made to the deed of gift which Inder Kunwar had executed on 5th October 1922 in favour of Ram Chandra (Ex. E), and to the deed dated 5th March 1923 executed by Madho Singh relinquishing the property in favour of Inder Kunwar (Ex M), and to the evidence given by Madho Singh. The reason now given by him for the proposal of the marriage of his son Ram Chandra with Jot Kunwar falling through is as follows :

"The marriage did not take place because there was disagreement respecting the dowry. It had been promised to me that I would be given half of Kunwar Rani Inder Kunwar's haqiat in the marriage."

So, according to Madho Singh, what he had been promised was not only half of one village, Kharaua, but half of the entire property which was in Inder Kunwar's possession. This is a remarkable story, to say the least of it. The recital made by Madho Singh in Ex. M was this: "Now, on account of some

private reasons, the marriage contract has been dissolved. . .'' The witness, Lachhman Prasad, on the other hand, has stated that "Madho Singh wanted Inder Kunwar to make a gift of her entire property to Ram Chander Singh." It is clear that neither of them can be believed. We entirely agree with the learned Judge below that Madho Singh is not a witness of truth. The real reason which led to the abandonment of the proposed marriage of Jot Kunwar with Ram Chandra Singh has not been disclosed. Then, again, we have not been referred to any credible evidence showing what steps Inder Kunwar took to find a suitable match for Jot Kunwar before she discovered that in the entire Rajput community no suitable young man other than the younger brother of her elder daughter's husband was available and that she had no option but to give half of village Kharaua in order that Jot Kunwar might be married to him.

As to the existence of a compelling necessity which left no choice to Inder Kunwar, the story is that when Inder Kunwar opened negotiations for the marriage of Jot Kunwar with Lakhpat Singh's younger son, Bahadur Singh — the father of the appellant — Lakhpat Singh made such demands as left no option to Inder Kunwar but to make a gift of a 10 biswa share of Kharaua. There is, however, no satisfactory explanation as to why Inder Kunwar could not negotiate the marriage in some other respectable family. In support of the story mentioned above the evidence of five witnesses, Raja Bahadur Raja Lakhpat Singh, Rai Saheb Jugal Kishore, Lachhman Prasad, Kanhaiya Lal and Madho Singh has been relied upon by appellant's learned counsel. The Court below has mentioned 6th witness, Prabhu Lal. The evidence given by all these witnesses has been dealt with in detail by the learned Judge of the Court below. We have already expressed our agreement with his conclusion that Madho Singh is not a reliable witness. With regard to the other witnesses also, we entirely agree with the learned Judge that none of them is reliable and with the reasons given by him for that conclusion. That being so, it is not necessary for us to say much with regard to these witnesses. Lakhpat Singh is the appellant's grandfather and is obviously deeply interested in the appellant's success. In fact, he is the real defendant-appellant. Jugal Kishore is a friend of his and is clearly under his influence. The other witnesses are, if possible, even more obviously untrustworthy.

In considering whether the story related by these witnesses is true, two facts have to be borne in mind, (1) that Lakhpat Singh was no stranger, but was already a relation, as his son Moti Singh had been married to Govind Kunwar four or five years earlier, and (2) that Moti Singh and Govind Kunwar had admittedly taken up their residence in Kharaua and were living with Inder Kunwar. In these circumstances, it is on the one hand, impossible to believe that Lakhpat Singh behaved in the manner in which he and the witnesses allege that he behaved when the proposal was made to him that Jot Kunwar should be married to his son Bahadur Singh. On the other hand, the truth is not far to seek. In our opinion, the fact is that Inder Kunwar was gradually led into marrying Jot Kunwar to Bahadur Singh and making a gift of the property by the machinations of Lakhpat Singh, Moti Singh and Govind Kunwar to which her own inclinations made her yield readily. Certain other points deserve consideration. The allegation in the deed of gift dated 5th July 1926, and in para. 11 of the written statement is that Inder Kunwar had spent Rs. 30,000 over the marriage of Govind Kunwar. Lakhpat Singh's statement in the witness-box, on the other hand, is that in Govind Kunwar's marriage he "received cash and articles worth Rs. 30,000." The discrepancy is obvious. Apart from the giving of a dowry, a good deal of other expenditure has to be incurred on the occasion of a marriage. The witness, Kanhaiyalal, related a different story. We do not believe either that Inder Kunwar spent a sum of Rs. 30,000 on the occasion of Govind Kunwar's marriage or that the presents given by her to Lakhpat Singh were worth Rs. 30,000. We do not also believe the story that Inder Kunwar had no money when Jot Kunwar's marriage was celebrated. It is obvious that she must have spent money over the entertainment of the barat (bridegroom's party) and other guests, and over the numerous other matters connected with a marriage. We have no doubt that, if she had not made up her mind to give away the share in Kharaua to her daughter, she could easily have arranged for a reasonable dowry in cash and kind. The learned Judge of the Court below has made the following observations on this part of the case :

"It will be noticed at once that it is not the defendant's case that the said 10 biswa share of mouza Kharaua was given to Beti Jot Kunwar on the occasion of her marriage as a customary ceremonial gift. Further, in the deed of gift itself that property has been valued at Rs. 40,000 and its annual net profits, after deducting collection charges, amount to Rs. 1936. Such a big property would not be a reasonable ceremonial gift to be made, in the name of custom, by a lady of Kunwar Rani Inder Kunwar's position, whose annual income was in the neighbourhood of Rs. 3000 only . . . . . The present case is not one where, in order to meet the reasonable expenses of the marriage of a daughter, the mother, representing the estate of her deceased husband has for want of funds alienated a reasonable portion of such estate. . . . The gift in question is only one of a series of transfers that Kunwar Rani Inder Kunwar made in respect of the property allotted to her share under the private partition made by Raja Sanwal Singh, and it rather seems that these transfers, including the gift, proceeded from a desire that, if possible, plaintiff Kunwar Rani should not, on the death of Kunwar Rani Inder Kunwar, come into possession of any portion of the property held by her."

We entirely agree with these observations, and would only add that the gift in question, the will and the deed of endowment (under which Govind Kunwar has been appointed the mutwalli of the endowment) clearly point to a deliberate intention on the part of Inder Kunwar to give away the entire property in her possession to her daughters, and the stories now put forward are pure inventions for the purposes of this case. The only other sub-head in which a question of fact is involved is sub-head (a). The plea is that the gift was made with the consent of the plaintiff, and the argument is that the plaintiff, having consented to the gift, cannot challenge it. The question that arises for consideration is whether it has been proved that the plaintiff had given her consent to the gift. We have already dealt with several allegations of fact made on behalf of the defendant-appellant and have shown that every one of them is devoid of truth. It may be stated at once that this one is no better. The very first point that is noteworthy is, as has already been pointed out that there is no such recital in the deed of gift itself. It is impossible to believe that such an important fact as the consent of Inder

a Kunwar's co-widow could possibly have been omitted from the carefully prepared recitals incorporated in the deed if there had been consent on the part of Prembada Kunwar. Further, if Prembada Kunwar had given her consent, she would most certainly have been an executant of the deed along with Inder Kunwar.

Appellant's witness, Lachhman Prasad already mentioned, has stated that Prembada Kunwar was not present at Kharaua when the deed of gift was executed and that she did not join Jot Kunwar's marriage. If Prembada Kunwar had given her consent to the gift, or had in any manner been consulted in the matter of Jot Kunwar's marriage to say nothing of her having taken an active part along with Inder Kunwar in the negotiations which culminated in the settlement of the marriage with
b Bahadur Singh, as is alleged by the witnesses she would have joined the marriage. The fact appears to be that the relations between the two ladies were not of the happiest and that Inder Kunwar never consulted Prembada Kunwar about anything. [After going through the evidence produced on behalf of the appellant their Lorships proceeded.] Our conclusion, therefore, is that the appellant entirely failed to prove that the plaintiff, Prembada Kunwar, had in any manner consented to the gift in question.

It would be convenient at this stage to advert to the law on the subject. Learned counsel for the plaintiff-respondent has contended that the transfer made by Inder Kunwar, being without the consent of Prembada Kunwar, were invalid and were not binding on Prembada Kunwar. He has cited and relied upon three decisions of the Judicial Com-
c mittee, 11 M. I. A. 487,[2] 19 I. A. 184,[9] and 55 I. A. 399.[3] In the first case, one Deenanath, a Hindu governed by the Benares School, died childless, possessed of a considerable estate, and left two widows, Doola Baee and Myna Baee, surviving him. The widows succeeded to his estate. In consequence of certain disputes the estate was divided between the widows by an order of the District Judge under Act No. 19 of 1841 and each widow came into possession of a half share. Doola Baee made a will whereby she disposed of her share of the property in favour of her father and her brother. She died shortly afterwards. Myna Baee thereupon brought the suit, out of which the appeal before the Judicial Committee had arisen, to recover possession of the half share in respect of which Doola Baee had made the will. The trial Court had dismissed the suit,
d but the Sudder Dewany Adawlut ultimately allowed the appeal of Myna Baee and made a decree in her favour. The defendants Doola Baee's father and brother thereupon appealed to His Majesty in Council. Their Lordships, in the course of their judgment, after stating the facts, observed :

". . . . the principal question between the parties is the broad and general one, whether, according to the law of Benares School, a Hindu widow is competent to dispose, by will or deed of gift, of either moveable or immovable property inherited from her husband, to the prejudice of his next heirs."

Having discussed the relevant authorities, their Lordships made this observation :

" It must, then, be taken upon the authorities to be settled law that under the law of Benares a Hindu widow has not the power to dispose of immovable property inherited from her husband to e the prejudice of his next heirs; and the only question open to doubt is, whether she has any such power over moveable property."

Their Lordships then proceeded to consider the question with regard to the widow's power over moveable property, and expressed their decision thus :

" Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate, whether moveable or immovable, to which a Hindu widow succeeds by inheritance, forms part of her stridhan, or particular property ; and that the text of Katyayana, which is general in its terms, and of which the authority is undoubted, must be taken to determine first, that her power of disposition over both is limited to certain purposes ; and, secondly, f that on her death both pass to the next heir of her husband."

Having thus answered the broad and general question, their Lordships next proceeded to consider "whether the effect of the so-called partition was to give Doola Baee any power of disposition over her share which she would not otherwise have had." Their Lordships found that there was "no proof of any contract to make a partition, and as part of that contract, to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract," and that the transaction was "merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected." Their Lordships then gave their decision in these words :

" The estate of two widows, who take their hus- g band's property by inheritance, is one estate. The right of survivorship is so strong that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow. They are, therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other."

The appeal of the defendants was dismissed and the decree in favour of Myna Baee was upheld. In 19 I. A. 184,[9] two widows, Neelamani and Radhamani, had succeeded to the estate of their husband as his heirs. Neelamani had executed two deeds of mortgage in favour of the plaintiff in the action, which was for the recovery of the amount due upon those deeds, and Neelamani being dead, it was brought against Radhamani. She pleaded that the alienation having been made without her con- h sent, was invalid and further that there was no necessity for the loans so as to bind the estate beyond the life time of Neelamani. The trial Court had dismissed the suit but the High Court at Madras reversed that decree and gave a decree against Radhamani for the amount found due upon the mortgages. Radhamani thereupon appealed to His Majesty in Council. The decision of their Lordships was in favour of Radhamani. The headnote may conveniently be quoted :

" A mortgage by a Hindu widow even for necessary purposes without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow.

Quære. Whether a case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate; certainly it cannot where the concurrence of the co-widow was not even applied for . . . ."

9. ('93) 16 Mad. 1 : 19 I. A. 184 : 6 Sar. 1 (P.C.), Sri Gajapati Radhamani Garu v. Maharani Sri Pasupati.

In the course of the judgment, their Lordships made these observations :

"It may be assumed for the present judgment, without deciding the point, that there was a sufficient necessity for borrowing money to pay the Government revenue or even for the payment of Neelamani's debt; but that necessity did not render a mortgage by one widow binding upon the joint estate which had descended from their deceased husband so as to affect the interest of the surviving widow : 11 M. I. A. 487.[2] "

The law thus laid down in the two cases mentioned above was re-affirmed in the third case, viz., 55 I. A. 399.[3] The last male owner there was Laiq Singh who was the owner of certain villages. He died childless or, at any rate, sonless and was survived by two widows, Umrao Kunwar and Gaya Kunwar. The widows partitioned the property through the revenue Courts. Their Lordships observed that what the widows did by means of this partition was "to separate and divide the enjoyment of the widow's life estate." In the year 1891 Umrao Kunwar executed two deeds of mortgage in favour of the appellant in respect of certain villages which had been assigned to her at the partition. The first of these mortgages was a mortgage with possession, and the second was a deed in respect of further charges. The mortgagee obtained possession over the mortgaged villages. Umrao Kunwar died in 1908, and Gaya Kunwar brought the suit, which gave rise to the appeal, within 12 years of Umrao Kunwar's death. Their Lordships observed that the sole question for their decision was "whether these two mortgages of 1891 are valid and binding on the respondent, who succeeded in 1908 to the villages by right of survivorship." Their Lordships then stated the law thus :

"The general law is so well settled that it scarcely requires restatement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together, they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime."

Their Lordships then observed that these principles had been established by a long series of decisions, one of the earliest and the most authoritative of which was the case in 11 M. I. A. 487.[2] Proceeding further, their Lordships made the following observations :

"There remains the question whether to the extent that the mortgages were made for a legal necessity they are binding on the respondent. This was not expressly decided by the case in 11 M.I.A. 487,[2] which dealt with a gratuitous alienation by one widow to the prejudice of the other, but it was made the subject of decision in the well known case in 19 I. A. 184.[9] There, it was held, as expressed in the headnote, that a mortgage by a Hindu widow, even for necessary purposes, without the concurrence of her co-widow, is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow but the question was left open whether a 'case for borrowing without the co-widow's consent could be establised so as to empower one widow so to bind the estate,' and the only thing that was definitely decided was that it could not do so where the concurrence of the co-widow was not even applied for."

The opinion expressed by this Court in 26 A.L.J. 268,[10] that, where two Hindu widows have separated for purposes of conveniently enjoying the estate left by the husband, if one of them alienates a portion of the estate in her possession under the pressure of legal necessity, the reversioner is bound by such alienation, was disapproved. It is thus clear that the Privy Council have definitely and repeatedly held that, where a sonless Hindu is survived by more than one widow, alienation of any part of the estate, even for legal necessity, is not valid unless all the widows act together, and that the fact that the widows have divided, and have taken possession of separate portions of the estate is of no effect. Learned counsel for the appellant referred to the following passage in the judgment in 55 I. A. 399[3] :

"Their Lordships can conceive of cases where when the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate," and drew our attention to an answer given by the plaintiff to a question put to her in cross-examination : "If I had been asked about the giving of Kharaua in the marriage of Jot Kunwar, I would have forbidden (Inder Kunwar to do so)," and argued that, in view of this statement of the plaintiff, it must be held that it was not necessary for Inder Kunwar to apply to the plaintiff for her concurrence. We cannot accept this argument. The crucial point is that the concurrence was never applied for. An answer, obtained in cross-examination, to a hypothetical question, to the effect that the plaintiff would have acted in a certain manner if a certain step had been taken by her co-widow, cannot be founded upon for an argument that the co-widow was relieved of the necessity of taking the step which the law required her to take. The important fact is that the step was not taken. There is, also, the further question whether Prembada Kunwar's refusal would, in the circumstances of this case, have been unreasonable. It may be pointed out that the law as stated above was not, as far as we can judge from the judgment of the Court below, in doubt in that Court. The defendant there rested this part of his case on the allegation of fact that the gift in question had been made with the consent of the plaintiff. It must also be noted, in view of what follows, that the judgment of the Court below on issue 3—which was the issue relating to the gift of 5th July 1926 — shows that the only questions raised and argued on behalf of the defendant in that Court were the questions of fact covered by sub-heads (a), (c) and (d) of the arguments of appellant's learned counsel on the second point.

In this Court, however, learned counsel for the appellant has raised a wholly new point, and that is the point involved in sub-head (b) of his argu-

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10. ('28) 15 A. I. R. 1928 All. 92 : 107 I. C. 699 : 50 All. 489 : 26 A. L. J. 268, Jai Narain Singh v. Munna Lal.

ment, to the consideration of which we now turn. The argument may be thus summarised : "Even if the defendant's allegation as to Dharam Singh's direction and oral will is not proved ; even if the defendant has failed to prove his allegation that the gift in question was made in circumstances amounting to legal necessity ; and even if it is not established that the gift was made with the plaintiff's concurrence, the gift is valid and binding on the plaintiff because it is laid down in certain text books on Hindu law that, where a Hindu dies leaving an unmarried daughter, besides a widow or widows, him surviving, the daughter has an absolute right to receive on the occasion of her marriage a one-fourth share of the estate in the hands of the widow or widows, which right does not depend on the bounty or generosity of the mother or step-mother, and the gift in the present case is of a share of the estate which admittedly is less than one fourth of the whole estate." No such plea was raised in the written statement ; there was no issue on the point, and no such ground has been clearly raised even in the memorandum of appeal filed in this Court. We, however, allowed the point to be argued as it involved a pure question of law and as no objection was raised by plaintiff-respondent's learned counsel.

Learned counsel for the appellant has cited the following rulings in support of his argument : 37 Cal. 1,[11] 5 Pat. 646,[12] 45 All. 297,[13] A. I. R. 1926 Cal. 486[14] A. I. R. 1933 Oudh 426[15] and 53 Mad. 84.[16] He has also read various passages from certain text books. We shall deal with the rulings first. The headnote of the case in 37 Cal. 1[11] is in these words :

"It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immovable property of her husband to her daughter on the occasion of the daughter's gowna ceremony ; and such a gift is binding upon the reversionary heirs of her husband."

The gift there was of a house and had been made by the widow of a sonless Hindu to her daughter on the occasion of the latter's gowna. The question that had been raised in the case was that a Hindu widow had no power to make a gift to her daughter on the occasion of the gowna ceremony whatever her powers for making a gift in the occasion of the marriage of the daughter might be. The trial Court held that the gowna ceremony was practically the completion and consummation of the marriage ceremony and that a gift of immovable property to the daughter by the mother on such an occasion was, therefore, valid, and had dismissed the suit which had been brought by the reversioner of the last male owner. The lower appellate Court had differed and had decreed the suit, and the defendants had taken the case to the High Court in second appeal. It is stated in the judgment that "the substantial question of law," which had been argued on behalf of the defendant-appellants, was, "whether a Hindu widow, governed by the Mitakshara law, is competent to make an absolute gift in favour of her daughter, on the occasion of the latter's gowna ceremony, of a reasonable portion of the immovable property left by her husband". It is next stated that the contention of the appellants was that this question must be answered in the affirmative, while it had been strenuously contended on behalf of the respondents that, "although, under the Hindu law, it may be open to a widow to make a suitable gift to her daughter on the occasion of her marriage, neither principle nor authority can be invoked in support of the validity of a post-nuptial gift to a daughter."

It will thus be noticed that the actual question which arose for consideration, and which was argued, was the narrow question of the widow's power to make a gift on the occasion of the gowna ceremony. In considering this question, however, the learned Judge began by referring to a number of texts in the ancient books of the Hindus, from the Rig Veda downwards, dealing with gifts to girls on the occasion of marriage. Dr. Katju has particularly invited our attention to the texts quoted from Manu, Book 9, Verse 118, and Yajnavalkya, Book 2, Verse 124 — which laid down that brothers should give to their unmarried sisters one-fourth of their own share — and to the observation of the learned Judges that "it is clear from the Mitakshara, Chap. 1, S. 7, paras. 5 to 14, and from Viramitrodaya, Chap. 2, Part 1, S. 21, that the maiden daughter is entitled to a share, which represents her dowry and marriage expenses, and such share is one-fourth of what she would have been entitled to receive, if instead of being a daughter she had been a son." The conclusion at which the learned Judges arrive, upon a consideration of these texts, is expressed in these words :

"These texts are, in our opinion, sufficient to support the view that when, upon the death of Hindu governed by the Mitakshara law, his property is taken by his widow, a gift by the widow to her daughter on the occasion of her marriage out of the estate of her husband is within her powers, provided that the portion so given is reasonable in amount, and that the question whether it is reasonable or not is to be determined with regard to what would have been the share of the unmarried daughter under the rules laid down in the Mitakshara, Chap. 1, S. 7, paras. 5 to 14."

These paragraphs of the Mitakshara contain an explanation of the following text of Yajnavalkya : "But sisters should be disposed of in marriage, giving them, as an allotment, the fourth part of a brother's own share." That the phrase, 'the fourth part of a brother's own share,' is ambiguous cannot be denied. It seems to us that the explanations given by the author of the Mitakshara in paras. 6 to 14 of Chap. 1, S. 7 do not make the position any better. To continue with the judgment in 37 Cal. 1.[11] The learned Judges then refer to certain authorities and arrive at the following conclusion :

"Upon the authority of the ancient texts and of the commentators, as also upon the judicial decisions to which we have referred, there cannot, in our opinion, be any reasonable doubt that a gift by a Hindu widow of a reasonable portion of her husband's immovable property to her daughter in connection with her marriage is within the scope of

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11. ('10) 37 Cal. 1 : 1 I. C. 945 : 10 C. L. J. 545 : 13 C. W. N. 994, Churaman Sahu v. Gopi Sahu.

12. ('26) 13 A. I. R. 1926 Pat. 582 : 99 I. C. 782 : 5 Pat. 646 : 7 P. L. T. 821, Ram Sumran Prasad v. Gobind Das.

13. ('24) 11 A. I. R. 1924 All. 23 : 73 I. C. 648 : 45 All. 297 : 21 A. L. J. 232, Bhagwati Shukul v. Ram Jatan Tiwari.

14. ('26) 13 A. I. R. 1926 Cal. 486 : 91 I. C. 186, Sailabala Deb v. Baikuntha Nath.

15. ('33) 20 A. I. R. 1933 Oudh 426 : 147 I. C. 210 : 10 O. W. N. 934, Birj Mohan Singh v. Mt. Rachhpal Kuar.

16. ('29) 16 A. I. R. 1929 Mad. 586 : 121 I. C. 113 : 53 Mad. 84 : 57 M. L. J. 826 (F. B), Subbayya v. Ananta Ramayya.

her authority as a qualified owner and is binding upon the reversionary heirs of her husband."

We consider it sufficient to say that this is very far from the proposition contended by Dr. Katju. Having arrived at the conclusion mentioned above, the learned Judges proceed to consider what the gowna ceremony is and state that it is also known as the dwiragaman ceremony. They then state their conclusion thus :

"In our opinion there is no substantial distinction between gifts made at the nuptial fire or in the bridal procession and gifts made at the time of the dwiragaman ceremony. In fact, gifts made at the time of the dwiragaman ceremony may rightly be regarded as dowry deferred . . ."

It is noteworthy that, after stating their conclusion as quoted above, the learned Judges observe : "The only question is whether the gift was of a reasonable portion of her husband's immovable property," and proceed to consider that question. If Dr. Katju's contention is correct, and the texts mentioning the one-fourth share are to be interpreted literally and followed strictly, no question of reasonableness can arise. The daughter must, according to Dr. Katju, be held to have an "absolute right" to a one-fourth share. Dr. Katju has had to go to the length of arguing that the daughter is entitled to enforce in a Court of law this "absolute right" to a one-fourth share of her father's estate. He has had to admit, however, that he is not aware of a single case in which any such claim has ever been put forward in, or recognised by, any Court. One of the precedents cited and relied upon in the judgment in 37 Cal. 111 is 22 Mad. 113.[17] The judgment of that case has been so well summarised by the learned Judges of the Calcutta Court at p. 8 of 37 Cal. 111 that we cannot do better than quote that summary :

"The texts justified something more than a disbursement out of the estate of only the price of things required in connection with celebration of the marriage. The better and sounder view was that the authorities should be understood to empower a qualified owner, like a widow, to do all acts proper and incidental to the marriage of a female, according to the general practice of the community to which she belongs."

If we may say so with great respect, this is perfectly intelligible, and this is the principle on which the Courts have always acted. We would repeat that this in no way supports the contention put forward by Dr. Katju. The relevant portion of the headnote in 5 Pat. 646[12] is in these words :

"A gift by a sonless Hindu widow of a reasonable portion of landed property to her son-in-law, out of the estate inherited from her husband, is permissible under the Hindu law as a part of the religious ceremony of marriage of the daughter and as being conducive to the spiritual welfare of the husband."

The facts of that case show that the gift in that case was not an improper one. The last male owner, Banarsi Prasad, left a widow, Jainti Kumari, and an unmarried daughter, Chhotan Bibi. The estate left by him was considerable. The annual income from landed properties alone was over Rs. 50,000. Then there was a money-lending business involving 20,000 to 30,000 rupees. There were Government promissory notes of the face value of over two lacs of rupees. The evidence showed that the widow, Jainti Kumari, was a careful manager. She actually saved money and acquired properties yielding an income of 20,000 to 30,000 rupees per annum, and thus enhanced the corpus of the estate by 50 per cent. She was clearly a widow of an exceptional character. The only expenditure of a capital nature incurred by her was in connexion with works of a religious and charitable character. She constructed a thakurbari (temple) at a cost of fifty to sixty thousand rupees, and dedicated to the temple property yielding an annual income of Rs. 18,000. The money spent on the building of the temple—which is likely to have taken several years—might well have come out of the income of the estate, considering that, according to the judgment, the lady "managed the property frugally and economically." It was also found that the expenditure incurred by the lady on charitable works, though large, was "not disproportionate to her means or the extent of the property she possessed." But, apart from that, it was admitted by the reversioners, who were the plaintiffs in the suit and were challenging a gift made by Jainti Kumari to her son-in-law, that Jainti Kumari had spent these moneys on the works of charity, and had made the dedication, with their consent. The gift in question had been made orally on the occasion of the ceremony of Gantha Pakrai which is one of the ceremonies that take place in connection with the celebration of a marriage. A deed of gift, confirming the oral gift thus made, was executed two years later.

It was found that Jainti Kumari spent a ridiculously small sum of money — considering her status and wealth — something in the neighbourhood of one thousand rupees, on the marriage of her daughter who was the only child left by Banarsi Prasad. The property gifted was an eight annas share in a certain mahal and one bigha of land in another village. The net profit from the eight annas share in the mahal amounted to Rs. 1200 to Rs. 1300 per annum. The one bigha of land in the other village could hardly have yielded any income. This represented one-fiftieth share of the property left by Banarsi Prasad, taking into consideration the landed properties alone. If the money-lending business and the Government promissory notes are taken into consideration the fraction becomes smaller. If the additions to the estate made by Jainti Kumari —which also came into the possession of the reversioners — are taken into consideration, the fraction becomes still smaller. Such a gift, made by such a widow, and in such circumstances, would be upheld by any Court. It is difficult to see how this decision is of any assistance to the appellant. It is not the plaintiff's case that a gift made by a Hindu widow on the occasion of her daughter's marriage can never be valid.

The facts in 45 All. 297[13] were somewhat peculiar. A Hindu—Brahmin by caste and Krishnanand by name—died leaving a widow, Mt. Mohna, and an unmarried daughter, Mt. Oreha. The total value of the property left by him was Rs. 500. Mt. Oreha had the misfortune to be blind and a cripple. The giving in marriage of a daughter being, according to Hindu notions, a religious duty of paramount importance, the anxiety of Mt. Mohna, a widow, possessing very small means, as she was, to find a husband for such a daughter can be easily imagined. The only man whom she could succeed in persuading to marry Mt. Oreha was one Ram Jatan Tiwari, who already had a wife, and who evidently insisted on the property inherited by Mt. Mohna from her husband being given to him — presumably as a reward for his goodness in agreeing to marry the unfortunate girl, particularly when he already had a wife. It was, in these circumstances, that Mt. Mohna

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17. ('99) 22 Mad. 113, Ramsami Ayyar v. Vengidusami Ayyar.

made a gift of the entire property to Ram Jatan. Some time later, Mt. Mohna died and, 10 years after her death, the suit giving rise to the appeal was brought by a reversioner of Krishnanand claiming possession over the property. The finding of the lower appellate Court was that, "in order to get the girl married, it was a sheer necessity for Mt. Mohna to provide a dowry of Rs. 500, or its equivalent by the gift of the property."

The suit having been dismissed by the lower appellate Court, the plaintiff had come up to the High Court in second appeal. The facts being as stated above, a learned Single Judge, before whom the appeal came up for hearing, dismissed the appeal. The plaintiff thereupon filed an appeal under the Letters Patent. The Bench before which it came up for a preliminary hearing — analogous to a hearing under O. 41, R. 11, Civil P. C. — dismissed the appeal summarily, observing that the learned Single Judge had decided the case rightly. The decision, in our opinion, was clearly within the principles laid down in 22 Mad. 113.[17] The validity of the gift in each case depends on the particular facts and circumstances of that case. The decision does not support the appellant's contention before us.

The cases in A. I. R. 1926 Cal. 486[14] and A. I. R. 1933 Oudh 426,[15] were also second appeals. In the Calcutta case the parties were governed by the Dayabhaga. The law on this subject in the Dayabhaga and the Mitakshara is, however, the same. The gift in that case was of property which represented 3/4ths of the estate. The value of the property gifted was only Rs. 1000. The estate was thus a very small one. The practice of exacting heavy dowries from the girl's parents is rampant in Bengal even to a greater extent than in other parts of the country. The finding of the lower appellate Court was that "the gift was a reasonable one having regard to all the circumstances disclosed in the evidence." It had also been found that the girl had been married in accordance with the wishes of her deceased father and that the ancestors of the plaintiffs had taken active part in the ceremony and also in the execution of the deed of gift. Although the latter circumstance could not estop the plaintiffs from claiming the property, it was held that the fact that those who were interested as possible reversionary heirs joined in the transaction clearly indicated that it was not considered unreasonable. The argument put forward on behalf of the plaintiffs was that the widow could not give more than one-fourth of the estate and the texts already mentioned, and similar texts from the Dayabhaga, quoted. The learned Judges held that the texts were not imperative but only directory and only indicated what should be considered as reasonable in each particular case, and referred to the Madras decision in 22 Mad. 113,[17] which we have already mentioned. The learned Judges further observed that "to limit the amount to be spent for her marriage to a fourth part of the estate left by the father would, in many cases, make it impossible for the widow to give her daughter in marriage."

On the finding of facts recorded by the lower appellate Court the second appeal was bound to be dismissed. The important fact to note is that it was held that the texts were not imperative but only directory, and that the question whether the gift was reasonable must be decided in the light of the facts and circumstances of each particular case. The case thus does not support the contention of Dr. Katju. In the Oudh case the gift was made by the mother of the last male owner in favour of her daughter on the occasion of the latter's marriage. It was in respect of about eight bighas of land out of some 28 bighas left by the last male owner. It was observed by the learned Judges that it is competent to a widow to make a gift of immovable property to her daughter on the occasion of the daughter's marriage and that the limitation on the validity of the gift is that it must be of a reasonable portion of the property. It was further observed that the question as to what is a reasonable gift on such occasions is a question of fact which has to be decided with due advertence to all the circumstances of the case. It was further held that one-quarter mentioned in the texts is not an invariable rule. The decision thus is on the same lines as that in the Calcutta case mentioned above and is within the principles laid down in 22 Mad. 113.[17] It is hardly necessary to point out that if, in view of the facts and circumstances of a certain case, the gift of more than one-fourth of the estate can be valid, in other cases the gift of less than one-fourth or of any property at all may in view of the facts and circumstances of those cases, be invalid.

The last case is that in 53 Mad 84.[16] The suit there was for partition, instituted by the son of defendant 1 by the latter's first wife. Defendant 1's son by his second wife was defendant 2. Defendant 1 had, at the date of the institution of the suit, three unmarried daughters by the second wife. The father claimed a provision for the marriage expenses of his daughters one of whom was married subsequent to the suit and before decree, and the remaining two had yet to be married. The plaintiff contended that he, or his share in the family property, was not liable therefor after the disruption of the coparcenary. Two of the three learned Judges who heard the case held in favour of the father — defendant 1—and the third held that the plaintiff's contention was correct. There was a considerable discussion of the texts, and an attempt was made to determine the basis of the daughter's right to marriage expenses, whether it was maintenance or participation. But even Ramesam J., who delivered the leading judgment upholding the father's claim, recognized that the rights of a daughter to maintenance and to marriage expenses are 'in substitution for an ancient right to a share which has now become obsolete," and that "there can be no suit for partition with her as a sharer." The decision is no authority for Dr. Katju's contention. The case, on the facts, has no application to the case before us.

So far as the passages in the text-books on Hindu law on which Dr. Katju has relied are concerned, reliance is placed in them on the original texts, the more important of which have been mentioned above, and on the rulings cited by Dr. Katju and similar other rulings. They do not therefore afford any further assistance. Dr. Katju has had to go to the length of arguing that a daughter, if one-fourth of her deceased father's property has not been given to her at the time of her marriage, is entitled, after she has been married, to claim that share against those who are in possession of the estate. The arguments put forward on behalf of the appellant, if accepted, will lead to the result that a daughter is entitled to claim partition. Learned counsel has suggested that such a result will not be undesirable. It is not for us to express any opinion on the merits of this suggestion. The Courts have to administer the law as it is and not as it should be. Whatever the contents of the ancient texts might be, the results to which the appellant's arguments lead are wholly against the Hindu law that has been administered, and is being administered, in British Indian Courts.

Sir Tej Bahadur Sapru, for the plaintiff-respondent has pointed out that not a single case has been cited by the appellant in which it has been held that the texts relied upon are mandatory and have to be followed literally with regard to the one-fourth share mentioned in those texts. In fact, the rulings to which Dr. Katju has referred show just the contrary. In A.I.R. 1926 Cal. 486,[14] it is laid down in express terms that the texts are not imperative, but only directory, and illustrative of what should be considered as reasonable. The other cases are also, by implication, based on the same principle. Once you hold that the gift must be of what, in the circumstances of the particular case, is a reasonable portion of the estate, you destroy the rigidity and inflexibility which is the whole basis of Dr. Katju's arguments, and what Dr. Katju describes as the "absolute right" of the daughter disappears. Sir Tej Bahadur Sapru has argued that the ancient texts do not always lay down what, in legal language, are known as positive laws. He has laid before us the following passage from the judgment of their Lordships of the Privy Council in the connected cases, *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma and Radhamohun* v. *Hardai Bibi*, 22 Mad. 398[18] at pp. 415-416:

"Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion and law in the Smritis, 25 I. A. 54 at page 69=20 All. 267[19] at page 285. They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said: 'All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws'. In the preface to his valuable work on Hindu law, Sir William Machnaghten says: 'It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible'. They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers."

Learned counsel has argued that, although it is the duty of a Hindu mother, or brother, to provide funds—out of the estate of the deceased husband, or father, as the case may be—required for the marriage of a daughter, or sister, their duty merely is to spend, or to give, what is reasonable in the circumstances of the particular case. In our judgment these arguments of Sir Tej Bahadur Sapru are well-founded. We have already held on the evidence that there was no necessity for the gift in question and that the gift was made, not because there was any difficulty in finding a suitable husband for Jot Kunwar without making a gift, but because Inder Kunwar wanted that her daughters should enjoy the half share of the property which was in Inder Kunwar's possession even during the lifetime of Prembada Kunwar. We have also held that the allegation that the gift was made with Prembada Kunwar's consent or acquiescence is untrue. The case of the appellant fails on this last ground alone, for the law, as laid down by their Lordships of the Privy Council in 11 M. I. A. 487,[2] 19 I. A. 184[9] and 55 I. A. 399,[3] is perfectly clear. Our conclusion therefore is that First Appeal No. 90 of 1939 is without force and must be dismissed.

We come now to the appeal of the idol, First Appeal No. 87 of 1939. The deed of endowment, Ex. Q, was, as already stated, executed on the same day as the will, viz., 23rd October 1934. The sole reason for the gift mentioned in this deed is that Dharam Singh had made an oral will that Inder Kunwar should dedicate the half share in the property in the two villages mentioned in the deed and in the residential house to Thakur Radhakrishanji Maharaj whom he had installed in the garhi. It is also stated in the deed that Dharam Singh had himself made a waqf of these properties in favour of the idol, "but he could not execute a deed of waqf," and that consequently, he made the oral will directing Inder Kunwar to execute a deed. It is also stated in the deed that, when making the oral will Dharam Singh had said that "if his will was not complied with he would claim justice on the day of judgment." Those responsible for preparing this deed may have believed that the use of this picturesque language would carry conviction. The question, however, remains whether the story that Dharam Singh first made an oral waqf dedicating only a half share of certain properties and subsequently made an oral will directing — not both of his wives — but Inder Kunwar alone to execute a deed dedicating the half share aforesaid, is true. It would almost appear that Dharam Singh knew that he would be survived by both of his wives, that those wives would divide the property and that, of the two wives, Inder Kunwar alone would obey his behests, and so—in spite of all the piety and the devotion to the Thakurji with which he is credited in the deed — confined his oral waqf to only a half share in the properties in question. We have no hesitation in holding that the whole story is absurd and without any foundation whatsoever. The time when Dharam Singh made the oral waqf is not stated in the deed, nor is it stated why he failed to execute a deed in writing himself. The time of even the oral will is only vaguely described as "before his death."

Furthermore, we find, on an examination of the evidence, that the decision of the Court below that it has not been established by any satisfactory evidence that the Thakurji in question had been installed by Dharam Singh or existed in his life-time is correct. Thus, the whole foundation on which the recitals in the deed Ex. Q are based disappears. Two witnesses, Sardar Singh and Kashi Ram, were examined to prove the alleged oral will of Dharam Singh. We entirely agree with the learned Judge of the Court below that it is not possible to believe these witnesses. Our attention has not been drawn to any evidence— beyond the recital in the deed — showing that Dharam Singh had made an oral waqf. It is also noteworthy that, although Dharam Singh died in May 1912, Inder Kunwar did not act upon the alleged solemn will of her husband for a period of more than 22 years and executed the deed in question only in October 1934. This delay alone is sufficient, in our opinion, to show that the recitals made in the deed were untrue. A plea was raised in the Court below, and has been repeated before us, to

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18. ('99) 22 Mad. 398 : 21 All. 460 : 26 I.A. 113 : 7 Sar. 330 : 9 M. L. J. 67 (P.C.).

19. ('98) 20 All. 267 : 25 I. A. 54 : 7 Sar. 279 (P. C.), Rao Balwant Singh v. Rani Kishori.

a the effect that even if the recitals in the deed Ex. Q were not true, Inder Kunwar was entitled to make the dedication for the benefit of her husband's soul. But Inder Kunwar did not state in the deed Ex. Q that she was making the dedication suo motu with the object of conferring spiritual benefit on her deceased husband. All that she stated in the deed was that she was merely obeying the command of her husband. Furthermore, we do not believe that the object with which Inder Kunwar executed this deed was to confer any benefit upon her husband's soul. On the contrary, we are satisfied that her object was to enable her daughter, Govind Kunwar, to get into possession of this property in the guise of the manager of an endowment which was fictitiously created.

Learned counsel for this appellant also argued that the plaintiff had no right to maintain the suit b as she had relinquished her right of survivorship. He did not rely on any fresh evidence but adopted the arguments put forward by the counsel for the appellant in the connected appeal, No. 90 of 1939. We have already dealt with that point at length and have held that it has not been proved that the plaintiff ever relinquished her right of survivorship. The last point urged is the one based on the allegation of Khiali Singh's adoption — the plea which was added to the written statement by a subsequent application for amendment. The very first question that arises is whether the allegation that Khiali Singh had been adopted by Dharam Singh is true. We have been taken through the entire evidence, oral and documentary, on which the appellant wanted to rely, and have come to the conclusion that the finding of the Court below that it c has not been established that Dharam Singh adopted Khiali Singh is perfectly correct. We are in agreement with the reasons given by the learned Judge below for rejecting the testimony of the witnesses produced by the appellant and for holding that the documentary evidence relied upon by the appellant did not prove the case of adoption. We are satisfied that the statements made by Dharam Singh in the deed Ex. 44, executed by him on 18th January 1910, declaring that his statements in Ex. AA and Ex. N were wrong and cancelling those two documents, were true. On a careful consideration of the materials laid before us we have no hesitatian in agreeing with the conclusion of the Court below that the story that Dharam Singh had ever adopted Khiali Singh is without foundation.

It may be pointed out that it was not the case of this appellant that the plaintiff, Prembada Kunwar, d had given her consent to the deed of endowment in question. The endowment fails on that ground alone. Even if it be taken for granted that Inder Kunwar in reality executed the deed—Ex. Q—with the object of conferring spiritual benefit on her deceased husband, she could not do so without the concurrence of her co-widow. Our conclusion therefore is that First Appeal No. 87 of 1939 also has no merits. The result is that both the appeals—First Appeal No. 87 of 1939 and First Appeal No. 90 of 1939 are without force. They are accordingly dismissed with costs.

G.N./R.K. *Appeals dismissed.*

A. I. R. (29) 1942 Allahabad 379 e

ALLSOP AND VERMA JJ.

Collector of Bulandshahr, as manager of Fatima Begam's Estate —
Defendant — Appellant

v.

Sagar Mal — Plaintiff — Respondent.

First Appeal No. 513 of 1935, Decided on 7th April 1942, from decision of Additional Sub-Judge, Bulandshahr, D/- 16th August 1935.

U. P. Court of Wards Act (4 of 1912), S. 19— Collector acting under S. 19 is not "agent duly authorized in this behalf" within S. 19, Limitation Act.

Under the Act the estate of a ward is under the f superintendence of the Court of Wards, and of the Court of Wards alone, and it is the Court of Wards on whom plenary powers of management have been conferred. The Court of Wards may exercise all or any of these powers through or delegate them to the Commissioners or the Collectors or any other person whom it selects for the purpose, but it has to obtain the sanction of the Local Government for such delegation. If any such delegation is alleged in any case, it has to be established by the party that alleges it. The scheme of the Act thus indicates that the Collector when he does any of the things which he is required by S. 19, Court of Wards Act, to do, such as preparing the list of claims and recording his opinions thereon for the consideration of the Court of Wards cannot be considered to be "an agent duly authorized in this behalf" within the meaning of S. 19, Limitation Act: 34 Mad. 221, *Not approved*; g *Case law discussed.* [P 382*g*,*h*; P 386*e*]

Limitation Act —

('42) Chitaley, S. 19, N. 58 Pt. 1; S. 21, N. 51.
('38) Rustomji, Page 357, Pts. 3 and 4.

N. P. Asthana — for Appellant.

P. L. Banerji and Babu Lal Mital — for Respondent.

VERMA J. — This appeal is by the Collector of Bulandshahr in his capacity of the officer in charge of the estates in that district which are under the superintendence of the Court of Wards. The appellant was the defendant in the suit which was brought by the respondent for the recovery of Rupees 6000 on the basis of a promissory note, executed on 26th June 1926 by one Mt. Fatima Begam and her husband, Syed Aziz Uddin, in favour of the respondent, for Rs. 5000. The suit, which was instituted h on 31st August 1934, has been decreed by the Court below. The material facts, which are not in controversy, are these: Mt. Fatima Begam is the owner of an estate in her own right and her husband has no interest in it. On 26th June 1926, she and her husband borrowed Rs. 5000 from the respondent and jointly executed in his favour the promissory note Ex. 20 and the receipt Ex. 21. The promise was to repay the loan on demand with interest at the rate of one rupee per cent. per mensem. On 23rd August 1927, the Court of Wards assumed the superintendence of the estate of Fatima Begam under the provisions of the U. P. Court of Wards Act (No. 4 of 1912) and under S. 15 of the Act, the Collector of Bulandshahr was put in charge. In accordance with the provisions of S. 17 of the Act, the Collector published the necessary notices calling upon all persons having claims for money against Fatima Begam to notify their claims. The respondent duly notified to the Collector his claim within the time prescribed.

a So did a number of other persons. The Collector thereupon proceeded to decide, under the provisions of S. 19 (1) of the Act, which of the claims were to be allowed and which were to be disallowed, in whole or in part. He also took into consideration the question of the rate of interest in accordance with the succeeding sub-sections of the section. He, accordingly, prepared, on 20th May 1928, a statement headed "schedule of debts. Claims duly notified under Ss. 17/18 of Act 4 of 1912." The debt due to the respondent was shown in this statement at serial No. 5.

It may be pointed out that there is a misprint in column 3 of this statement which is Ex. 1 on the record as printed in our paper book. The year should be 1926 and not "22." The entries in this document show that the Collector's decision was that this claim was to be allowed and that the rate of interest b should be reduced to 6 per cent. per annum from the date of the submission by the respondent of his claim. This statement was signed by the Collector and was forwarded by him, through the Commissioner, to the Court of Wards which at that time was the Board of Revenue for confirmation of his decisions. For reasons which are not material to the present case no final orders have yet been passed by the Court of Wards, at any rate, so far as the claim of the respondent is concerned. It may however, be mentioned that the correspondence, some of which has been printed, indicates that the Commissioner, in all likelihood, expressed a doubt as to whether the respondent's claim should be allowed in view of the fact that Fatima Begam's husband admitted that the loan had in reality been taken by him alone for his own purposes. The Collector, accordingly, amended the statement (Ex. 1) c on the footing that the respondent's claim along with certain others was to be disallowed and reduced the amount of the total of the claims against the estate from Rs. 1,47,461-0-6 to Rs. 1,05,632 'in round figures.' The Collector, by his letter dated 29th May 1928 (Ex. C) informed the Commissioner that the necessary corrections had been made in the statement previously submitted. It further appears that the Board of Revenue, evidently on receipt of the amended statement together with the Commissioner's recommendations, called for certain documents "before arriving at a final decision or sending the case to the Legal Remembrancer if necessary" (Ex. L).

It is common ground that sometime later, the Court of Wards on the report of the Collector, came to the conclusion that the debts and liabilities with d which Fatima Begam's estate was charged were such as to render their liquidation within a reasonable time impracticable, and consequently sought the sanction of the Government for the release of the estate from the superintendence of this Court of Wards (S. 44 of the Act). The Government are stated to have passed an order on 30th May 1929, sanctioning the release. It is further stated that 10th June 1929 was fixed as the date on which the estate would be released and action under S. 50 of the Act would be taken. The ward and the creditors were apparently informed that the Court of Wards intended to release the estate on 10th June 1929. On that very day, namely, 10th June 1929, the respondent filed a suit being Suit No. 48 of 1929 of the Court of the Subordinate Judge of Bulandshahr, against Syed Aziz Uddin and Mt. Fatima Begam, for the recovery of Rs. 5000 principal and Rs. 1750 interest, total Rs. 6750, on the basis of the promissory note in question. Certain other creditors also brought suits on that day for the recovery of the amounts alleged by them to be due to e them. It is not necessary for us to go into the reasons which impelled these creditors, including the respondent to institute their suits on the very day which had been fixed for the release of the estate. The Court of Wards was not made a defendant to these suits which were framed on the footing that the proposed release of Fatima Begam's estate had taken place. The Collector when he came to know of the institution of these suits intervened, and filed an application on 24th July 1929, alleging that the estate of Mt. Fatima Begam had not been released but was still under the superintendence of the Court of Wards, and prayed that he be impleaded as a defendant to the suit as the person in charge of Fatima Begam's estate (Ex. A). He was so impleaded and became defendant 3 in the suit of the present respondent. The Collector thereupon filed a written statement and one of the f pleas raised by him was that, as the notice required by S. 54, Court of Wards Act had not been given, the suit was not maintainable. Another plea was that the claim of the plaintiff had "not yet been confirmed by the Board and the Court of Wards has informed the plaintiff about it" and that the plaintiff was not "entitled to get any period counted from the publication of the notice to the effect that the estate was taken under the management of the Court of Wards and in no way S. 52, Act 4 of 1912, is applicable to this suit."

As the Collector was impleaded as a defendant to the suit after 26th June 1929, the plea of limitation was open to him. We have not been shown the judgment of suit No. 48 of 1929 — the suit instituted by Sagar Mal, the respondent before us. The judgment of another suit instituted on the same day g by another creditor, one Gokul Chand—suit No. 47 of 1929 — is however, before us (Ex. 3). That judgment shows that of the issues framed in that suit, issues 2, 3, 4, 5 and 6 were as follows :

"2. Is the suit barred by time against defendant 3 ? 3. Is the suit bad for want of notice under S. 54, Court of Wards Act, against defendant 3 ? 4. Does the application dated 10th January 1928, alleged to have been made to defendant 3 by the plaintiff, amount to a valid notice under S. 54, Court of Wards Act ? 5. Is the suit barred by section 55, Court of Wards Act ? 6. Is the suit maintainable against defendant 2 ?"

Defendant 2 was Mt. Fatima Begam as the plaint Ex. 2 shows. It is not denied that similar issues were framed in Sagar Mal's suit (No. 48 of 1929) also. The Court of first instance found all the issues in h favour of the plaintiffs of the various suits and passed a decree in favour of the plaintiff in each suit. The Collector appealed to this Court against the decrees in all the suits. Here, again, we have before us the judgment of the appeal against Gokul Chand, but it is common ground that all the appeals were governed by the same judgment. By its order dated 10th October 1933, this Court adjourned the hearing of the appeals in order that certain documents might be produced (Ex. 5). These documents were produced and were admitted as additional evidence. One of the reasons given in the judgment of this Court, dated 31st October 1933 (Ex. 6), for the admission of the additional evidence was that these papers had been summoned by the plaintiffs themselves in the Court below and had been brought to the Court but, on an objection raised by the Court of Wards that they were confidential documents and that it should not be compelled to file them, the Court had decided against their production. It was held by this Court that the estate of Fatima Begam

had not in point of fact been released, but was still under the superintendence of the Court of Wards, and that consequently the absence of the notice prescribed by S. 54, Court of Wards Act, was fatal to the maintainability of the suits against the Court of Wards. The suits were accordingly dismissed as against Fatima Begam and the Court of Wards. As already stated, this judgment was pronounced on 31st October 1933. Thereafter, the respondent, Sagar Mal, complied with the requirements of S. 54 and brought the present suit against the Collector. It was, however, as already stated, not instituted until 31st August 1934.

The limitation applicable to the suit being that prescribed by Art. 73 of Sch. 1, Limitation Act (No. 9 of 1908), the suit was on the face of it beyond time when it was instituted. The plaint had therefore, under O. 7, Rule 6, Civil P. C., to show the ground upon which exemption from the law of limitation was claimed. Such exemption was sought on the basis of the combined benefit of two sections of the Limitation Act to which the plaintiff claimed to be entitled on grounds to be presently stated. It was alleged that the entries, with regard to the plaintiff's debt, made in the schedule of debts, Ex.1 mentioned above, and signed by the Collector on 20th May 1928, amounted to an acknowledgment of liability in respect of the debt within the meaning of S. 19, Limitation Act, and that consequently a fresh period of limitation had to be computed from the time when Ex. 1 was signed by the Collector, that is, from 20th May 1928. It was next alleged that the plaintiff, when he instituted Suit No. 48 of 1929 on 10th June 1929, believed in good faith that Fatima Begam's estate had as a matter of fact been released from the superintendence of the Court of Wards, that the plaintiff continued to have that belief in good faith throughout the pendency of the suit and of the appeal in the High Court, and that consequently the operation of the statute was interrupted and the entire period from 10th June 1929 to 31st October 1933 had, in accordance with the provisions of S. 14 of the Act, to be excluded. In other words, the contention was that the plaintiff had time for instituting the suit up to 11th October 1935 and that therefore the suit, instituted as it was on 31st August 1934, was well within time. The pleas raised by the defendant-appellant in answer to this claim of the plaintiff were embodied in paras. 16, 17 and 18 of the written statement which may be reproduced :

"16. That no acknowledgment of the plaintiff's claim was ever made by the Court of Wards. The Collector of Bulandshahr had no authority to admit to the plaintiff's claim. The Court of Wards never confirmed the decision of the Collector as required by S. 19, Court of Wards Act.

17. That the previous Suit No. 48 of 1929 was not prosecuted by the plaintiff in good faith. Soon after the institution of the suit the plaintiff was informed, on 24th July 1929, that the estate of Fatima Begam was under the superintendence of the Court of Wards, but he repudiated this fact. The plaintiff is not entitled to the exclusion of any time under S. 14, Limitation Act.

18. That the claim is barred by Art. 73, Limitation Act."

It is hardly necessary to point out that, if the contention of the plaintiff based on either of the two sections of the Limitation Act mentioned above is negatived, the suit has to be dismissed as being barred by time. On the questions thus raised the Court below framed issues 2, 3 and 4 which were as follows:

"2. Whether the claim of the plaintiff was acknowledged by the Court of Wards, and if so, what was its result?

3. Is the plaintiff entitled to the exclusion of any time under S. 14, Limitation Act?

4. Is the claim barred by Art. 73, Limitation Act?"

On issue 2 the learned Judge below recorded his finding thus : "I hold that the decision of the Collector under S. 19 (1), Court of Wards Act, could be taken to be an acknowledgment so as to give the plaintiff a fresh start of limitation from 20th May 1928." The finding on issue 3 was this : "Under these circumstances the plaintiff must in fairness get the benefit of S. 14, Limitation Act, and the period from which he filed the suit to the period that the High Court decided against him on 31st October 1933 must be excluded. I, therefore, hold that the claim is within time and is not barred by limitation." In view of these findings, issue 4 did not need separate treatment and was decided in favour of the plaintiff. The finding on the only remaining issue, which was concerned with the questions of fact whether Fatima Begam had borrowed any money from the plaintiff and, if so, how much and whether she had executed the promissory note in question after understanding its contents, being in favour of the plaintiff, the suit was decreed as prayed. The defendant has accordingly preferred this appeal. The only question that has been argued before us is the question of limitation. The first question that arises for consideration is whether there was, on 20th May 1928, an acknowledgment within the meaning of S. 19, Limitation Act. It will be convenient here to reproduce the relevant portions of that section :

"Where, before the expiration of the period prescribed for a suit .... in respect of any .... right, an acknowledgment of liability in respect of such .... right has been made in writing signed by the party against whom such .... right is claimed ... a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Explanation II.—For the purposes of this section, 'signed' means signed either personally or by an agent duly authorised in this behalf."

The contention of the plaintiff-respondent is that the entries in the schedule of debts, Ex. 1 amount to an acknowledgment within the meaning of the section and that the Collector, when he signed the schedule, was such "an agent duly authorised" of Fatima Begam as is contemplated by the section. The case of the defendant, on the other hand, is that, having regard to the provisions of sub-s. (1) of S. 19, Court of Wards Act (4 of 1912), the Collector when he is doing any of the things which S. 19, Court of Wards Act, requires him to do, is not an agent duly authorized to make an ackhowledgment of liability so as to give a fresh start to limitation. Section 19 (1), Court of Wards Act, is as follows :

"The Collector shall decide which of the claims notified or deemed to have been notified under Ss. 17 and 18 are to be allowed and which are to be disallowed, in whole or in part, and, on his decision being confirmed by the Court of Wards, shall give written notice of the same to the claimants."

The appellant's arguments, put shortly, are that the sub-section quoted above clearly shows that it is the Court of Wards alone which can, when it confirms the Collector's decision, bring into existence such an acknowledgment as it is required by S. 19, Limitation Act, and that the Collector's "decision" is no more than a proposal of an officer subordinate to the authority which is the duly authorised agent of the proprietor of the estate. It may be mentioned

a that sub-s. (6) of the section lays down that the Collector's action in the matter of interest, under sub-ss. (2), (3) and (4) also shall be subject to the confirmation of the Court of Wards. It is important to bear in mind that the contention is that the Collector, when he prepares a statement or schedule while acting under S. 19, Court of Wards Act, is not a duly authorised agent of the proprietor within the meaning of S. 19, Limitation Act, and not that the Court of Wards is not such an agent. It has further been argued that the entries in the schedule of debts, Ex. 1 do not amount to "an acknowledgment of liability" within the meaning of S. 19, Limitation Act. It will be convenient at this stage to examine those sections of the U. P. Court of Wards Act which are relevant to our present purpose. It may be pointed out that the amendments made in the Court of Wards Act of 1912 by the Act b of 1933 do not affect the question which we have to decide. An examination of the relevant sections yields the following results. The Court of Wards is a statutory body to which has been entrusted the duty of the superintendence of the property of "disqualified" proprietors. The provisions relating to the superintendence of the person do not call for consideration in this case. A proprietor may also apply to have his property placed under the superintendence of the Court of Wards and the Court of Wards may, if it is satisfied that it is expedient to undertake the management of such property, make a declaration to that effect.

In certain cases the Court of Wards is bound to assume, and in certain other cases it has the discretion to assume or refrain from assuming, such superintendence. When the Court of Wards assumes the superintendence of the property of any such c proprietor, the order of assumption is notified in the official Gazette and it has to specify the Collector or other person who is put in charge. The proprietor whose property thus comes under the superintendence of the Court of Wards becomes the ward of the Court of Wards, and the whole of his moveable and immovable property is deemed to be under the superintendence of the Court of Wards from certain dates prescribed in S. 16, according to the nature of the case, and the Collector or other person appointed in that behalf takes possession and custody of the property of the ward and manages it in accordance with the rules made by the Court of Wards under S. 64 of the Act. Steps are then taken to ascertain the debts, if any, for which the ward is liable, and for this purpose the Collector specified in the order of assumption, or d any other Collector whom the Court of Wards may appoint in this behalf, has to publish notices calling upon all persons having claims for money against the ward or his property to notify the same in writing to such Collector within a certain period. Any claim which is not notified within the prescribed period is deemed to have been duly discharged. This is subject to S. 20, which lays down that any claimant, who has submitted a claim but whose claim has been disallowed, is at liberty to institute or to continue any suit or proceeding in respect of such claim. A claimant who submits his claim after the expiration of the prescribed period has to show sufficient cause for his failure to do so, and on such cause being shown his claim is received and is deemed to have been notified in accordance with the provisions of S. 17. The Collector is then directed by S. 19 to "decide" which of the claims notified or deemed to have been notified are to be allowed and which are to be disallowed, in whole or in part, and has to submit his "decisions" to the Court of Wards for confirmation. If, and when the e Court of Wards confirms his "decisions," the Collector has to give written notice of the same to the claimants. We have already quoted sub-s. (1) of S. 19 which deals with this matter. Then follow provisions as to the appointment by the Court of Wards of guardians of the person in cases where superintendence of the person has been assumed, and of managers of the property.

Section 38 lays down the powers of the Court of Wards as to the property under its superintendence. The Court of Wards has the power to make such transfers, to make such remissions of rent or other dues and generally to pass such orders and do such acts as it may judge to be for the advantage of the ward or for the benefit of the property. Section 7 authorises the Court of Wards to exercise all or any of the powers conferred upon it by the Act through f the Commissioners of the Divisions or the Collectors of the Districts in which any part of the property of its wards may be situated, or through any other person whom it may appoint for such purpose. It may also delegate from time to time any of its powers to such Commissioners or Collectors or other person as aforesaid, and may at any time revoke such delegation. The delegation as well as the revocation require the sanction of the Local Government. The only other section which need be mentioned here is S. 55 which lays down that no ward shall sue or be sued nor shall any proceedings be taken in the civil Court otherwise than by and in the name of the Collector in charge of his property or such other persons as the Court of Wards may appoint in this behalf.

From what we have said above—and there is g nothing in any other section showing anything to the contrary—it is clear, in our judgment, that the estate of a ward is under the superintendence of the Court of Wards, and of the Court of Wards alone, and it is the Court of Wards on whom plenary powers of management have been conferred. The Court of Wards may exercise all or any of these powers through the Commissioners or the Collectors or through any other person whom it selects for the purpose. The Court of Wards may also delegate to the Commissioners, or the Collectors or to such other persons as it chooses such of its powers as it likes, but it has to obtain the sanction of the Local Government for such delegation. If any such delegation is alleged in any case, it has to be established by the party that alleges it.

The scheme of the Act being as stated above, it h seems to us that the contention of the learned Advocate-General, that the Collector when he does any of the things which he is required by S. 19, Court of Wards Act, to do cannot be considered to be "an agent duly authorized in this behalf" within the meaning of S. 19, Limitation Act, must be accepted. The use of the word "decide" in sub-s. (1) of S. 19, Court of Wards Act, is in our opinion of no consequence. Any one who has to submit proposals or recommendations for consideration has to arrive at conclusions or decisions for himself before he can make any proposals or recommendations. Nothing has been shown to us in the Court of Wards Act which can warrant the proposition that the Collector, when he frames his proposals for submission to the Court of Wards under S. 19, Court of Wards Act, is "an agent duly authorized in this behalf" as contemplated by Expl. 2 to S. 19, Limitation Act. The matter does not, however, rest here, for learned counsel for the plaintiff-respondent has contended that there are rulings which support him.

a It becomes necessary therefore to examine the decisions which he has cited.

The first case relied upon is that in (1888) A. W. N. 187.[1] The appeal before the High Court had arisen out of a suit for the redemption of a mortgage of a 5 biswas share in a certain village on the allegation that the defendants were mortgagees of the property, the mortgage having been given by the predecessors-in-interest of the plaintiffs to the predecessors-in-interest of the defendants. One of the pleas raised by the defendants had been that the suit was barred by time. It appeared that in certain settlement proceedings started in the year 1861, the predecessors-in-title of the plaintiffs had alleged that the 5 biswas were held by the person who was at that time the predecessor-in-title of the defendants under a lease. That predecessor-in-title of the defendants had through his mukhtar, one Durga
b Prasad, denied the existence of any lease and had alleged that he was in possession of the property under a mortgage the details of which were stated. The settlement authorities evidently decided against the claimants and thereupon they raised an action in the civil Court claiming the property on the ground that the defendant was their lessee and that they were entitled to resume possession. The estate of the alleged lessee was at that time under the superintendence of the Court of Wards and the action was consequently brought against the Collector of the district as the person in charge of the property. The Collector filed a written statement on 18th May 1866 and made the same allegations with regard to the property being held under a mortgage as had been made in the settlement proceedings of 1861. The action was decided in 1866 and the claim
c was apparently dismissed presumably on the ground that the possession of the defendant was not under a lease which had determined but under a mortgage. The contention of the plaintiffs who were seeking redemption in the suit which gave rise to the appeal decided by the High Court in 1888 was that in view of the statements made by the mukhtar Durga Prasad in the settlement proceedings and by the Collector in the written statement in the action which was determined in the year 1866, the suit was within sixty years from the date which appeared from the statements of Durga Prasad and the Collector to have been the date of the mortgage.

It was further contended that, in any event, the statements of Durga Prasad in the settlement proceedings, and of the Collector in the written statement in the civil Court in 1866, amounted to acknowledgments within the meaning of S. 19,
d Limitation Act and that the suit was thus within limitation. The mortgage deed had been lost, but the statements of Durga Prasad, which had been made in 1862 in the course of the Settlement proceedings, were proved. So also was a letter written by one Rao Saheb Singh mukhtar of the mortgagee's estate, to Durga Prasad. It was found that this letter must have been written between 11th March and 11th June 1862. It was stated in this letter, and it was stated by Durga Prasad in the settlement proceedings, that the mortgage had been made forty years before that letter was written and before Durga Prasad made the statements, and it was for a term of ten years. Thus, the mortgage had been made about the year 1822 and limitation for a suit for redemption could not begin to run before the year 1832. The suit was thus well within time from the date when the cause of action first arose, and it was not necessary for the plaintiffs to e seek the aid of any acknowledgment under S. 19, Limitation Act. That is what the High Court, Edge C. J. and Tyrrell J., held. The learned Chief Justice who delivered the judgment of the Court, Tyrrell J. concurring, observed, "Holding that view of the case, it is immaterial to consider the question of whether there has been any acknowledgment within the meaning of S. 19, Limitation Act." Having made that observation, he went on to say: "However, as I have formed an opinion about that, it would probably be better that I should express it." He expressed that opinion thus:

" I have no doubt that the written statement of the Collector in the action of 1866 signed and verified by him was an acknowledgment which comes within the meaning of S. 19, Limitation Act, and that it is binding upon the defendants. He was the person who represented the minor defendant and the estate f in that action. It appears to me that statement can only mean that the predecessors of the plaintiffs there had mortgaged the property in question to the predecessors of the defendants about forty years before that statement was filed. If it were necessary to rely on an acknowledgment to take this case out of the Limitation Act, I would be prepared to hold that that statement filed by the Collector was certainly an acknowledgment. I do not think it is necessary to go into the question of whether the signed statements made by Durga Prasad of Bulandshahr, the Mukhtar, amount to an acknowledgment within the meaning of the statute or whether he was an agent competent to make an acknowledgment of that kind. "

As has already been indicated, the written statement, which had been filed by the Collector on 18th g May 1866, in the action in the civil Court that was determined in 1866, contained allegations which were similar to the statements made by Durga Prasad and Saheb Singh in 1862 in the settlement proceedings. It is clear that whatever was said by the learned Chief Justice on the question of acknowledgment was obiter and wholly unnecessary for the purposes of that case. But, apart from that, the views expressed there cannot support the proposition that is contended for by the plaintiff respondent in the case before us. A written statement filed by the Collector in a suit stands on an entirely different footing from a schedule of debts prepared by him for submission with his own opinion as to which of the debts should be allowed and which should not be allowed to the Court of Wards. As was pointed out by the learned Chief Justice, the Collector was h the person who represented the minor defendant and the estate in the action in 1866. Furthermore, the ward in that case being a minor, the Collector had apparently been appointed his guardian. Section 205, North-Western Provinces Land Revenue Act (19 of 1873) which was the enactment at that time which in Chap. 6, contained the law relating to the Court of Wards as it stood after amendment by Act 8 of 1879, was as follows :

"All disqualified proprietors whose property is in charge of the Court of Wards and for whom guardians have been appointed, shall sue and be sued in civil Courts by and in the name of their guardians.

Provided that no such suit shall be instituted, defended, compromised or otherwise dealt with by any such guardian without the previous sanction of the Court of Wards.

Disqualified proprietors, whose property is in charge of the Court of Wards, and for whom guardians have not been appointed, shall sue and be sued

1. ('88) 1888 A. W. N. 187, Kamla Kuar v. Har Sahai.

in civil Courts by and in the name of the Collector of the District in which the suit is brought."

Thus, from whatever point of view the matter is looked at, the Collector, when he filed the written statement in 1866, was clearly "an agent duly authorised in this behalf" within the meaning of Expl. 2 to S. 19, Limitation Act. He was not only representing the minor defendant and the estate, but was also acting with the sanction, and under the authority, of the Court of Wards. It may be pointed out that under the law now in force the Collector is the representative of the Court of Wards in all suits by virtue of S. 55, Court of Wards Act.

The next case relied upon is 17 All. 198.[2] The facts, briefly, were these. One Laik Singh, who was the owner of an estate, borrowed a sum of Rupees 7000 from a firm called Gopalji Kishen Das and executed, on 20th June 1876, a bond for that sum in favour of the firm. The bond was registered. It declared that the debt would be payable on 1st November 1876. The firm also held a mortgage bond for Rs. 14,000 executed by Laik Singh in their favour on 25th January 1875. Laik Singh died and was succeeded by his widow and, on her death, the estate passed to Laik Singh's nephew, Pirthi Singh. Owing to unsoundness of mind, Pirthi Singh was found to be incompetent to manage his property, and the Collector of the district consequently appointed Pirthi Singh's wife, Raj Kuar, to be sarbarahkar of the estate. She was not appointed her husband's guardian under Act 35 of 1858. On 12th February 1880, she executed a power of attorney in favour of one Ajudhia Prasad, and three other persons, appointing them to be her am-mukhtars in connection with her husband's property, of which she was in possession as sarbarahkar as well as some property of which she was the owner in her own right. One Rani Kishori brought a suit against the firm of bond-holders, Gopalji Kishen Das, and in that suit, on 17th May 1881, a prohibitory order was issued to the bond-holders attaching the bond of 20th June 1876. In the course of those proceedings, the Court, evidently with the object of obviating the risk of the debt due under the bond becoming barred by time, summoned Ajudhia Prasad, as mukhtar-am of Raj Kuar, and examined him on 14th October 1882. In his statement Ajudhia Prasad made a clear acknowledgment of the liability under the bond. Raj Kuar remained the sarbarahkar of her husband's estate till her husband's death in 1887 when she succeeded to the estate as his heir. She then petitioned, under section 194 (g) of Act 19 of 1873, that the estate be taken under the charge of the Court of Wards and this was done. On 7th March 1887, Beti Maharani purchased the bond of 20th June 1876 at a sale in execution of a decree against Gopalji Kishen Das and brought a suit on its basis on 6th November 1888. Laik Singh's estate being under the management of the Court of Wards, with Raj Kuar as the ward, the Collector of the district, as representing the Court of Wards, was impleaded as the defendant. The bond being a registered one, the term of limitation was six years. The suit had, however, been brought more than 12 years after the date fixed in the bond for payment. The Collector raised the plea of limitation. The plaintiff thus had to prove circumstances which interfered with the running of time. She relied on three circumstances: (1) the prohibitory order passed by the Subordinate Judge on 17th May 1881, attaching the bond, which order remained in force till 7th March 1887, (2) the acknowledgment of the debt made by Ajudhia Prasad on 14th October 1882, and (3) a notice, issued in April 1888 by the Collector, on behalf of the Court of Wards, to Kishen Das, which was in the following words :

" Whereas the riasat of Harchandpur, Tehsil Phaphund, is under the management of the Court of Wards, and it has been ascertained that money is due to you by the raises of Harchandpur, therefore notice is hereby given to you to attend either in person or through a mukhtar at the Collector's office at Etawah in my Court on 17th April 1888 at 10 A. M., together with the deeds relating to the accounts, and you will be questioned about the debt. "

It was contended by the plaintiff, Beti Maharani that in this notice there was an acknowledgment of the existence of the liability under the bond within the meaning of S. 19, Limitation Act. The Court of first instance decided against the plaintiff her plea based on the acknowledgment made by Ajodhia Prasad. It held on a construction of the power of attorney of 12th February 1880, that Ajudhia Prasad was not an "agent duly authorized in this behalf" within the meaning of S. 19, Explanation II, Limitation Act. It, however, held in favour of the plaintiff on the other two pleas raised by her. It, accordingly decreed the suit. The Court of Wards appealed, and this Court agreed with the first Court in holding that Ajodhia Prasad was not a duly authorized agent of the Sarbarahkar within the meaning of S. 19, Explanation II, Limitation Act, but differed on the other two questions. The appeal was accordingly allowed and the suit was dismissed as being barred by time. The plaintiff, Beti Maharani, then appealed to His Majesty in Council. Their Lordships of the Privy Council pointed out that the plaintiff could not succeed by establishing only one of the circumstances relied upon by her, but had to prove at least two and observed :

"If there has been a valid acknowledgment by Ajudhia, and also by the Court of Wards, as contended, the right of suit is saved, or if the attachment prevented the running of time and there has been either acknowledgment by Ajudhia or by the Court of Wards, there is the same result. But, unless the plaintiff can establish one of those combinations of events, the suit is barred."

Their Lordships agreed with the decision of the Courts in India with regard to the acknowledgment of Ajudhia, and they agreed with the decision of the High Court on the other two points. The result was that the decree made by the High Court, dismissing the suit as time barred, was upheld. When dealing with the question arising out of Ajudhia's acknowledgment their Lordships observed that the authority of the sarbarahkar herself seemed very doubtful. They pointed out that the office of sarbarahkar appeared to have regard to the estate, and not to the person or the personal property of the landholder, and that, in these circumstances, it was difficult to see how a sarbarahkar, not being guardian could be considered to have authority to admit a personal liability, such as was created by the bond in question. Their Lordships, however, held that it was clear that, even if Raj Kuar had any such authority, she did not delegate it to Ajudhia. The portion of their Lordships judgment which is relied upon is that dealing with the acknowledgment contained according to the plaintiff Beti Maharani, in the notice issued by the Collector in April 1888. The actual decision was that it

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2. ('95) 17 All. 198 : 22 I.A. 31 : 6 Sar. 551 (P.C.), Beti Maharani v. Collector of Etawah.

was impossible to hold that the words of the notice necessarily referred to the debt due under the bond in suit and so constituted an acknowledgment of liability in respect of the particular right sued for as was required by S. 19, Limitation Act. It was pointed out that the notice was addressed, not to the plaintiff, but to Kishen Das, and that there was the mortgage bond of 25th January 1875 executed by Laik Singh in favour of Kishen Das. It was held that, in this state of facts, it was impossible for the plaintiff to contend that the general words of the notice were not satisfied by reference to the mortgage bond.

Their Lordships, however, in the course of their judgment on this part of the case, observed that the statement in the notice that it had been ascertained that money was due from the Raises of Harchandpur would, if it could be applied to any particular debt, be an acknowledgment of liability to pay whatever might be found due on account of that debt. It is to be noted, however, that their Lordships, in the circumstances of that case, treated the notice as having been given by the Court of Wards, and observed "but it must be taken that the Court's act would bind the ward Raj Kuar and that the notice is the act of the Court." Learned counsel for the plaintiff respondent has contended that these observations of their Lordships establish the proposition that every act of the Collector, done on any occasion, in connexion with any work, in his capacity of the person immediately in charge of the estate, is necessarily an act of the Court of Wards. We are unable to agree that their Lordships intended to lay down any such broad rule. The notice in the case before their Lordships having been the act of the Court of Wards any acknowledgment contained therein would clearly have been within S. 19, Expln. 2, Limitation Act. In the case before us, all that happened was that the Collector, in compliance with the provisions of S. 17, Court of Wards Act, issued notices calling upon persons having claims to notify such claim in accordance with the law, and, in obedience to S. 19 of the Act, had a list of the claims so notified prepared by his office and on that list recorded his own opinions as to which of the debts should be allowed, and which should be disallowed, by the Court of Wards, and submitted that list together with his opinions to the Court of Wards for such action as it thought fit. We are not able to see how this act of the Collector, the preparation of the list and the recording of his opinions thereon for the consideration of the Court of Wards can be regarded as an act of the Court of Wards. The argument, if accepted, would lead to the result that the Court of Wards, under S. 19, Court of Wards Act, submits proposals to itself for confirmation. In our judgment, what was held by their Lordships of the Privy Council in 17 All. 198[2] was that an acknowledgment of liability made by the Collector, on an occasion when, in the circumstances of the particular case, he is found to have been acting as the representative and the agent of the Court of Wards, is an acknowledgment by an agent duly authorised in that behalf within the meaning of S. 19, Limitation Act.

Learned counsel for the plaintiff-respondent has argued that the decision of their Lordships of the Privy Council in 17 All. 198[2] has been interpreted in this Court in the sense in which he asks us to interpret it, and has cited the cases in 30 All. 422[3] and I.L.R. (1938) All. 363=(1938) A.L.J. 252,[4] both of which were heard by a Bench of three Judges. In the first of these cases the question was as to the effect of an acknowledgment that had been made by the mother and natural guardian of certain minors. Stanley C.J. held that the relation of guardian and ward resembled rather that of trustee and *cestui que trust* than that of principal and agent and that a guardian could not be considered the authorised agent of his ward for the purpose of making an acknowledgment of a debt on behalf of his ward within the meaning of S. 19, Limitation Act. The other two members of the Bench, Banerji and Richards JJ. on the other hand, held that when a guardian acting within the scope of his authority and for the benefit of a minor makes an acknowledgment of a debt, such acknowledgment is by an agent duly authorised in this behalf and gives a fresh start for the computation of limitation. It is obvious that the point which has arisen before us or the point which arose in 17 All. 198[2] did not even remotely arise in that case. 17 All. 198[2] was mentioned only by way of analogy. The learned Chief Justice pointed out that the Court of Wards is the creature of the Legislature and derives its authority by statute, and that it acted under the authority of the Legislature and not under the authority of the ward of anybody else. Learned counsel for the plaintiff-respondent has relied on the following passages in the judgment of Banerji J. at p. 437 of the report :

"In 17 All. 198[2] their Lordships of the Privy Council were of opinion that an acknowledgment by the Court of Wards saves limitation. They observed : "If there has been a valid acknowledgment by Ajudhia and also by the Court of Wards, as contended, the right of suit is saved. . . ." They held that the act of the Court of Wards would bind the ward. The Court of Wards not being the party liable for the debt, an acknowledgment of debt by it such as saves limitation can only be an acknowledgment as agent of the ward. This Court has held in (1888) A.W.N. 187[1] that an acknowledgment by the Court of Wards gives a fresh start for the computation of limitation."

It seems to us to be clear that these observations of the learned Judge do not support the proposition contended for by the plaintiff-respondent before us. The point raised by the appellant is not that an acknowledgment by the Court of Wards is not effective for the purposes of S. 19, Limitation Act. Richards J. made these observations at pp. 444-445 of the report :

"It clearly appears from the judgment of their Lordships of the Privy Council in 17 All. 198[2] that their Lordships were of opinion that the acknowledgment of the Collector acting on behalf of the Court of Wards would bind the minor whose estate was under the management of the Court. In such a case it seems to me that the Collector must be regarded as the agent appointed by law to act for the minor or (which is really the same thing), the act of the Collector must be looked upon as the act of the minor."

It is sufficient to say that the learned Judge recognises that the Collector, when making the acknowledgment, must be acting on behalf of the Court of Wards. In other words, the Collector must, when making the statement which is relied upon as an acknowledgment, be acting in circumstances

3. ('08) 30 All. 422 : 5 A.L.J. 375 : 1908 A. W. N. 175 (F.B.), Ram Charan Das v. Gaya Prasad.

4. ('38) 25 A. I. R. 1938 All. 217 : 175 I. C. 556 : I.L.R. (1938) All. 363 : 1938 A. L. J. 252 (F. B.), Shankar Lal v. Rana Lal Singh.

which justify the conclusion that his act was the act of the Court of Wards itself. In our opinion, the case is no authority for the proposition put forward on behalf of the plaintiff-respondent in the present case. In the second of the cases mentioned above I. L. R. (1938) All. 363,[4] the question which arose for consideration, as stated in the judgment, was "whether an acknowledgment made after the expiry of the prescribed period, but during an excluded period, excluded by a special and local Act, can form an acknowledgment to extend limitation under S. 19, Limitation Act." It arose thus. A promissory note was executed in favour of the plaintiffs-appellants on 29th July 1927. In the ordinary course, therefore, the creditors had time to sue on the note up to 29th July 1930. The estate of the debtor was subsequently taken under the superintendence of the Court of Wards and the notices prescribed by S. 17, Court of Wards Act, were published on 3rd August 1929. The plaintiffs duly notified their claim and the Collector, on 13th October 1930, recommended that their claim should be allowed, and the Board of Revenue, on 30th October 1930, passed orders accepting the recommendation of the Collector. The debt due to the plaintiffs was, however, not paid and the estate was released on 21st December 1931. The plaintiffs thereafter brought the suit giving rise to the appeal on 3rd January 1933. The plaintiffs not only relied on the recommendation of the Collector and its acceptance by the Board of Revenue—which was the Court of Wards—in October 1930 as an acknowledgment, but further contended that, although the acknowledgment had been made more than three years after the date of the promissory note, it was a good acknowledgment as it had been made during a period which was, under S. 52, Court of Wards Act, to be excluded in computing the period of limitation applicable to the suit. The contention was not accepted and it was held that S. 19, Limitation Act, cannot apply to an acknowledgment made after the expiry of the period of limitation prescribed but during the period excluded by S. 52, Court of Wards Act. In the course of the judgment, it was observed that the lower appellate Court had held that "the powers of a Collector in regard to claims are limited by S. 19, Court of Wards Act, where a Collector can only allow or reject a particular claim, but cannot acknowledge it as an agent or representative of his ward," and that the second ground of appeal contested that finding. It was then observed that the contrary had been held in (1888) A. W. N. 187[1] and in 17 All. 198[2] and that "this was abundant authority for the proposition that the Collector in charge of the Court of Wards was the duly authorized agent of the defendants for the purpose of making such an acknowledgment.

Now, in the first place, these observations were obiter in view of the question which, according to the judgment, had arisen for decision. In the second place, as has been shown above, the decisions in (1888) A.W.N. 187[1] and in 17 All. 198,[2] do not lay down any such broad proposition as is stated in the observations quoted above. Attention seems to have been concentrated on the question whether an acknowledgment made after the expiry of the period prescribed for the suit, but during a period excluded by a special and local Act, can be treated as an acknowledgment extending limitation under S. 19, Limitation Act, and the Bench having arrived at a conclusion adverse to the plaintiffs-appellants on that question, the matter mentioned in the obiter dicta quoted above was, in all likelihood, not fully argued and did not call for careful consideration. In our judgment, the case cannot be considered to be an authority for the proposition which learned counsel for the plaintiff-respondent has asked us to accept. Learned counsel has next cited 43 Cal. 211.[5] It was held in that case that the Bengal Court of Wards Act of 1879 did not contain any express power authorizing the Court to execute promissory notes. It was further held that there could be no doubt on the authorities that the Court had power to give an acknowledgment so as to give a new period of limitation under S. 19, Limitation Act. This, again, does not help the plaintiff-respondent.

Lastly, reliance has been placed on 34 Mad. 221.[6] The facts of that case, so far as they are material for our present purpose, were these. The appellant, who was the minor proprietor of an estate, was sued — under the guardianship of the Court of Wards—for the recovery of a certain sum of money on the basis of certain promissory notes, which had been executed by the appellant's mother in 1897 and in 1898. The allegation of the plaintiff was that the moneys had been borrowed by the appellant's mother on behalf of the estate. Subsequently, the management of the estate was assumed by the Court of Wards. The plaintiff demanded payment of the money due to him and threatened to sue. Thereupon he received, from time to time down to 1903, acknowledgments in writing from the Collector "as agent of the Court of Wards." The debt was subsequently repudiated and the plaintiff instituted the suit on 3rd November 1903. The defendant pleaded limitation and contended that the acknowledgments relied upon by the plaintiff were not acknowledgments within S. 19, Limitation Act, and that they had been made without authority. The Court considered the enactments applicable to the territories within their jurisdiction and observed that the duties and obligation of the Court of Wards were not limited to the education of the minor and included the due preservation of the estate. It was further observed that, having regard to the preamble and the general scope of the Act, the Court of wards must be held to have the power to make an acknowledgment of a debt which would bind the ward and give a new starting point for limitation. Lower down, the learned Judges observed that an acknowledgment by a Collector, as agent of the Court of Wards, is equally binding. So far, if we may say so with great respect, no exception can be taken to the opinions expressed in that judgment, and they do not support the contention put forward on behalf of the plaintiff-respondent before us. Learned counsel, however, relies on a subsequent paragraph which is in these words.

"Section 32 of Regn. 5 of 1804 no doubt requires the confirmation of the Court of Wards of any decision of the Collector as to the allowance of claims, whilst S. 17 requires the permission of the Court of Wards in writing for the payment of any private debt. But we do not think these provisions restrict the power of the payment of any private debt. But we do not think these provisions restrict the power of the Collector to give an acknowledgment which would save limitation, a power which in our opinion, comes within the scope of his authority as agent of the Court of Wards."

No reasons are given for the wide proposition laid down in the second sentence of the paragraph

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5. ('16) 3 A. I. R. 1916 Cal. 107: 34 I. C. 205: 43 Cal. 211, Rashbehary Lal v. Anand Ram.

6. ('10) 34 Mad. 221: 6 I. C. 407: 20 M. L. J. 808, Kondamodalu Linga Reddi v. Alluri Sarvarayudu.

quoted above and, with profound respect, we are unable to agree for the reasons which we have already given in this judgment. The result is that in our judgment the Collector, when he formulated his proposals and recorded them on the schedule of debts, Ex. 1, on 20th May 1928, for submission to the Court of Wards, was not "an agent duly authorised in this behalf" within the meaning of S. 19, Limitation Act. The suit is therefore not saved from limitation. In view of the conclusion at which we have arrived on the first point raised on behalf of the defendant-appellant, it is not necessary to express any opinion on the second question, namely whether the entries in the schedule Ex. 1 amount to an acknowledgment of liability within the meaning of S. 19, Limitation Act. Our decision with regard to the contention based on S. 19, Limitation Act, being adverse to the plaintiff, the suit must be held to be barred by time. It is, therefore, not necessary to express any opinion on the question whether the plaintiff is entitled to claim the benefit of S. 14, Limitation Act, as has already been explained. If the plaintiff's contention based on either of the two sections is not accepted, the suit is barred. It only remains to make it clear that this judgment is confined to the facts as they existed at the time of the institution of the present suit and that we express no opinion as to whether or not the plaintiff would be entitled, in the event of the estate being released by the Court of Wards, to claim the exclusion of any period of time under S. 52, U. P. Court of Wards Act, for the purpose of any suit that he may be advised to bring after such release. For the reasons given above, we allow the appeal, set aside the decree of the Court below, and dismiss the suit with costs throughout.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Allahabad 387

ALLSOP AND VERMA JJ.

Karam Singh and others — Applicants

v.

Kunwar Sen and others —

Opposite Party.

Misc. Case No. 295 of 1939, Decided on 7-5-1942.

(a) Civil P. C. (1908), S. 22 — Applicability.

The provisions of S. 22 can apply only if the suit, in its entirety is cognizable by either of the two Courts. [P 388*g*]

C. P. C. —

('40) Chitaley, S. 22, N. 1.

('41) Mulla, Page 132, Note "Scope of Ss. 22 to 25."

(b) Civil P. C. (1908), O. 2, Rr. 3 and 6 — R. 3 is subject also to condition that Court has jurisdiction as to all causes of action involved.

Order 2, R. 3 is subject not only to the provisions of O. 2, R. 6 but also to the condition that the Court has jurisdiction in respect of all the causes of action involved. [P 389*a*]

C. P. C. —

('40) Chitaley, O. 2, R. 3, N. 1.

('41) Mulla, Page 538, Note "Scope of the Rule."

(c) Civil P. C. (1908), Preamble — Neither alterations in rules of Sch. 1 nor those rules themselves should be inconsistent with body of Code—No rule in Sch. 1 can confer jurisdiction upon Court which it would not have under body of Code.

The Civil Procedure Code was framed in its present form namely, in the form of an Act with schedules attached so as to give greater elasticity to the rules of procedure. The main body of the Act sets forth the fundamental principles which are variable only by the Legislature itself. The rules in Sch. 1 deal with matters of detail which are variable at the instance of the various High Courts with the previous approval of certain other authorities. It is specifically laid down that variations in the rules shall not be inconsistent with the body of the Code. It is a reasonable inference that the Legislature when it first made the rules in Sch. 1 intended that those rules should themselves not be inconsistent with the body of the Code. It follows that no rule in the schedule can confer upon any Court a jurisdiction which it would not have under the provisions in the body of the Code which confer such jurisdiction. [P 389*a*,*b*]

C. P. C. —

('40) Chitaley, Pre., N. 2 and S. 121, N. 1.

('41) Mulla, Page 4 Note "Interpretation of the Act Item 11."

(d) Civil P. C. (1908), O. 1, R. 3 — Applicability—Act or transactions when different should be so connected as to constitute one entity and cause of action against all defendants jointly—Court must have local jurisdiction to deal with controversies arising between plaintiff and each of defendants—O. 1, R. 3 does not enable plaintiff as of right to join various causes of action against different defendants in same suit.

Order 1, R. 3 does not enable a plaintiff, as of right, to join various causes of action against different defendants in the same suit because in the first place, as O. 1 contains no provision corresponding with that in O. 2, R. 6 no Court would have any power to prevent any inconvenience which might arise out of a joint trial and in the second place, in order that the provisions of O. 1, R. 3 should be applicable it is necessary that the right to relief should arise out of the same act or transaction or series of acts or transactions which implies, that the acts or transactions, where they are different, should be so connected as to constitute a single series which could fairly be described as one entity or fact which would constitute a cause of action against all the defendants jointly. Whether this necessary condition exists in any particular case would depend upon the nature of the case but it is at least necessary that the Court in which the suit is instituted should have local jurisdiction in the first instance to deal with the controversies arising between the plaintiff and each of the defendants : ('22) 9 A.I.R. 1922 Cal. 500, *Rel. on.* [P 389*c*,*d*]

C. P. C. —

('40) Chitaley, O. 1 R. 3, N. 2.

('41) Mulla, Page 497, Note "New Rule."

(e) Civil P. C. (1908), S. 17—Object — Applicability.

The provisions of S. 17 are intended to solve the difficulty which would naturally arise if there was a dispute about some immovable property which was situated partly within one jurisdiction and partly within another. But before the provisions of S. 17 come into play there must be one property which is situated in different jurisdictions. The property must, in the particular circumstances of the suit, be capable of being described as a single entity. Whether it can or cannot be so described will depend upon the nature of the dispute between the parties. If there is a dispute about a single estate which both parties are claiming as a whole that estate is obviously for the purposes of that

particular suit a single entity. If, on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not for the purposes of the dispute between him and the trespassers be one entity but several entities and the provisions of S. 17 would not apply. [P 389*e*,*f*]

C. P. C. —

('40) Chitaley, S. 17, N. 2.

('41) Mulla, Page 110, Note "Scope and object of the section."

(f) Civil P. C. (1908), Ss. 22 and 17 and O. 1, R. 3—*B*, a Hindu, dying leaving two properties at Hardwar and Amritsar—His daughters alienating properties to certain persons at Hardwar and Amritsar — Amritsar transferees in their turn selling property to various persons—Suits by *B*'s collaterals after death of daughters for possession of Hardwar and Amritsar properties filed at Saharanpur and Amritsar respectively—Neither S. 22 nor S. 17 nor O. 1, R. 3 held applicable.

The two properties in suit situate at Amritsar and Hardwar originally belonged to one *B* a Hindu who died in 1870 leaving him surviving two daughters, *J* who died in 1901 and *P* who died in 1926. *J* made a will in favour of *A* whom she described as her adopted son. There was a dispute about the property between *A* and *P*. The dispute was referred to arbitration with the result that the major part of the property went to *A* and the remainder to *P*. Thereafter, *A* sold the property at Amritsar to *N* who converted it into a building site and transferred various plots to various persons. The collaterals of *B* sued for possession of the Hardwar and Amritsar properties in the Courts of Saharanpur and Amritsar respectively. On the application under O. 22, that the suit pending in Saharanpur Court should proceed in the corresponding Court having jurisdiction at Amritsar :

Held that O. 1, R. 3 did not apply as the relief claimed against the defendants in possession of the property at Hardwar and the defendants in possession of the property at Amritsar could not be said to have arisen out of the same series of acts or transactions. Nor was S. 17 applicable as the two properties claimed could not for the purposes of S. 17 be described as a single entity, and since the Court at Saharanpur had jurisdiction only to deal with the dispute about the Hardwar property and the Court at Amritsar had jurisdiction only to deal with the dispute about the Amritsar property S. 22 did not apply: 1 Agra H.C.R. 109 (F.B.) and ('19) 6 A.I.R. 1919 All. 270, *Rel. on* ; *Case law discussed.* [P 389*f* ; P 390*e*]

C. P. C. —

('40) Chitaley, S. 17, N. 2 S. 22, N. 1 and O. 1 R. 3, N. 6.

('41) Mulla, Pages 110-111 Note "Section 17 does not apply . . . is different" and Page 132 Note "Scope of Ss. 22 to 25."

Sir Tej Bahadur Sapru and Harnandan Prasad — for Applicants.

P. L. Banerji, Gopi Nath Kunzru and Shiva Prasad Sinha — for Opposite Party.

ALLSOP J. — This is an application under S. 22, Civil P. C., requesting that we should determine that a suit which is pending in the Court of the civil Judge of Saharanpur should proceed in the corresponding Court having jurisdiction at Amritsar in the Punjab. The suit was instituted by the plaintiffs in order to obtain possession of two properties, one, which is by far the more valuable, situated in the town of Amritsar in the Punjab and the other situated in the town of Hardwar in the district of Saharanpur. The allegation made by the plaintiffs was that both properties originally belonged to one Badri Das who died in the year 1870 leaving him surviving two daughters, Jwala Devi who died in the year 1901 and Prem Devi who died in the year 1926. The plaintiffs alleged that they or some of them were entitled to the property on the death of Prem Devi as the collaterals of Badri Das. It appears from the affidavits that Jwala Devi made a will in favour of one Amar Nath whom she described as her adopted son, that there was a dispute about the property between Amar Nath and Prem Devi and that this dispute was referred to arbitration with the result that the major part of the property went to Amar Nath and the remainder to Prem Devi. Thereafter, Amar Nath sold the property in Amritsar to Nathu Mal Jai Ram Das, who converted it into a building site and transferred various plots to various persons who are defendants in the suit. The property in Hardwar was transferred by Prem Devi to some of the other defendants or to their predecessors-in-interest. The plaintiffs claimed only their own share in the properties and admitted that other shares would belong, if their allegations were true, to 16 other persons who were impleaded pro forma. Three of the defendants were said to be in possession of the property in Hardwar and the remaining two hundred and thirty-five in possession of the property in Amritsar. It is some of these last named defendants who are the applicants before us and their application has been supported by others who hold parts of the property at Amritsar.

After we had heard arguments for some time it appeared to us that it was doubtful whether the provisions of S. 22, Civil P. C., applied to the case. Those provisions could apply only if the suit, in its entirety was cognizable by either of the two Courts at Saharanpur and Amritsar. It is true that the application was based on the assumption that either Court would have jurisdiction and that the opposite party accepted the assumption, but we felt that we could not pass a positive order that the suit should proceed in either Court unless we were satisfied that that Court would have jurisdiction to deal with the whole suit. The result was that we adjourned the arguments to enable counsel on both sides to consider this aspect of the matter.

When arguments were resumed learned counsel for the applicants agreed that our doubt was justified but learned counsel for the opposite party, that is, the plaintiffs, urged that his clients were entitled, as of right to implead all the defendants in the same suit under the provisions of O. 1, R. 3 of Sch. 1, Civil P. C., and that once all the defendants had been impleaded either of the Courts at Saharanpur and Amritsar had jurisdiction under the provisions of S. 17, Civil P. C., because the property claimed was situated partly within the local limits of the jurisdiction of one Court and partly within the local limits of the jurisdiction of the other Court. I may say at once that I do not consider that the provisions of O. 1, R. 3 apply because I am not satisfied that the right to relief against all the defendants arises out of the same series of acts or transactions within the meaning of that rule, but before pursuing the matter further I should like to make some observations about the provisions dealing with the joinder of causes of action, the joinder

of defendants and the local jurisdiction of Courts. The provisions for the joinder of different causes of action against the same defendant or the same defendants are to be found in O. 2, R. 3. They allow a plaintiff, save as otherwise provided, to unite in the same suit several causes of action against the same defendant or the same defendants jointly. They are subject to the provisions of R. 6 which allow the Court to order separate trials where it appears that causes of action joined in one suit cannot be conveniently tried or disposed of together and in my judgment, they are subject also to the condition that the Court has jurisdiction in respect of all the causes of action involved. It is manifest that the Civil Procedure Code was framed in its present form, namely, in the form of an Act with schedules attached so as to give greater elasticity to the rules of procedure. The main body of the Act sets forth the fundamental principles which are variable only by the Legislature itself. The rules in Sch. 1 deal with matters of detail which are variable at the instance of the various High Courts with the previous approval of certain other authorities. It is specifically laid down that variations in the rules shall not be inconsistent with the body of the Code and it seems to me that it is a reasonable inference that the Legislature when it first made the rules in Sch. 1 intended that those rules should themselves not be inconsistent with the body of the Code. It follows that no rule in the schedule can confer upon any Court a jurisdiction which it would not have under the provisions in the body of the Code which confer such jurisdiction. The provisions of O. 1, R. 3 of Sch. 1 are that:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise."

It has been suggested that this rule enables a plaintiff, as of right, to join various causes of action against different defendants in the same suit. I doubt whether that was the intention. In the first place, O. 1 contains no provision corresponding with that in O. 2, R. 6 and consequently, if the contention was right, no Court would have any power to prevent any inconvenience which might arise out of a joint trial. In the second place, in order that the provisions of the rule should be applicable it is necessary that the right to relief should arise out of the same act or transaction or series of acts or transactions and this implies, in my judgment, that the acts or transactions, where they are different, should be so connected as to constitute a single series which could fairly be described as one entity or fact which would constitute a cause of action against all the defendants jointly. Whether this necessary condition exists in any particular case would, of course, depend upon the nature of the case but I am satisfied that this at least is necessary that the case should be such that it could be said that the Court in which the suit was instituted had local jurisdiction in the first instance to deal with the controversies arising between the plaintiffs and each of the defendants. This proposition is supported by the decision of the learned judges of the Calcutta High Court in 49 Cal. 895.[1]

In this connection it is necessary to consider the provisions of S. 17, Civil P. C. In suits which arise out of disputes about immovable property the jurisdictions of Courts depend upon the situation of the property itself. A difficulty would naturally arise if there was a dispute about some immovable property which was situated partly within one jurisdiction and partly within another. The provisions of S. 17 are, in my judgment, intended to solve this difficulty, but before the provisions come into play there must be one property which is situated in different jurisdictions. The property must, in the particular circumstances of the suit, be capable of being described as a single entity. Whether it can or cannot be so described will depend again upon the nature of the dispute between the parties. If there is a dispute, for instance about a single estate which both parties are claiming as a whole that estate is obviously for the purposes of that particular suit a single entity. If, on the other hand, the owner of an estate has a claim against unconnected trespassers who have trespassed upon different parts of the estate or different properties situated within it, those parts or those properties would not for the purposes of the dispute between him and the trespassers be one entity but several entities and the provisions of S. 17, would not apply.

Having made these observations I must now return to the question whether in the suit with which we are dealing it can be said that the relief claimed against the defendants in possession of the property at Hardwar and the defendants in possession of the property at Amritsar arises out of the same series of acts or transactions and whether the two properties claimed can, for the purposes of S. 17, be described as a single entity. It must be admitted that there is no apparent connection between the transfer of the Amritsar property to Amar Nath under the will executed by Jwala Devi and the subsequent transfers made by him and his successors-in-interest on the one hand and the transfer made by Prem Devi of the Hardwar property on the other hand. It must be admitted also that the plaintiffs are not claiming the estate of Badri Das as a whole against any rival claimant to the estate. They are claiming two properties against two sets of defendants whom they allege to be trespassers and who, if they are trespassers have absolutely no connexion with each other. The only connecting link is that the plaintiffs' claim in both the properties arose at the time of the death of Prem Devi and that the claim is based on the assumption that the defendants are in possession as the result of transfers made by limited owners who were entitled, during their lives, to the enjoyment of the whole estate and the properties comprised within it. It was held many years ago in 1 Agra H. C. R. 109[2] that unconnected transfers by a Hindu widow of properties comprised within the husband's estate did not give rise to one cause of action against the various transferees. The same rule was laid down in 17 A.L.J. 658.[3] In that case a reference was made to the decision in 16 All. 165[4] and it was pointed out that that was a case where a claim was made against one defendant who had taken possession of different properties in execution of one decree. There is no doubt that that case is clearly

1. ('22) 9 A. I. R. 1922 Cal. 500 : 70 I. C. 229 : 49 Cal. 895 : 27 C.W.N. 82, B. & N. W. Ry. Co. Ltd, v. Sadaram Bhairodan.

2. ('67) 1 Agra H.C.R. 109 (F.B.), Mt. Jehan Bebee v. Saivuk Ram.

3. ('19) 6 A. I. R. 1919 All. 270 : 50 I. C. 905 : 41 All. 583 : 17 A. L. J. 658, Bindo Bibi v. Ram Chandra.

4. ('94) 16 All. 165 : 1894 A. W. N. 65 (F. B.), Murti v. Bhola Ram.

distinguishable from the case with which we are dealing. Our attention has not been drawn to any case of this Court in which the decision in 1 Agra H.C.R. 109[2] has been questioned.

Our attention has been drawn to certain cases decided by other High Courts and by their Lordships of the Privy Council but none of them seems to me to justify the conclusion that the rule to which we have referred is no longer good law. The case in 1932 A. L. J. 691[5] supports, if anything, the conclusion to which I have come. In 1930 A. L. J. 99,[6] it was pointed out that in order that different defendants should be joined in the same suit the right to relief claimed against them should arise out of the same series of acts or transactions. In 1 Lah. 295[7] the High Court of Lahore did hold that a single suit could be maintained against persons who had obtained property as a result of different alienations made by the father and uncles of the plaintiff but there is nothing in the report to show that the alienations were unconnected with each other. It appears that there had been various mortgages and the land in suit had ultimately been sold and it is possible that various defendants were jointly concerned in some or other of these transactions. In that case a reference was made to the decision in 36 Cal. 780[8] but their Lordships did not base their decision in that case upon the ground that there had been no misjoinder. They said that the objection about misjoinder could not be raised in appeal and although they expressed some doubts whether there had been a misjoinder it does not appear that there was any question of local jurisdiction involved. In 49 Mad. 836[9] the plaintiff, who had been appointed a trustee as the result of a suit under S. 92, Civil P. C., was seeking to recover property from a number of transferees to whom the previous trustee had transferred it under leases for periods of 99 years, the validity of these leases being in question.

The learned Judges of the Madras High Court held that all the defendants could be impleaded in one suit but here again there is no reason to suppose that the Court in which the suit was instituted did not have local jurisdiction in respect of all the properties and it may further be mentioned that it is manifest that it was convenient that the question in issue should be decided once for all against all the defendants and that may have been a point that weighed with the learned Judges. In A. I. R. 1933 Mad. 622,[10] the defendants were impleaded as the result of a single mortgage. In A. I. R. 1928 Mad. 820[11] an adopted son was seeking to set aside a number of alienations which were effected by his adoptive mother and it was held that although the properties were within the jurisdictions of different Courts one suit could lie in one of these Courts, but the judgment is a very short one and the matter was not considered in any detail so that I should hesitate to accept this decision as an authority. In 45 Cal. 111[12] there was apparently no question of local jurisdiction involved and one of the learned Judges was a party to the subsequent case of 49 Cal. 895[1] where it was distinctly held that the provisions of O. 1, R. 3 could not confer local jurisdiction upon a Court which would not otherwise have it. I am satisfied that the Court at Saharanpur has jurisdiction only to deal with the dispute about the Hardwar property and that the Court at Amritsar has jurisdiction only to deal with the dispute about the Amritsar property. In these circumstances, the provisions of S. 22, Civil P. C., do not apply and I would, therefore, dismiss the application.

VERMA J. — I agree. Suppose a sonless Hindu dies possessed of immovable property scattered all over India at Karachi, Peshwar, Lahore, Allahabad, Patna, Dacca, Shillong, Calcutta, Madras and Bombay and is succeeded by his widow who, in the course of 40 or 50 years, transfers on different dates, portions of the property situated at each of the places mentioned above, to different persons each of whom resides at the place where the property transferred to him is situated, and the transfers are wholly unconnected with, and independent of, one another. Upon the widow's death the reversioner wants to challenge these various transfers. Learned counsel for the plaintiffs has argued that in such a case the reversioner is entitled to bring one suit challenging all the transfers at any one of the places mentioned above, impleading all the transferees. I find it very difficult to hold that such a result is contemplated by the provisions of the Code of Civil Procedure upon which reliance has been placed and which are mentioned in the judgment of my learned brother. I do not consider it necessary to pursue the matter any further. It is clear to my mind that, if the plaintiffs' argument mentioned above is accepted, startling results will follow.

BY THE COURT. — The application is dismissed. In the circumstances of the case, we make no order for costs.

G.N./R.K. *Application dismissed.*

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5. ('32) 19 A.I.R. 1932 P. C. 172 : 137 I. C. 539 : 7 Luck. 324: 59 I. A. 268: 1932 A.L.J. 691 (P. C.), Nisar Ali Khan v. Mohammad Ali Khan.

6. ('30) 17 A. I. R. 1930 All. 180 : 123 I. C. 324 : 1930 A. L. J. 99, Shyam Behari Mal v. Maha Prasad.

7. ('20) 7 A. I. R. 1920 Lah. 19 : 54 I. C. 512 : 1 Lah. 295 : 17 P. L. R. 1920, Ralia Ram v. Mulk Raj.

8. ('09) 36 Cal. 780 : 3 I. C. 382 : 36 I. A. 103 : 93 P. R. 1909 : 10 C. L. J. 58 : 13 C. W. N. 920 (P. C.), Lala Rup Narain v. Mt. Gopal Devi.

9. ('26) 13 A. I. R. 1926 Mad. 911 : 97 I. C. 212 : 49 Mad. 836 : 51 M.L.J. 194 (F. B.), Govindaraja Mudaliar v. Alagappa Thambiran.

10. ('33) 20 A. I. R. 1933 Mad. 622 : 144 I. C. 202, Papamma v. Ramaswami.

11. ('28) 15 A. I. R 1928 Mad. 820 : 110 I. C. 672, Bhimayya v. Lakshminarayana.

12. ('18) 5 A. I. R. 1918 Cal. 858 : 41 I.C. 944 : 45 Cal. 111 : 27 C. L. J. 158 : 21 C. W. N. 794, Ramendra Nath v. Brojendra Nath.

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FULL BENCH

IQBAL AHMAD C.J., BAJPAI AND DAR JJ.

Mt. Ketki Kunwar and another — *Judgment-debtors* — *Appellants*

v.

L. Ram Saroop and others — *Decree-holders* — *Respondents.*

Exn. First Appeal No. 248 of 1941, Decided on 7th September 1942, from decision of Civil Judge, Bareilly, D/- 16th July 1941.

(a) U. P. Debt Redemption Act (13 of 1940), S. 8 — Application under S. 8 — Controversy determined by execution Court — Judgment is appealable.

An application by an agriculturist debtor under S. 8, U. P. Debt Redemption Act, raises a question

relating to execution, discharge or satisfaction of a decree, and if the controversy raised by the applicants is determined by the execution Court the judgment of the Court in the proceedings is a decree and is open to appeal: ('40) 27 A.I.R. 1940 All. 326 (F.B.) and ('40) 27 A. I. R. 1940 Cal. 257, *Rel. on.* [P 392*e*,*f*]

C. P. C. —

('40) Chitaley, S. 47, N. 84 Pt. 1; N. 86 Pt. 1.

('41) Mulla, Page 198, Note "Appeal."

(b) U. P. Debt Redemption Act (13 of 1940), S. 8 — "Liable to pay amount due" — Liability need not be personal — Property only liable — S. 8 applies.

The words "liable to pay the amount due under a decree" used in S. 8 cannot be restricted to the case where liability is personal and the words are sufficiently wide to include the liability which is on person and property both jointly or on person or property alone singly. There may be decrees against agriculturists who are minors which cannot be personally enforced against them. There may be decrees against agriculturists in which their property is only liable to sale. In both these cases and in all similar cases agriculturists are liable to pay the amount of the decree though the liability is not personal: ('16) 3 A. I. R. 1916 All. 290 and ('36) 23 A. I. R. 1936 All. 639, *Disting.* [P 393*a*,*b*]

(c) U. P. Debt Redemption Act (13 of 1940), Ss. 2 (9) and 8—Renewed loan is advance within S. 2 (9) — Persons agriculturists at renewed mortgage can apply under S. 8—Original mortgagor need not be agriculturist.

A renewed loan is a transaction which in substance amounts to an advance within the meaning of S. 2 (9), U. P. Debt Redemption Act. Hence, persons who were agriculturists at the time when the renewed mortgage was made, are entitled to make an application for the amendment of the decree under S. 8. It is not necessary for them to prove in order to succeed in the application that at the time of the old mortgage the then mortgagor was an agriculturist: ('42) 29 A.I.R. 1942 All. 50 (F.B.) (Majority view), *Rel. on*; ('38) 25 A.I.R. 1938 All. 1, *Not foll.* [P 393*d*,*e*]

(d) U. P. Debt Redemption Act (13 of 1940), Ss. 2 (9) and 8 — Debt recoverable only from property — Advance need not be made to agriculturist—If claimant is agriculturist at time of recovery, it is sufficient.

The meaning of S. 2 (9) is that in cases where advance is recoverable both from the person and the property of an agriculturist in order to take benefit of S. 8 of the Act it must be shown that the claimant was an agriculturist both at the time when the advance was recoverable and when the advance was made. But in a case of a workman or in a case where the advance is recoverable only from the property of an agriculturist or workman, it is not necessary that the advance should have been also made to a workman or to an agriculturist. The policy behind the statute is that in case where the advance is recoverable from property alone and where the property is liable to be sold it is sufficient if the claimant possesses the status of an agriculturist or workman on the date when the advance is recoverable, although at the time when the advance was made it was not made to an agriculturist or a workman. [P 394*c*,*d*]

B. Malik — for Appellants.

G. S. Pathak and S. K. Verma — for Respondents.

DAR J. — This is an appeal against a judgment and decree, dated 16th July 1941 of the Civil Judge of Bareilly in an execution matter. On 1st July 1920, Kanhai Lal, a Hindu resident of Anwla in Bareilly district, executed a simple mortgage of certain zamindari property situated in Bareilly district in favour of Bhairon Prasad for Rs. 8000. The sum secured by this mortgage carried an interest of ten annas per cent. with yearly rests. Soon after the execution of the mortgage both the mortgagor and the mortgagee died. The mortgagor, Kanhai Lal, left two sons — the elder Ram Sarup by his predeceased wife and the younger Krishna Murari Lal by his second wife, Mt. Ketki, who survived the mortgagor. Bhairon Prasad, the mortgagee, also left two sons — Ram Sarup and Ram Bharose Lal. In the year 1925 a partition took place between the sons and the widow of Kanhai Lal, as a result of which the family property and the family debts were divided and with the consent of the sons of the mortgagee, viz., Ram Sarup and Ram Bharose Lal, the liability of the mortgage of 1920 was divided half and half between Ram Sarup and Krishna Murari Lal. On 21st September 1927, Ram Sarup, son of Kanhai Lal, executed a simple mortgage in favour of Ram Sarup and Ram Bharose Lal, the sons of Bhairon Prasad, for a sum of Rs. 9500 bearing interest at ten annas per cent. By this mortgage half the liability of Ram Sarup on the mortgage of 1920 was satisfied and some other consideration also formed part of the mortgage money. But as we are not directly concerned with this mortgage in this litigation, it is not necessary to particularize it any further. On 21st July 1928, Mt. Ketki and Krishna Murari Lal, the widow and the second son of Kanhai Lal, executed a simple mortgage in favour of Ram Sarup and Ram Bharose Lal, sons of Bhairon Prasad, for Rs. 4800 bearing interest at 13 annas and 4 pies per cent. per annum with yearly rests. Out of this consideration of Rs. 4800 a sum of Rs. 4742-1-6 was in satisfaction of half the liability on the mortgage of 1920 and Rs. 57-14-6 was a fresh advance. It is alleged that after the partition and before the execution of the mortgage of 1928 Mt. Ketki and Krishna Murari Lal had paid a sum of Rupees 2400 to Ram Sarup and Ram Bharose Lal towards the payment of the mortgage of 1920 and the sum of Rs. 4742-1-6 which was the consideration of the mortgage of 1928 was the balance which was left after the payment. But this matter again has not been investigated and is not material for the purpose of the controversy which we have to determine in this appeal. In 1937 Ram Sarup and Ram Bharose Lal raised an action No. 19 of 1937 in the Court of the Subordinate Judge of Bareilly for recovery of a sum of Rs. 7980 due on the bond of 1928 against Mt. Ketki and Krishna Murari Lal and on 29th January 1938, a preliminary decree was passed in their favour and on 19th April 1940, a final decree was passed in their favour in the said mortgage suit. At the time when the action was raised time had run out for enforcing any personal liability against Mt. Ketki and Krishna Murari Lal and the mortgage money could only be recovered from the sale of the property.

The mortgage-decree mentioned above remained unsatisfied and on 5th April 1941, (Execution Case No. 32 of 1942) Ram Sarup and Ram Bharose Lal made an application to the execution Court at Bareilly for sale of the mortgaged property and on 28th April 1941 (Miscellaneous Case No. 51 of 1941) Mt. Ketki and Krishna Murari Lal made an application under S. 8, U. P. Debt Redemption Act (13 of 1940), for amendment of the said mortgage-

decree. In their application, Mt. Ketki and Krishna Murari Lal alleged that Kanhai Lal was an agriculturist in the year 1920 when the mortgage mentioned above was executed and Mt. Ketki and Krishna Murari Lal were agriculturists in the year 1928 when the mortgage of 1928 was executed and they were and have been agriculturists at all material times and were entitled to the benefit of the provisions of the U. P. Debt Redemption Act. They further alleged that having regard to the rate of interest which the decree-holders were entitled to recover under S. 9, Encumbered Estates Act, a sum of Rs. 3216 was all that was left due on the mortgage-decree and they prayed that the decree might be amended by reducing its amount, as stated above. The execution Court found in a well considered judgment that Kanhai Lal could not be regarded as an agriculturist within the meaning of the U. P. Debt Redemption Act, as he was paying on the date of the mortgage of 1920 a local rate ten times of which exceeded the sum of Rs. 1000. It further found that Mt. Ketki and Krishna Murari Lal were agriculturists within the meaning of the Act on the date of the mortgage of 1928, but in order to reap the benefit of the U. P. Debt Redemption Act the applicants must prove that the person who received the original loan was an agriculturist and inasmuch as the person who received the original loan, viz., Kanhai Lal, was not an agriculturist, the applicants Mt. Ketki and Krishna Murari Lal were not entitled to claim benefit of the U. P. Debt Redemption Act. On these findings, the application of Mt. Ketki and Krishna Murari Lal was dismissed with costs and against this judgment and decree they have preferred this appeal. At the outset we have to determine the question whether the order of the learned Judge dismissing the application of Mt. Ketki and Ram Sarup is open to appeal. The U. P. Debt Redemption Act, 1940, does not provide specifically for any appeal or revision with regard to matters which may be determined under the said Act. But S. 24, U. P. Debt Redemption Act, provides that "the provisions of the Code of Civil Procedure, 1908, save in so far as they are inconsistent with the provisions of this Act, shall apply to all proceedings under this Act." Now under S. 96, Civil P. C., an appeal lies "from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court." The relevant definition of decree as given in S. 2 (2) of the Code is as follows :

"Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144 . . ."

Section 47, cl. (1), Civil P. C., provides :

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit . . . ."

It is also settled law that though determination of every question between the decree-holder and judgment-debtor relating to the execution, discharge or satisfaction of the decree is not a decree within the meaning of S. 2 (2), Civil P. C., yet every determination which conclusively determines the rights of the parties with regard to the execution, discharge or satisfaction of a decree is a decree within the meaning of the Code. In the case before us Ram Sarup and Ram Bharose Lal, decree-holders, had made an application for execution of the mortgage decree in which they claimed a sum of Rs. 8386 by sale of the mortgaged property. The judgment-debtors in opposition to this execution made an application praying that under the U. P. Debt Redemption Act the amount due under the decree was only Rupees 3216 and the decree could not be executed for the amount which the decree-holders claimed and the decree should be amended and reduced to Rs. 3216. In our opinion, a clear controversy arose between the decree-holders and the judgment-debtors relating to execution, partial discharge or partial satisfaction of the decree and this controversy was finally determined by the execution Court and this determination was clearly a decree within the meaning of the Code and is open to appeal. We are further of opinion that generally speaking an application by an agriculturist debtor under S. 8, U. P. Debt Redemption Act, raises a question relating to execution, discharge or satisfaction of a decree, and if the controversy raised by the applicants is determined by the execution Court the judgment of the Court in the proceedings is a decree and is open to appeal. In 1940 A. L. J. 377,[1] a Full Bench of this Court held that an order of an execution Court staying the execution of a decree for costs under S. 3, Temporary Postponement of Execution of Decrees Act, is a decree and in I.L.R. (1940) 1 Cal. 393,[2] Nasim Ali and Narsing Rau JJ. held that "the combined effect of S. 47 and S. 2 (2) is that an order in execution proceedings is a decree, if, so far as regards the Court passing it, it conclusively determines a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree. The decision of the Court that the judgment-debtors are not debtors within the meaning of the Bengal Agricultural Debtors Act and are not therefore entitled to the benefit of the Act, conclusively determines the question relating to the judgment-debtors liability with reference to the relief granted by the decree and is a decree."

The decree-holders further contend that an agriculturist who is entitled to make an application under S. 8, U. P. Debt Redemption Act, for amendment of a decree is a person who is "liable to pay the amount due under a decree" to which the U. P. Debt Redemption Act applies and the phrase "an agriculturist liable to pay the amount due under a decree" means personally liable to pay the decree and in case where the agriculturist is not personally liable but only his property is liable the conditions laid down in the statute are not satisfied and such an agriculturist is not entitled to make an application under S. 8. It is contended that the words 'liable to pay the amount due under a decree' have been judicially interpreted and they mean as a matter of law that liability should be personal and not on the property and for this contention reliance is placed on two decisions of this Court, 38 All 669[3] at p. 672 and 58 All. 907.[4] These were the cases in

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1. ('40) 27 A. I. R. 1940 All. 326 : 189 I. C. 848 : I.L.R. (1940) All. 517 : 1940 A. L. J. 377 (F. B.), Har Narain Lal v. Mathura Prasad.
2. ('40) 27 A. I. R. 1940 Cal. 257 : 188 I. C. 483 : I. L. R. (1940) 1 Cal. 393 : 44 C. W. N. 364, Nafar Chandra v. Kali Pada Dass.
3. ('16) 3 A.I.R. 1916 All. 290 : 36 I.C. 948 : 38 All. 669 : 14 A.L.J. 776, Sheo Shankar v. Chunni Lal.
4. ('36) 23 A.I.R. 1936 All. 639 : 162 I.C. 289 : 58 All. 907 : 1936 A.L.J. 562, Nagesar Ram v. Rajnet Ram.

which a question arose whether a mortgage-decree could be set off against a money decree under O. 21, R. 18, Civil P. C., and on the ground that the two decrees were held under different characters the set off was disallowed. These cases are no authority for the proposition that in a mortgage-decree where the amount could only be recovered from the property the mortgagor cannot be regarded in the eye of law as liable to pay the amount of the decree. In our opinion, the words 'liable to pay the amount due under a decree' used in S. 8, U. P. Debt Redemption Act, cannot be restricted to the case where liability is personal and the words are sufficiently wide to include the liability which is on person and property both jointly or on person or property alone singly. There may be decrees against agriculturists who are minors which cannot be personally enforced against them. There may be decrees against agriculturists in which their property is only liable to sale. In both these cases and in all similar cases agriculturists are liable to pay the amount of the decree though the liability is not personal.

We now come to the main question whether Mt. Ketki and Ram Sarup cannot be regarded as agriculturists within the meaning of the U. P. Debt Redemption Act 1940 because Kanhai Lal, the husband of Mt. Ketki and father of Ram Sarup, was not an agriculturist in the year 1920 when the original mortgage was made. This raises a question whether a loan under the U. P. Debt Redemption Act has to be a cash advance or a renewed loan can also be regarded as a loan within the meaning of the Act. The word 'loan' has been defined in S. 2 (9), U. P. Debt Redemption Act, and it means in substance an advance in cash or kind made to an agriculturist and 'includes any transaction which in substance amounts to such advance.' 'Loan' has also been defined in S. (2) (10) (a), U. P. Agriculturists Relief Act, 1934, as "an advance to an agriculturist whether of money or in kind, and shall include any transaction which is in substance a loan. . . ." At the time when the execution Court pronounced its judgment in this case the view taken by this Court was that 'loan' for the purposes of the U. P. Agriculturists' Relief Act meant a cash advance and not a renewed loan and relying upon the view of this Court in 1937 A.L.J. 882,[5] the execution Judge held that the renewed mortgage of 1928 could not be regarded as a loan within the meaning of the U. P. Debt Redemption Act and the loan must, therefore, be the mortgage of 1920 when the cash advance was made. Since this judgment was pronounced the majority of Judges in a Full Bench of this Court in *Pratap Singh* v. *Gulzari Lal*[6] has held that "where an earlier transaction of loan is renewed the new transaction itself is a "loan" for the purposes of the U. P. Agriculturists' Relief Act (17 of 1934)." In our opinion, the reasons given by the majority of Judges in *Pratap Singh* v. *Gulzari Lal*[6] for holding a renewed loan as a loan fully apply to the definition of 'loan' as given in the U. P. Debt Redemption Act, S. 2, cl. 9, and a renewed loan is a transaction which in substance amounts to an advance within the meaning of the said S. 2 (9), U. P. Debt Redemption Act. It is true that under S. 9, U. P. Debt Redemption Act, renewed transactions can be reopened. But this is a matter which stands on a different footing altogether and it furnishes no reason for holding that in the definition of 'loan' as given in S. 2 (9), renewed loan is not included. In our opinion, by reason of the fact that Mt. Ketki and Ram Sarup were agriculturists at the time when the mortgage of 1928 was made, they were entitled to make an application for the amendment of the decree under S. 8, U. P. Debt Redemption Act, 1940, and it was not necessary for them to prove in order to succeed in this application that at the time of the mortgage of 1920 Kanhai Lal was an agriculturist.

But there is yet another ground on which Mt. Ketki and Ram Sarup were entitled to succeed. Undoubtedly, on the date when the U. P. Debt Redemption Act came into force and when the application was made by Mt. Ketki and Ram Sarup for amendment of decree under S. 8, U. P. Debt Redemption Act, they were agriculturists. Undoubtedly, the mortgaged property which is zamindari property and "land" within the meaning of the U. P. Debt Redemption Act was going to be sold. Does the U. P. Debt Redemption Act grant relief to an agriculturist or a workman who was an agriculturist or a workman both at the time when the loan was received by him and also when the loan is recoverable or does it grant relief also in cases when the loan is recoverable from the property of the agriculturist or the workman though it was made to a person who was not an agriculturist or a workman at the time when the loan was made. This necessitates the examination of certain relevant provisions of the U. P. Debt Redemption Act, 1940. Section 8, U. P. Debt Redemption Act, gives a right to apply for amendment of a decree to 'an agriculturist or a workman liable to pay the amount due under a decree to which this Act applies'. Under S. 2 (6) "decree to which this Act applies" means "a decree passed either before or after the commencement of this Act in a suit to which this Act applies". Under S. 2 (17), "suit to which this Act applies, means any suit or proceeding relating to a loan," 'Loan' has been defined in S. 2 (9) as follows:

" 'Loan' means an advance in cash or kind made before 1st June 1940, recoverable from an agriculturist or a workman or from any such person and other persons jointly or from the property of an agriculturist or workman and includes any transaction which in substance amounts to such advance, but does not include an advance the liability for the repayment of which has, by a contract with the borrower or his heir or successor or by sale in execution of a decree, been transferred to another person or an advance by the Central or Provincial Government or by a local authority authorized by the Provincial Government to make advances or by a co-operative society or by a scheduled bank :

" Provided that an advance recoverable from an agriculturist or from an agriculturist and other persons jointly shall not be deemed to be a loan for the purposes of this Act unless such advance was made to an agriculturist or to an agriculturist and other persons jointly."

If we leave out the proviso to S. 2 (9) for the time being it will be observed that loan as defined in S. 2 (9) means an advance in cash or kind made before 1st June 1940—(i) recoverable from an agriculturist or a workman or (ii) from any such person and other persons jointly, or (iii) from the property of an agriculturist or workman and includes any transaction which in substance amounts to such advance, but does not include an advance the liability for the repayment of which has, by a contract with the borrower or his heir or successor or by sale in execution of a decree, been transferred to

5. ('38) 25 A. I. R. 1938 All. 1 : 173 I. C. 676 : I.L.R. (1938) All. 29 : 1937 A. L. J. 882, Dharam Singh v. Bishan Sarup.
6. *Reported in* ('42) 29 A. I. R. 1942 All. 50 : 199 I.C. 57:I.L.R. 1942 All. 185:1942 A.L.J. 3 (F.B.).

another person. It will be further observed that if this cl. (9) had stood alone without the proviso then 'loan' was an advance recoverable from three classes of persons—(1) agriculturist or workman, (2) agriculturist or workman jointly with others and (3) from the property of an agriculturist or workman, and cl. (9) only laid down that the advance should be recoverable from these persons and it did not lay down that advance should have been made to these persons and if this clause had remained without a proviso then it would not have been possible to maintain that the statute required that the advance to be a 'loan' should have been made to an agriculturist and should also be recoverable from an agriculturist. The statute required only one condition, namely, that it should be recoverable from, and not that it should have been made to an agriculturist or workman.

We have now to examine the effect of the proviso which is to the effect that an advance recoverable from an agriculturist or from an agriculturist and other persons jointly shall not be deemed to be a loan for the purposes of this Act unless such advance was made to an agriculturist or to an agriculturist and other persons jointly. It will be observed that the proviso applies to two only of the three cases mentioned in the main clause of S. 2 (9), viz., advance made to an agriculturist and to an agriculturist and other persons jointly. It does not apply to the case of a workman at all and it does not apply to the third class of advance mentioned above which was recoverable from the property of an agriculturist or workman. Therefore the effect of the proviso is that in case where an advance is recoverable from an agriculturist or from an agriculturist and other persons jointly, under the proviso advance must be recoverable from an agriculturist and must have been made also to an agriculturist. But where the advance is recoverable from a workman or recoverable from the property of an agriculturist or workman, the proviso has no application and the case is governed by the main clause of S. 2 (9). In the case before us the advance was recoverable from the property of an agriculturist and it is a case within class 3 mentioned above and to a case like this the proviso has no application and the advance which is recoverable from the property of an agriculturist solely and not from his person is a loan within the meaning of S. 2 (9) and is unaffected by the proviso to S. 2 (9). In our opinion, the meaning of S. 2 (9) is that in cases where advance is recoverable both from the person and the property of an agriculturist in order to take benefit of S. 8, U. P. Debt Redemption Act, it must be shown that the claimant was an agriculturist both at the time when the advance was recoverable and when the advance was made. But in a case of a workman or in a case where the advance is recoverable only from the property of an agriculturist or workman, it is not necessary that the advance should have been also made to a workman or to an agriculturist. The policy behind the statute seems to be that in case where the advance is recoverable from property alone and where the property is liable to be sold it is sufficient if the claimant possesses the status of an agriculturist or workman on the date when the advance is recoverable although at the time when the advance was made it was not made to an agriculturist or a workman.

We are therefore of opinion that Mt. Ketki and Ram Sarup were entitled to make an application under S. 8, U. P. Debt Redemption Act, on two grounds firstly, because advance was made to them in the year 1928 and they were agriculturists at that time and, secondly, because advance is recoverable from their property alone and not from their persons and at the time when the advance is recoverable from their property they are agriculturists. We accordingly allow this appeal, set aside the judgment and decree of the execution Court and remand the case back to that Court with direction that it should be restored to its original number and be disposed of according to law. The appellants will have their costs in this Court and in the Court below in proceedings arising out of an application under S. 8, U. P. Debt Redemption Act. Other costs and future costs will be in the discretion of the Court below.

R.K. *Appeal allowed.*

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* A. I. R. (29) 1942 Allahabad 394

FULL BENCH

IQBAL AHMAD C. J., DAR AND PLOWDEN JJ.

Sheikh Mohd. Abdul Razzak and another — Judgment-debtors — Appellants

v.

Mt. Srimati Parvati Devi and another — Decree-holders — Respondents.

Exn. First Appeal No. 168 of 1941, Decided on 7th September 1942, from decision of First Civil Judge, Meerut, D/- 11th March 1941.

*** (a) U. P. Debt Redemption Act (13 of 1940), S. 4 (3), proviso 3 — Words "already applied" in S. 4 (3), proviso 3 refer to execution applications made not only after but also before Act :** I. L. R. (1942) All. 119=('42) 29 A. I. R. 1942 All. 251=202 I. C. 18, *OVERRULED.*

In the absence of some compelling indication to the contrary, an adverb of time, such as "already" has reference to the present and in relation to a statute, to the time from which the statute comes into force : (1906) 2 Ch. 270, *Rel. on.* [P 395*g,h*]

The words "has alredy applied for execution" in Proviso 3 to S. 4 (3) are of general import not being controlled by any restrictive provision and have reference not only to applications for execution made after the passing of the Act but also to applications for execution made before the Act came into force : ('42) 29 A.I.R. 1942 All. 19 (F.B.), *Rel. on*; I.L.R. (1942) All. 119=('49) 29 A.I.R. 1942 All. 251=202 I. C. 18, *OVERRULED.* [P 396*b*]

(b) Interpretation of statutes — Words in statute clear — Court cannot depart from ordinary meaning of words on mere supposition that intention of Legislature was otherwise.

When the words used by the Legislature in a statute are clear, it is not permissible for the Courts to depart from the ordinary and plain meaning of the words used on the mere supposition that the intention of the Legislature was otherwise than indicated by the plain and ordinary interpretation of the words used. [P 396*b*]

C. P. C. —
('40) Chitaley, Preamble N. 7 Pt. 5.
('41) Mulla, Page 2 Pt. (c).

(c) U. P. Debt Redemption Act (13 of 1940), Ss. 8 and 24—Order rejecting judgment-debtor's application under S. 8 falls under S. 47, Civil P. C. — Appeal lies to High Court.

Apart from the fact that by S. 24, U. P. Debt Redemption Act, the provisions of the Civil Proce-

dure Code, save in so far as they are inconsistent with the provisions of that Act, have been made applicable to all proceedings under that Act, an order rejecting an application for amendment of decree under S. 8 of the Act, falls within the purview of S. 47, Civil P. C., inasmuch as the reduction of the decretal amount sought by the judgment-debtor is clearly a matter relating to execution or discharge of the decree and therefore is appealable to the High Court. [P 396*e*,*f*]

C. P. C. —

('40) Chitaley, S. 47 N. 3 Pt. 1.

Dr. M. A. Rauf and S. A. Rafique — for Applts.

B. Mukerji — for Respondents.

IQBAL AHMAD C. J. — This is a judgment-debtor's appeal and is directed against an order passed by the Court below rejecting an application for the amendment of a decree under S. 8, U. P. Debt Redemption Act (13 of 1940). The decree in question is a simple money decree that was obtained by the respondent, decree-holder against the judgment-debtor, appellant so far back as on 30th May 1932. The decree was for about Rs. 6900 and was payable by instalments. There was default in the payment of instalments and the decree-holder then, on 1st June 1935, applied for execution of the decree by arrest of the appellant. The appellant paid a sum of Rs. 200 in part satisfaction of the decree and thereafter the application for execution was dismissed on 22nd July 1935.

On 25th April 1936, the appellant, who is an agriculturist, applied for the amendment of the decree by reduction of interest and granting of instalments under the Agriculturists' Relief Act. The application for amendment was allowed and the decretal amount was reduced to Rs. 3419-9-2 and was made payable in four years by equal yearly instalments. The appellant again defaulted in payment of the instalments with the result that the respondent on 9th March 1939, filed an application for execution of the decree by the attachment and sale of certain shops belonging to the appellant. During the progress of the execution the appellant on 7th January 1941, applied for amendment of the decree under S. 8, U. P. Debt Redemption Act. The decree-holder then on 18th January 1941, filed a declaration in conformity with the provisions of cl. (3) of S. 4 of the Act, to the effect that the decree "shall not be executed against the land, agricultural produce or person of" the appellant, and on the strength of this declaration contended that the appellant is not entitled to have the decree amended. In support of this contention the decree-holder relied on sub-s. (3) of S. 4, U. P. Debt Redemption Act, which provides :

" No decree recoverable from an agriculturist shall be amended under the provisions of this Act, if the creditor declares that such decree shall not be executed against the land, agricultural produce or person of such agriculturist. "

The judgment-debtor, on the other hand, contended that as the decree-holder had executed the decree in 1935 against his person, the declaration now made by her (the decree-holder) was incompetent in view of proviso 3 to sub-s. (3) of S. 4 and that, notwithstanding that declaration he was entitled to have the decree amended in conformity with the provisions of S. 8 of the Act. Proviso 3 runs as follows :

" Provided also that no declaration shall be made under sub-s. (3) where the creditor has already applied for execution against the land, agricultural produce or person of such agriculturist. "

The Court below held that the words "already applied" in the proviso have reference only to applications for executions made after the Act came into force and not to applications for execution made before the passing of the Act. It held that proviso 3 was applicable only to cases in which the decree-holder had applied for execution of the decree after the passing of the Act "against the land, agricultural produce or person" of the agriculturist judgment-debtor. In this connexion the Court below observed that :

" What the Legislature apparently intended was that after this Act had come into force the decree-holder must make up his mind whether he is agreeable to have a decree against an agriculturist amended or not. If he is agreeable to this course he must file a declaration of the nature referred to in sub-cl. (3) . . . He cannot be allowed to execute his decree in a manner inconsistent with the declaration provided for by sub-cl. (3), after he has become cognizant of his rights under the Act, and then to turn round and seek to defeat an application for amendment by filing a declaration. "

In this view of the matter the Court below held that the declaration made by the decree-holder was a competent declaration and satisfied the requirements of sub-s. (3) of S. 4, and, as such, the judgment-debtor was not entitled to have the decree amended. We are unable to agree with the decision of the Court below. The answer to the question, whether a decree-holder who had, before the passing of the Act, applied for execution of his decree against the land, agricultural produce or person of the agriculturist judgment-debtor, is barred from making the declaration contemplated by sub s. (3) of S. 4, depends on the interpretation that is put on the words "has already applied for execution" in proviso 3 to sub-s. (3). A somewhat similar question arose for decision in the Full Bench case in 1942 A. L. J. 55,[1] and the Full Bench, of which two of us were members, held that the word "already" in S. 30 (2), Agriculturists' Relief Act, had reference to decrees passed before the Act came into force and not to decrees passed after the coming into force of that Act. Three separate but concurrent judgments were delivered by the three Judges constituting the Full Bench and in the course of those judgments reasons were assigned in support of the view that the word "already" in S. 30 (2) of the Act had reference, in its ordinary grammatical sense, to the date when the Act came into force. It was pointed out in that case that it is a recognized principle of construction that, in the absence of some compelling indication to the contrary, an adverb of time has reference to the present and, in relation to a statute, to the time from which the statute comes into force. In support of this decision reliance was placed by the Full Bench on the decision in (1906) 2 Ch. 270[2] at p. 274, in which Kekewich J. is reported to have observed as follows:

"We are not dealing with a technical word, but with a word in common use in the English language and it is one which has no technical meaning whatever. The rule in such cases is to construe the word according to its popular and colloquial meaning. What is the meaning of the word 'already' in the popular or colloquial sense ? It means 'at this

1. ('42) 29 A. I. R. 1942 All. 19 : 198 I. C. 690 : I. L. R. (1942) All. 45 : 1942 A. L. J. 55 (F. B.), Shri Nath v. Puran Mal.
2. (1906) 2 Ch. 270: 75 L.J.Ch. 595: 95 L.T. 129: 4 L.G.R. 787 : 22 T. L. R. 631, Godden v. Hythe Burial Board.

time' or 'now.' Reading the Act through, it reads thus : 'No ground not now used as or appropriated for a cemetery.' That 'now' can only mean, it seems to me, at the date of the passing of the Act. There is no 'now' with reference to an Act of Parliament except the date when it receives the royal assent. There might possibly be an exception where the coming into operation of the Act is deferred; but, as at present advised, I do not think even that would alter it. 'Now,' it seems to me, points to the date when the Act in which the word is used becomes an Act, that is, when it receives the royal assent. I see nothing in the authorities which have been cited to make me think that that is otherwise than perfectly correct. The point is not decided but the authorities, I think, point to that conclusion."

For the reasons given in the Full Bench case referred to above we are of the view that the words "has already applied for execution" in the third proviso to sub-s. (3) of S. 4, Debt Redemption Act, have reference not only to applications for execution made after the passing of the Act but also to applications for execution made before the Act came into force. To adopt the view taken by the Court below would be to introduce words to the effect "after the passing of the Act" in the third proviso—words which are not there. When the words used by the Legislature in a statute are clear it is not permissible for the Courts to depart from the ordinary and plain meaning of the words used on the mere supposition that the intention of the Legislature was otherwise than indicated by the plain and ordinary interpretation of the words used." The words "has already applied" in the third proviso are words of general import and are not controlled by any restrictive provision. It therefore follows that the third proviso applies to all those cases in which the decree-holder had put his decree in execution by one of the modes referred to in sub-s. (3) whether before or after the passing of the Act. A contrary view was taken by a learned Judge of this Court in 1942 A. L. J. 178.[3] But for the reasons given above we are unable to agree with that decision in so far as it lays down that Proviso 3 does not apply to an execution application made and disposed of before the Act came into force. That the view taken by us accords with the plain and ordinary meaning of the words used in the proviso may be illustrated by the following example :

The Debt Redemption Act came into force on 1st January 1941. Take a case in which a decree-holder had, before the passing of the Act, applied for execution of his decree against an agriculturist judgment-debtor by his arrest and that application for execution had been dismissed. Again after the passing of the Act the decree-holder filed a second application for execution on 1st January 1941, and incorporated in the application for execution the declaration contemplated by sub-s. (3) of S. 4. The judgment-debtor, on the other hand, on the same date, viz. on 1st January 1941, filed an application for amendment of the decree under S. 8. It seems plain to us that on 1st January 1941, it would be open to the judgment-debtor to say that an application for execution had already been made by the decree-holder, and, as such, the third proviso was applicable. We therefore hold that the declaration made by the decree-holder in the present case was incompetent and the Court below was wrong in refusing to amend the decree in conformity with the provisions of S. 8 of the Act. A preliminary objection to the hearing of the appeal was taken by the learned counsel for the decree-holder respondent. He contended that as no right of appeal against an order rejecting an application for amendment of decree was given by the Act the decision of the Court below was final. In our judgment there is no force in this contention. Apart from the fact that by S. 24, Debt Redemption Act, the provisions of the Code of Civil Procedure, save in so far as they are inconsistent with the provisions of that Act, have been made applicable to all proceedings under that Act, the present order of the Court below does in our judgment, fall within the purview of S. 47, Civil P. C. The judgment-debtor by his application for amendment wanted reduction of the decretal amount and the reduction sought by him was clearly a matter relating to execution or discharge of the decree. The order of the Court below was therefore appealable to this Court. The result is that we allow this appeal, set aside the decision of the Court below and remand the case to that Court with the direction to restore the same to its original number and to try and dispose of the same according to law. The appellant is entitled to the costs of this appeal.

G.N./R.K. *Appeal allowed.*

3. ('42) 29 A.I.R. 1942 All.251: 202 I.C. 18: I.L.R. (1942) All. 119 : (1942) A. L. J. 178, Babunandan Lal v. Parshottam Sahu.

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* A. I. R. (29) 1942 Allahabad 396

FULL BENCH

BAJPAI, DAR AND YORKE JJ.

Seth Radhey Lal — Plaintiff

v.

Roop Ram — Defendant.

Civil Misc. Case No. 461 of 1941, Decided on 15th September 1942, on reference submitted by Judge Small Cause Court, Meerut, as per letter, dated 8th August 1941.

(a) Limitation Act (1908), Ss. 12 to 25 — Entire law of limitation, and provisions for computing limitation, for suspension of cause of action and for exclusion of time have not been codified for all times and for all purposes in Act—Central and Provincial Legislatures can make additional and supplemental provisions—Such provisions become part and parcel of law of limitation applicable to an action.

The entire law of limitation and all the provisions for computation of period of limitation and for suspension of cause of action and for exclusion of time have not been codified for all times and for all purposes in the Limitation Act and it is open to the Central Legislature as also to a Provincial Legislature from time to time to make additional and supplemental provisions for computation of period of limitation and for suspension of cause of action and for exclusion of time and if such provisions are made they will become part and parcel of the law of limitation applicable to an action.

[P 398*b*,*c*]

Limitation Act —

('42) Chitaley, Preamble N. 19, S. 3, N. 3.

('38) Rustomji, Page 20, Note "New exemptions cannot be recognized by Courts."

*** (b) U. P. Temporary Postponement of Execution of Decrees Act (10 of 1937 as amended by Act 15 of 1938 and Act 6 of 1940), S. 5 —Expiry of temporary Act—Effect explained—Act temporary or permanent repealed by new Act—Effect of S. 6, U. P. General Clauses Act**

— Notwithstanding expiry of U. P. Act 10 of 1937 on 31st December 1940 and repeal of same by U. P. Debt Redemption Act on 1st January 1941 creditor is entitled to exclude time from 1st January 1938 to 31st December 1940 in computing limitation applicable to his claim.

It is not the law that when a temporary Act comes to an end and ceases to be in force all rights which arose under some of the provisions of the temporary Act automatically disappear with the cessation of the Act. It is a question of the interpretation of the particular provision of the statute whether it was to remain effective till the Act was to remain in force or whether it was to remain operative even after the Act had ceased to be in force : (1841) 8 M. & W. 234, *Rel. on.* [P 398*c*,*d*]

The language of U. P. Act 10 of 1937 clearly points to the conclusion that the benefit given by S. 5 of that Act, was to take effect after the Act had ceased to be in force and the statute contemplated and provided that though it would cease to be in force rights arising thereunder would continue to be in operation. [P 399*b*]

Nor is it the law that because an Act, temporary or permanent, is repealed by a new Act all rights and obligations arising thereunder disappear and the old Act is wiped out of the statute book and is treated for all purposes as if it had never existed. Section 6, U. P. General Clauses Act, and S. 6, General Clauses Act, clearly indicate that the remedy with regard to rights and privileges arising under a repealed Act can be enforced even after the repeal and to that extent it is to be deemed that the repeal had not taken place. Section 5, U. P. Act 10 of 1937 conferred a privilege or a right upon the creditors to avail themselves of an option not to enforce their claims which had matured and upon which time was running. Such a right or privilege cannot be governed by same considerations which apply when a period of limitation given by an existing law is cut short by a new law of limitation. Interference with a right or privilege like this affects the previous operation of the enactment and something done or suffered thereunder within the meaning of S. 6 (b), U. P. General Clauses Act. A right or privilege like that partakes more of the nature of a vested right rather than of a matter affecting procedure and is fully protected by the provisions of the U. P. General Clauses Act.

[P 399*f*,*g*; P 400*a*,*b*]

Consequently notwithstanding the expiration of the U. P. Temporary Postponement of Execution of Decrees Act, 10 of 1937, on 31st December 1940, and the repeal of the said Act by the U. P. Debt Redemption Act 13 of 1940, on 1st January 1941, a creditor is entitled under S. 5, U. P. Act 10 of 1937 as amended to exclude the time from 1st January 1938 to 31st December 1940 during which that Act remained in force, in computing the period of limitation applicable to his claim. [P 400*b*,*c*]

DAR J. — This is a reference under O. 46, R. 1, Civil P. C., by the Judge, Small Cause Court of Meerut, for our determination of a question of law which has arisen in a pending suit before him, about which he entertains reasonable doubts, in the following circumstances: On 24th June 1936, Roop Ram borrowed a sum of money from Radhey Lal on a bond which was payable within six months. The money due under this bond was not paid to Radhey Lal on due date and a right to sue arose in his favour on 24th December 1936, and this right could be enforced under the law of limitation (Act 9 of 1908) upto 24th December 1939. At the time of loan and at all material times Roop Ram, the borrower, was and has been an "agriculturist." On 1st January 1938, a law for the relief of judgment-debtors who were agriculturists and called the Temporary Postponement of Execution of Decrees Act (10 of 1937) came into force, and it was to remain in force for six months. By Act 15 of 1938 and by Act 6 of 1940 this period of six months was extended to 24 months and 30 months respectively with the result that the said Temporary Postponement of Execution of Decrees Act remained in force from 1st January 1938 to 31st December 1940. Section 5, Temporary Postponement of Execution of Decrees Act, provides as follows :

"5. (1) In computing the period of limitation prescribed by the Limitation Act, 1908, or any other law for the time being in force, for (a) the institution of a suit in a civil Court against an agriculturist for money or foreclosure or sale in enforcement of a mortgage and (b) the execution of such decree as is referred to in section 3, and not covered by S. 6, the period during which this Act shall remain in force shall be excluded. (2) In computing the period of 12 years prescribed by S. 48, Civil P. C., 1908, the period during which this Act shall remain in force shall be excluded."

Relying upon this provision numerous creditors in these provinces raised no action against the agriculturists during the time the said Act 10 of 1937 was in force, and Radhey Lal, the creditor mentioned above, was one of them. On 21st December 1940, a new Act called the U. P. Debt Redemption Act (13 of 1940) received the assent of the Governor-General and it was published in Gazette on 28th December 1940, and it came into force on 1st January 1941. By this Act a comprehensive scheme was laid down for relief of agricultural indebtedness and subject to certain conditions decrees were allowed to be executed against agriculturists and the ban against the execution of decrees provided by Act 10 of 1937 was lifted. By S. 27, U. P. Debt Redemption Act, 1940, read with Sch. 2 of the said Act, the U. P. Temporary Postponement of Execution of Decrees Act, 10 of 1937, was repealed the whole of it. On 29th April 1941 Radhey Lal raised an action in the Court of Small Causes at Meerut for recovery of money due on the said bond and he claimed that by virtue of S. 5, Temporary Postponement of Execution of Decrees Act, 1937, the time between 1st January 1938 and 31st December 1940, during which the said Act had remained in force, should be excluded from the period of limitation prescribed for the suit. It is not disputed that if this period could be excluded his action was within time. The defendant Roop Ram resisted the claim and he pleaded that the effect of the repeal of the Temporary Postponement of Execution of Decrees Act, 10 of 1937, by the U. P. Debt Redemption Act, 13 of 1940, was that the Act never existed in fact and must be taken to have been expunged from the statute book, and if this is the real effect of the repeal then undoubtedly the claim is barred by limitation.

The learned Judge who has referred this case to us has favoured the view that the claim was barred by limitation. His grounds in substance are that the law of limitation which applies to an action is the law which is in force on the date of the action and not any pre-existing law, that the effect of the repeal of an Act is that its existence has to be disregarded for all times and for all purposes and it is taken to be expunged from the Statute book, that the law of limitation being a law of procedure in

a which no person has a vested right takes effect retrospectively and retrospective effect may not be given effect to a statute of limitation if by the reason of change in law a person is left without any remedy whatever, but these considerations do not apply when there is an interval between the passing of a new Act and of its coming into force, however short, because the presumption is that the Legislature contemplated that the interval thus given should be employed for raising action under old law which was to be substituted by the passing of new Act, and lastly, hard as this interpretation of the law may be upon numerous creditors of these provinces, equitable considerations have no place in interpreting any law of limitation.

These propositions, subject to certain reservations and qualifications, may be accepted as correct, but, in our opinion, they have no real application to the b problem in this case. It is not disputed that the law of limitation which applies to this action and has always applied to this action is contained in the Limitation Act (9 of 1908). It is also not disputed that various provisions for computation of period of limitation and for exclusion of time and for suspension of causes of action are provided in Ss. 12 to 25 of part 3, Limitation Act 1908, and they do not help the plaintiff and that the suit is governed by Art. 66, Limitation Act, and under S. 9, Limitation Act, time having begun to run continues to run and can not be suspended. But it also can not be disputed that the entire law of limitation and all the provisions for computation of period of limitation and for suspension of cause of action and for exclusion of time have not been codified for all times and for all purposes in the Limitation Act and it is open to the Central Legislature as also c to a Provincial Legislature from time to time to make additional and supplemental provisions for computation of period of limitation and for suspension of cause of action and for exclusion of time and if such provisions are made they will become part and parcel of the law of limitation applicable to an action. It also cannot be disputed that one such provision for exclusion of time in computing the period of limitation was made by S. 5, Temporary Postponement of Execution of Decrees Act, 1937, and the whole problem in the case is what is the legal effect of the fact and circumstance that the Temporary Postponement of Execution of Decrees Act had ceased to be in force and was also repealed at the time when Radhey Lal raised his action.

In our opinion, it is not the law that when a temporary Act comes to an end and ceases to be in d force all rights which arose under some of the provisions of the temporary Act automatically disappear with the cessation of the Act. In our opinion it is a question of the interpretation of the particular provision of the statute whether it was to remain effective till the Act was to remian in force or whether it was to remain operative even after the Act had ceased to be in force. Suppose the Indian Legislature passes a temporary Act for a period of two years providing that during the period the Act remains in force no suit will be brought against the debtors and the cause of action would remain suspended but after the lapse of two years and after the Act had ceased to be in force suits would lie against the debtors and suspension of cause of action would cease and time would run against them. Can it then be reasonably contended that in spite of the express terms of the statute time would run during those two years when it had been expressly suspended by the statute? Similarly, the statute may provide that during two years time would be excluded in computing the period of limitation when e actions are brought after a lapse of two years, and if it does so, we see no reason why this express assurance given by the statute may not be given its legal effect.

By reason of the passing of the Expiring Laws Continuance Act this matter has lost a great deal of its importance in England. But at one time questions arose in England as to what was the effect of an expired temporary Act on the future right of persons affected thereby. In (1841) 8 M. & W. 234[1] decided by the Court of Exchequer "the case related to 6 Geo. IV, c. 133 s. 4, which enacted that every person who held a commission as surgeon in the army should be entitled to practise as an apothecary without having passed the usual examination. This Act was temporary, expiring on 1st August 1826, and it was contended that a person who under the Act was entitled to practise as an apothecary would f lose his right after 1st August 1826. But the Court held that such a person would not be so deprived of his right." Some of the observations made by the Chief Baron and other Barons in giving their judgments in the above case may be usefully recalled. Lord Abinger C. B. observed :

"It is by no means a consequence of an Act of Parliament's expiring, that rights acquired under it should likewise expire. Take the case of a penalty imposed by an Act of Parliament, would not a person who had been guilty of the offence upon which the Legislature had imposed the penalty while the Act was in force, be liable to pay it after its expiration ?. The case of a right acquired under the Act is stronger. The 6 Geo. IV, c. 133, provides, that parties who hold such warrants shall be entitled to practise as apothecaries; and we cannot engraft on g the statute a new qualification; limiting that enactment."

Parke B. said :

"Then comes the question whether the privilege of practising given by that Statute 6 Geo. IV, referred to in the replication, is one which continues notwithstanding the expiration of that statute. That depends on the construction of the temporary enactment. There is a difference between temporary statutes and statutes which are repealed, the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

Parke B. then, after discussing the interpretation of the statute, continues :

"It is enough to say that we think those who h were qualified by being assistant surgeons in the navy before 1st August 1826, retained that qualification notwithstanding the expiration of the statute."

Alderson B. stated :

"Independently, however, of this consideration I agree in the opinion already expressed by my brother Parke. It seems to me that those persons who, during the year for which the last Act was to continue in force, or previous to that period, had obtained rights under it, had obtained rights which were not to cease by the determination of the Act, any more than where a person commits an offence against an Act of a temporary nature, the party who had disobeyed the Act during its existence as a law is to become dispunishable on its ceasing to exist."

Rolfe B remarked :

"(1) The only important question in this case is

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1. (1841) 8 M. & W. 234 : 10 L. J. Ex. 338 : 5 Jur. 1064, Steavenson v. Oliver.

the last. The 6 Geo. IV, when it says that the Act shall continue in force till 1st August next, does not mean that what is therein enacted would be of no force after that day; if it were so, the Act might be productive of the greatest injustice . . . (2) Now the Court would be reluctant to suppose that the Legislature meant that a person authorised to practise during the year the Act was in force, should have to go back to a state of apprenticeship, in order to entitle him to continue his practice. I think that although in one sense this Act is not in force yet it is still permanent as to the rights acquired under it."

Section 5, Temporary Postponement of Execution of Decrees Act, 1937, clearly provides that in computing the period of limitation prescribed by the Limitation Act, 1908, the period during which this Act shall remain in force shall be excluded. It clearly contemplates that an action might be raised and should be raised after the Act had ceased to be in force and when the action is thus raised the plaintiff should be entitled to exclude the time during which the Act was in force. The language of the statute clearly points to the conclusion that the benefit given by S. 5 was to take effect after the Act had ceased to be in force and the statute contemplated and provided that though it would cease to be in force rights arising thereunder would continue to be in operation. Nor do we think it is the law that because an Act, temporary or permanent, is repealed by a new Act all rights and obligations arising thereunder disappear and the old Act is wiped out of the statute book and is treated for all purposes as if it had never existed. Both in England and in India ample provision has been made by legislative enactment to save vested rights and privileges from the effect of the repeal; in England by S. 38, Interpretation Act, 1889, and in India by the General Clauses Act, Central and Provincial of 1897 and of 1904 respectively. Section 6, U. P. General Clauses Act, 1 of 1904, is as follows :

"6. Where any United Provinces Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not :

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or

(e) affect any remedy, or any investigation or legal proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

and any such remedy may be enforced and any such investigation or legal proceeding may be continued and concluded and any such penalty forfeiture or punishment imposed as if the repealing Act had not been passed."

It will be noticed that under cl. (b) of S. 6, U. P. General Clauses Act, the repeal of an Act leaves unaffected "the previous operation of any enactment so repealed or anything duly done or suffered thereunder," and by cl. (c) of the said section the repeal does not affect "any right, privilege . . . . acquired, accrued . . . . under any enactment so repealed," and cl. (e) and the clause which follows (e) in S. 6 provides that this repeal shall not "affect any remedy . . . . . and any such remedy may be enforced . . . . as if the repealing Act had not been passed."

Section 6, General Clauses Act (10 of 1897), is as follows :

"6. Where this Act or any Act of the Governor-General in Council or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears the repeal shall not:

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty forfeiture or punishment may be imposed as if the repealing Act or regulation had not been passed."

Section 6, General Clauses Act, is in the same terms as S. 38, cl. (2), Interpretation Act, 1889, but cl. (e) of S. 6, U. P. General Clauses Act, 1904, is somewhat differently and less happily worded. This change in our opinion, in the U. P. Act does not serve any useful purpose and it only tends to create confusion, but for the purpose of points we are considering there is substantially no difference between the two clauses, Central and Provincial, and, in our opinion, they clearly provide that the remedy with regard to rights and privileges arising under a repealed Act can be enforced even after the repeal and to that extent it is to be deemed that the repeal had not taken place. That this is the effect of the General Clauses Act upon a repealed law hardly admits of any doubt. The principle of English common law which was stated in Maxwell on the Interpretation of Statutes as follows was considered in an English case in relation to the Interpretation Act, 1889.

"Where an Act expired or was repealed, it was formerly considered, in the absence of a provision to the contrary, as if it never existed, except as to matters and transactions past and closed. Where therefore a penal law is broken, the offender could not be punished under it, if it expired before he was convicted, although the prosecution was begun while the Act was still in force."

Avory, Shearman and Salter JJ. after explaining that the well-known principle of English common law as stated above by Maxwell had been altered by the Interpretation Act, 1889, held that an offence committed under a repealed Act at the time when the repealed Act was in force could be proceeded with after the Act had ceased to be in force and a new Act had taken place of the repealed Act. The object of the Temporary Postponement of Execution of Decrees Act was to stay execution of decrees against agriculturists, to protect agriculturists from being harassed by suits based on loans and to encourage money-lenders not to embark upon unnecessary and fruitless litigation, the fruit of which in the form of execution of decrees they were prohibited to gather ; and by S. 5, Temporary Postpone-

ment of Execution of Decrees Act an assurance was given to money-lenders that limitation would be saved if they refrained from raising action during the time the Act remained in force. It was thus a privilege, a right conferred upon the creditors to avail themselves of an option not to enforce their claims which had matured and upon which time was running. Such a right or privilege cannot be governed by same considerations which apply when a period of limitation given by an existing law is cut short by a new law of limitation. Interference with a right or privilege like this affects the previous operation of the enactment and something done or suffered thereunder within the meaning of cl. (b) of S. 6, U. P. General Clauses Act. And a right or privilege like this partakes more of the nature of a vested right rather than of a matter affecting procedure and in our opinion it is fully protected by the provisions of the General Clauses Act. It will be an inconvenient state of law if persons who had given loan to agriculturists were under necessity to embark upon unnecessary and fruitless litigation during the time the Temporary Postponement of Execution of Decrees Act was in force. And it will be a lamentable state of law if relying upon the assurance given by the statute they refrained from action, they now find that their claims are barred by limitation.

We hold that notwithstanding the expiration of the Temporary Postponement of Execution of Decrees Act, 1937, on 31st December 1940, and the repeal of the said Act by the U. P. Debt Redemption Act, 1940, on 1st January 1941, the creditor Radhey Lal was entitled to exclude the time from 1st January 1938 to 31st December 1940, in computing the period of limitation applicable to this claim and on this computation his claim was within time, and this is our answer to the reference.

G.N./R.K. *Answer accordingly.*

A. I. R. (29) 1942 Allahabad 400

YORKE J.

Nathoo and others — Appellants

v.

Emperor.

Criminal Appeal No. 57 of 1942, Decided on 4th June 1942, from order of Sess. Judge, Moradabad, D/- 29th November 1941.

(a) Penal Code (1860), Ss. 325 and 304—*A*, *C* and *D* attacking *B* and his companion—Sudden fight in heat of passion on sudden quarrel—No undue advantage taken—Fight long drawn out with passions considerably raised yet without any intention to kill—In course of fight *B*'s rib broken and *B* dying as result of broken rib having pierced *B*'s lung—Who gave fatal blow which broke rib impossible to say — Offence held fell within S. 325 and not S. 304.

A was ploughing a field which did not belong to him and which had been given by the owner on batai to *B* who was unable to obtain possession from *A*. *B* who was at work in his own field next door passed some remark about the way in which *A* was cultivating the field which really did not belong to him. Thereupon *A* with his companions *C* and *D* came to *B*'s field and attacked *B* and his companion. It was a sudden fight in the heat of passion upon a sudden quarrel in which no undue advantage was taken. In the course of fight *B* received some injuries on the head but they were not serious and his death was caused by fractures of rib and sternum, one fractured rib unfortunately having pierced a lung and caused haemorrhage and death:

Held that since there was a quite long drawn out fight with passions considerably raised and yet without any intention to kill and it was impossible to say who gave the fatal blow which broke the rib which pierced the lung of the deceased and it was difficult to say that in inflicting any of the injuries found on the body of the deceased, *A*, *C* and *D* were really saddled with the knowledge that by so doing they were likely to cause the death of *B*, much less that there was an imminent danger of his death being caused, the conviction of *A*, *C* and *D* should properly be under S. 325 and not S. 304 as there clearly was a common intention to inflict hurt extending to grievous hurt. [P 401*b*,*c*]

Penal Code —
('36) Ratanlal, Page 800 Pts. 4 to 8.
('36), Gour, Page 1115 Pt. 4.

(b) Penal Code (1860), S. 325 — Case under S. 325—Fight lasting some time and number of injuries received on both sides — Accused interested but having no injury on his person — Accused accompanying other accused to thana to help them in making first information report —Evidence held insufficient to prove accused's participation in fight.

In a case under S. 325 there was a fight which had lasted some time and in which a number of injuries were received on both sides. The accused was undoubtedly interested in the fight but he had not a single injury on his person. It was in evidence that the accused had gone with the other accused to the thana to help them to make the first information report:

Held that the evidence was not sufficient to establish the accused's participation in the fight. [P 401*b*]

Penal Code —
('36) Ratanlal, Page 806 Note "Evidence."

E. V. David — for Appellants.

Assistant Government Advocate — for the Crown.

JUDGMENT. — This is an appeal by Nathoo Brahman, Nathoo Ahir and Hardayal who have been convicted by the learned Sessions Judge of Moradabad of offences under S. 304 read with S. 34 and S. 323, Penal Code, and sentenced on the former count to 10 years' rigorous imprisonment and on the latter count to nine months rigorous imprisonment, the sentences to run concurrently. This case has arisen out of a dispute about a field in village Afzalpur Lut in the Gajraula circle of the Moradabad District. It seems that one Paima Brahman had a field for the ploughing of which he borrowed the bullocks of Nathoo Brahman appellant. It seems further that Nathoo Brahman had the idea that by reason of the cultivation of the field having been done with his bullocks the crop was his and he asserted possession over the plot. The appellant Nathoo Ahir is said to be a friend of Nathoo Brahman and there came to be some ill-feeling between him and Paima Brahman because Paim Brahman left Nathoo Ahir in charge of his house while he was away from the village and on his return found a sum of money buried in the ground missing and accused Nathoo Ahir of having stolen it. It was the prosecution case that a month before the occurrence of 24th August 1941 which led to this prosecution Nathoo Brahman, Nathoo Ahir, Hardayal and one Budhu Ahir forcibly irrigated the plot in dispute as a result of which Paima made a report to the police. Paima at this stage found that

he was unable to enforce his possession, if indeed he really had any possession, and he accordingly gave the field on batai to Uda Brahman deceased who had three sons. The idea seems to have been that Uda might be able to recover possession of the plot, but it seems that he never did so because the other party were people able to hold their own with Uda and his family.

According to the prosecution story, on 24th August 1941 at about noon an occurrence took place close to the disputed field. The learned Sessions Judge has come to the conclusion relying upon the evidence and also upon the discovery of blood on the ground by the investigating officer that the occurrence took place in the field of Uda which was next door to the field in dispute. He has held that what had happened was that Nathoo Brahman was ploughing the field in dispute while his friends Nathoo Ahir and Hardayal were present on the spot, doubtless to give him moral support. He has further held that Uda who was at work in his own field next door passed some remarks about the way in which Nathoo Brahman was cultivating a field which did not really belong to him and as a result Nathoo Ahir, Hardayal and Nathoo Brahman left the field in dispute, came into the field of Uda and attacked him and thereafter a fight took place between the three appellants on the one side and Uda and Chhajju on the other. The learned Sessions Judge in arriving at this conclusion has had to disbelieve the prosecution witnesses on an important point, namely, their allegation that Uda had actually got possession of the field in dispute. He has, however, believed those witnesses in regard to the fight except in one respect, namely, that he was not satisfied that a fourth man Budhu took part in the fight on the side of the appellants. In arriving at this conclusion, he also considered the evidence of defence witness, Kallu, who deposed that the fight was really only between Uda and Chhajju on one side and Nathoo Ahir and Hardayal on the other, Nathoo Brahman taking no part.

Now so far as the appellants Nathoo Ahir and Hardayal are concerned, there can be no doubt of their participation in the fight which undoubtedly took place because they had sustained injuries. Nathoo aged 25 received four injuries including one on the head, while Hardayal had five injuries including one on the head. On the other side Uda aged 50 had sustained 22 injuries, while Chhajju aged 26 had sustained 8 injuries. Uda had some injuries on the head but they were not serious and his death was caused by fracture of rib and sternum one fractured rib unfortunately having pierced a lung and caused hæmorrhage and death.

It seems to me that bearing in mind the findings of the learned Sessions Judge and the view he has taken of the reliability of the witnesses for the prosecution on important points, the essential point which he had to consider was whether there was any real corroboration — and I should say independent corroboration — of the case against Nathoo Brahman, appellant. It is of no use to refer in this connexion to the evidence of the prosecution witnesses because those witnesses have been disbelieved on an important point and despite their evidence the accused Budhu was acquitted. The learned Sessions Judge really regards as corroboration the probability, as he considers it, that Nathoo Brahman must have taken part because he was interested in the quarrel. Now, while that is true, there are other points to consider. As the learned Assistant Government Advocate has himself said, bearing in mind the number of injuries sustained on both sides by Uda, Chhajju, Nathoo and Hardayal, it is obvious that this fight lasted for some time. To my mind it is extraordinarily improbable that Nathoo Brahman, had he taken part in this fight, would have escaped without a single injury and the improbability which arises from this fact is, if anything, stronger than the probability that Nathoo Brahman would have taken part because he was interested in the quarrel. One other point to which reference has been made as possibly suggesting the participation of Nathoo Brahman is the fact mentioned by the Sub-Inspector that Nathoo Brahman was arrested at the thana where he had gone along with Nathoo Ahir when the latter made a first information report half an hour later than the first information report made on behalf of the prosecution. I cannot myself regard this fact as leading to the conclusion that Nathoo Brahman must have taken part in the fight. Nathoo Ahir and Hardayal were in any case his supporters and it was inevitable that he should go to the thana to help them to make the first report. Taking the evidence as a whole, I am of opinion that the charge has not been convincingly established against Nathoo Brahman who is therefore entitled to the benefit of doubt.

I accordingly allow his appeal set aside his conviction and sentence and direct that, if he is not required in connexion with any other case, he should be set at liberty without delay. As regards the other two appellants, Nathoo Ahir and Hardayal, there can be no doubt that they took part in a fight and I think the learned Sessions Judge has rightly held that this was a case of a sudden fight in the heat of passion upon a sudden quarrel and that no undue advantage was taken. There could be no question of self-defence because the fight took place in the field of Uda and not in the field in dispute which was in possession of Natho Brahman. On the other hand, this is not one of those cases in which two men have battered the head of another man to pieces and obviously intended to cause his death. On the contrary it seems that there was a quite long drawn out fight with passions considerably raised and yet without any intention to kill. In my judgment conviction in such a case should properly be under S. 325. It is impossible to say who gave the fatal blow which broke the rib which pierced the lung of the deceased. It would be difficult to say that in inflicting any of the injuries found on the body of the deceased the appellants were really saddled with the knowledge that by so doing they were likely to cause the death of Uda, much less that there was an imminent danger of his death being caused. On the other hand, there clearly was a common intention to inflict hurt extending to grievous hurt upon the opponents, Uda and Chhaiju. In these circumstances I would set aside the conviction under S. 304 and substitute a conviction under S. 325, Penal Code. Taking the circumstances of the case as they have been set out, I think further that the sentence is decidedly severe. In my judgment it is not necessary to inflict the maximum sentence under S. 325 and a sentence of four years rigorous imprisonment will be sufficient to meet the ends of justice. The sentences inflicted on Nathoo Ahir and Hardayal are accordingly reduced from 10 years to 4 years rigorous imprisonment. The sentences inflicted under S. 323 will remain as before and will continue to run concurrently.

G.N./R.K. *Order accordingly.*

a **A. I. R. (29) 1942 Allahabad 402**

ALLSOP AND VERMA JJ.

Mohammad Waheed Khan and others — Defendants — Appellants

v.

Nabi Ahmad Khan and others — Plaintiffs — Respondents.

First Appeal No. 519 of 1935, Decided on 7th May 1942, from decision of Additional Sub-Judge, Bareilly, D/- 23rd September 1935.

(a) Deed — Construction — Analogies from technical terms of English law are rarely helpful and frequently misleading.

In construing a deed analogies from technical
b terms of English law are rarely helpful and very frequently misleading : ('25) 12 A. I. R. 1925 P. C. 184, *Rel. on*; (1851) 1 Rep. 93*b* and 1897 A.C. 658, *Ref.* [P 403*h*]

T. P. Act —

('42) Chitaley, S. 8, N. 20 Pt. 38.

(b) Grant—Crown grant — Tenures released to *A*'s heirs general under Mahomedan law of descent — No incumbent entitled to alienate tenure for period beyond his life — Grant held created succession of independent life estates — Applicability of Art. 144, Limitation Act, to alienations of tenures by incumbent explained.

The relevant portion of the grant by Government in favour of the descendants of *A* was as follows : "The Lieutenant Governor considers that all the tenures now in the possession of the family must be declared released in perpetuity to heirs general
c under the Mahomedan law of descent with a distinct proviso that no tenure now declared released in perpetuity can be alienable by an incumbent for any period longer or beyond his individual life" :

Held that the grant created a succession of independent life estates. The successive life estate holders were nominated by words of description. Each successive life estate holder derived title, not from or through the previous holder, but directly from the grant. He had, of course, to answer to the description given in the grant that he should be an heir according to the personal law by which the family was governed. The intention of the Government in making the grant must be taken to have been to keep the property in the family of *A* for the maintenance in perpetuity of his descendants, and to prevent strangers from coming in. If any such
d descendant did not, within 12 years of his becoming entitled to possession on the death of the last preceding incumbent, attack a transfer made by any of his predecessors, his right to recover the property for himself would be barred. But that would not bar the right of any of those coming after him : F. A. No. 262 of 1936, *Approved*; *Case law discussed.* [P 404*e*, *f*; P 405*e*]

Limitation Act —

('42) Chitaley, Art. 144, N. 61; N. 90.

('38) Rustomji, Page 1510, Note "Inalienable property : Adverse possession of."

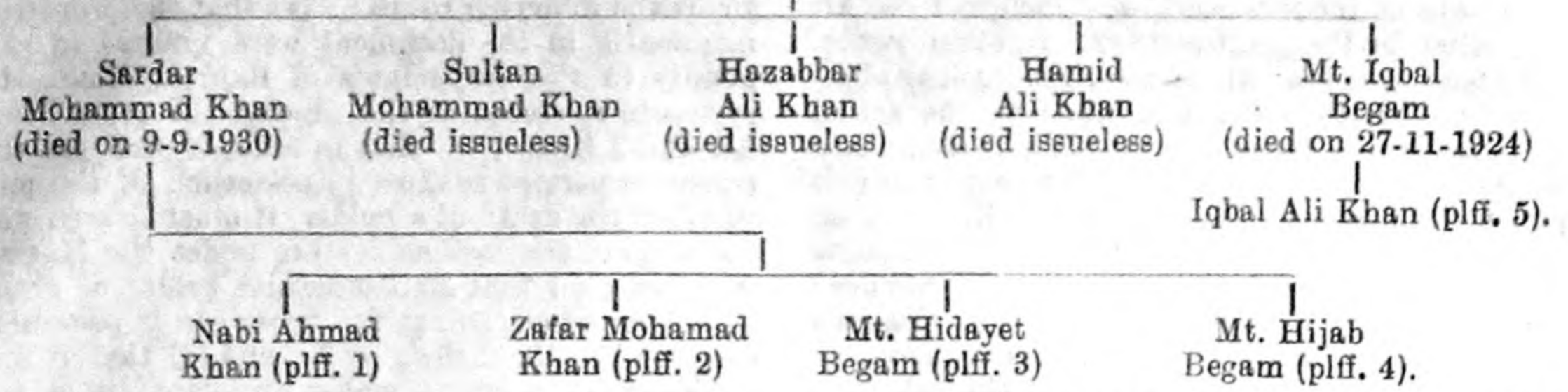
Sir Syed Wazir Hasan, M. A. Aziz, B. N. Misra, C. B. Agarwala and C. S. Saran — for Appellants.

P. L. Banerji, Mushtaq Ahmad and Waheed Ahmad Khan — for Respondents.

VERMA J. — This is an appeal by the defendants in the suit which was for the recovery of possession of the entire 20 biswas of a village described as mauza Murshidabad Gauntara alias Gauntia and for mesne profits for the three years preceding the e
suit and for pendente lite and future mesne profits up to the date of possession. The Court below has decreed the suit as prayed, the amount of mesne profits having been fixed at Rs. 900 per annum in accordance with the statement made by the parties before the Court on 18th September 1935. The following pedigree will be of assistance in appreciating the facts of the case :

(for pedigree see next page)

The two sons and the two daughters of Sardar Mohammad Khan and the son of his sister Mt. Iqbal Begam, are the first five plaintiffs in the suit. Plaintiff 6, Ahmad Hasan Khan is a person to whom the first five plaintiffs have with the object of raising funds for the litigation sold a half share in the interest which they allege they have in the property in dispute. According to the plaintiffs Ali Akbar f
Khan was the grandson of one Nawab Hafiz Rahmat Khan who was the last of Rohilla Chieftains and died in 1774. The village in question is situated in that part of these provinces which is known as Rohilkhand and is alleged to have formed part of the territories over which Rahmat Khan is said to have ruled. The Nawab Wazir of Oudh acquired Rohilkhand some time in the eighteenth century. In 1801 the Nawab Wazir ceded Rohilkhand to the East India Company. By certain regulations passed in the years 1802 and 1803 the East India Company granted certain concessions to the descendants of Rahmat Khan for the purpose of maintenance. It was also declared by those regulations that certain concessions of which the descendants of Rahmat Khan were already in enjoyment would continue to be enjoyed by them. This state of affairs continued up to the year 1842. In that year a grant was g
made by the Lieutenant-Governor of these provinces to the descendants of Rahmat Khan. It is on the interpretation of this document that the decision of this appeal depends. The case of the plaintiffs is that this was a grant in perpetuity to successive generations of the heirs of Rahmat Khan, according to the Mahomedan law of descent, that each holder or group of holders was entitled to hold the property thus granted only for his or their life or lives, that no alienation of any portion of the property by any holder or holders for the time being could, under the terms of the grant, be operative beyond the life or lives of the alienor or alienors, that each successive generation of descendants acquired under the grant itself an independent title to possess the estate during their lifetime, that such right therefore accrued to the first four h
plaintiffs on the death of Sardar Mohammad Khan on 9th September 1930 and to plaintiff 5 on the death of Mt. Iqbal Begam on 27th November 1924, that Ali Akbar Khan had in 1853 sold the village in question to one Karim Bakhsh, that Karim Bakhsh's heir, Ahmad Bakhsh had in the year 1903 sold it to Ismail Khan who was the predecessor-in-title of the defendants and that the plaintiffs by virtue of the right which, according to them, was conferred on them by the grant of 1842, were entitled to recover possession of the property from the defendants, the suit instituted on 22nd December 1934, being within 12 years of the deaths of Mt. Iqbal Begam and Sardar Mohammad Khan. Three separate written statements were filed by the defendants, one by defendant 1, another by defendant 2 and the third by defendants 3 and 4. The defendants denied every single allegation made by the plaintiffs. They also pleaded the bar of limitation, but the ground on which the plea was based was not quite the same in the different written statements.



The following issues were framed for trial in the Court below :

"(1) Whether the property in suit is part of a heritable, perpetual and inalienable Crown grant to Nawab Ali Akbar Khan ? (2) Are plaintiffs 1 to 5 b heirs of Nawab Ali Akbar Khan and have they any right to sue ? (3) Whether the grant, if any, was of land revenue only ? If so, whether the Court has any jurisdiction to try the suit ? (4) Whether the suit is barred by Art. 144, Limitation Act, and under 60 years rule of limitation ? (5) Whether the plaintiffs are entitled to any mesne profits, if so, how much ?"

The Court below answered all the issues in favour of the plaintiffs and decreed the suit as stated above. In the memorandum of appeal grounds have been taken challenging every finding of the Court below. At the commencement of the arguments before us, however, the points involved in issues 2 and 3 mentioned above were abandoned, and Sir Wazir Hasan, who appeared for the appellants, stated that the appellants wished to confine their submissions to the questions raised by issues 1 and c 4 framed by the Court below. In other words, the only point argued is the point of limitation, the decision of which depends on the interpretation of the grant made in 1842. So far as issue 5 is concerned, the right of the plaintiffs to recover mesne profits depends on their rights to recover possession and the amount of mesne profits has been fixed by the agreement as has been already stated. Thus, of the grounds taken in the memorandum of appeal, only the 2nd, 3rd, 5th and 6th have been pressed before us. The question that has been raised is as to the nature of the estate that was created by the grant of 1842. The document in question is a letter, bearing date 8th January 1842, from the officiating secretary to Government N. W. P. to the secretary to the Board of Revenue, conveying to the Board the orders of the Lieutenant Governor—in other d words, the Government : "regarding the rent-free lands held by the descendants and dependants of Hafiz Rahmat Khan in the Districts of Bareilly, Pilibhit and Moradabad." We are concerned with the District of Bareilly, and village Gauntia, out of which village Murshidabad has been carved, is at serial No. 35 among the properties of this District. The relevant portion of this document, on the construction of which the decision of the case depends, is contained in para. 2, and is in these words :

"The Lieutenant Governor considers that all the tenures now in the possession of the family, viz., from Nos. 1 to 43, . . . must be declared released in perpetuity to heirs general, under the Mahomedan law of descent, with a distinct proviso that no tenure now declared released in perpetuity can be alienable by an incumbent for any period longer or beyond his individual life."

Before proceeding further, I consider it desirable to quote Ss. 2 and 3, Crown Grants Act (15 of 1895). They are as follows :

"2. Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of her Majesty the Queen Empress, her heirs or successors, or by or on behalf f of the Secretary of State for India in Council to, or in favour of, any person whomsoever, but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

3. All provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

It is clear therefore that grants made by the Crown are not in any manner affected by the rules which govern transfers of immovable property made by persons other than the Crown and are entirely independent of those rules. The nature of the estate created by a Crown grant has therefore to be determined by the interpretation of the words used in g the document embodying the grant and not by reference to the rules which govern other transfers of property. Sir Wazir Hasan has sought to construe the document with which we are concerned in the light of the rules prevailing in England and has used technical terms of English law, such as "estate of inheritance," "words of limitation," "fee simple," "life tenant," etcetera. He has even pressed into service the rule laid down in (1851) 1 Rep. 93*b*[1] and has relied on the explanation of that rule to be found in Lord Davey's opinion in (1897) A. C. 658[2] at pp. 684-685. It may be pointed out that the rule in (1851) 1 Rep. 93*b*[1] was abolished in England by S. 131, Law of Property Act of 1925 as the provisions of S. 60 of that Act removed the necessity for the rule. He has contended that the estate taken under the grant in 1842 by Ali Akbar Khan, who h was the descendant of Rahmat Khan then in being, was an "estate of inheritance" or an estate "in fee simple" and that the words in the grant, "heirs general under the Mahomedan law of descent," are "words of limitation" and not "words of purchase." I do not propose—indeed, I do not consider it desirable — to get involved in these highly technical terms of English law. As was pointed out by their Lordships of the Privy Council in 52 I. A. 294[3] at p. 301: "Such analogies are rarely helpful and very frequently they are misleading." I shall therefore construe the document in question according to its plain tenor.

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1. (1851) 1 Rep. 93*b*, Shelley's case.
2. (1897) 1897 A. C. 658 : 66 L. J. Q. B. 745 : 77 L. T. 170, Van Grutten v. Foxwell.
3. ('25) 12 A. I. R. 1925 P. C. 184 : 88 I. C. 347 : 52 Cal. 971 : 21 N. L. R. 117 : 52 I. A. 294 : 23 A. L. J. 667 (P. C.), Subhan Ali. v. Imami Begum.

a Sir Wazir Hasan's first argument is that a "complete estate of inheritance" was conferred on Ali Akbar Khan by the grant of 1842. In other words, the contention is that Ali Akbar Khan took an absolute estate under the grant. In fact the actual words used by Sir Wazir were : "This is a case of a clear fee simple being granted." The object of this argument was to show that Ali Akbar Khan, being absolute owner of the property had an absolute power of disposal and that therefore the sale deed of 1853 conferred upon the vendee, Karim Bakhsh an indefeasible title and that, at all events upon the expiry of 12 years from the date of the sale, the title of Karim Bakhsh and his successors could not be questioned by anybody. This, however, is clearly an untenable contention. By the very terms of the grant, none of the tenures, declared "released" in perpetuity by it, could be alienated by an incumbent b "for any period longer or beyond his individual life." Thus, neither Ali Akbar nor those who were to come after him were given an unrestrained power of alienation, which is of the very essence of an estate of inheritance or in fee. The first argument of the learned counsel cannot therefore be accepted.

The second argument put forwerd on behalf of the appellants is this. It is urged that, even if a series of life-tenancies be taken to have been created—which, it is made clear, is not admitted—each life-tenant took by inheritance from the last life-tenant in other words, each life estate came to the successor as an heir of the last life estate holder and not by any independent right in himself. It is argued that adverse possession, therefore, commenced at the moment of the transfer. The contention is c that Ali Akbar lost his right to sue in 1865 and even his sons and daughter never had any right to sue, much less their descendants. I am unable to accept this argument. The moment it is admitted that a series of life-tenancies was created, it becomes impossible to argue that any heir or group of heirs got the right to come into possession of the property by inheritance to the heir or group of heirs immediately preceding, in other words, that any heir or group of heirs claims through the preceding heir or groups of heirs. The possession of Ali Akbar's vendee could not therefore be adverse to those who, under the terms of the grant, were to become entitled to come into possession of the property upon the death of Ali Akbar. The argument that the right to sue did not accrue to the sons and daughter of Ali Akbar when the latter died in 1895, as the right had become extinguished for all time to come d in 1865, is not correct.

It is then argued—and this is the last argument —that even if a right to sue did accrue to the sons and daughter of Ali Akbar on his death in 1895, those sons and daughter having admittedly never exercised that right during their lives which lasted for more than 12 years after 1895, the right became extinguished, not only so far as the sons and daughter of Ali Akbar were concerned, but also so far as their descendants are concerned. This argument also is in my opinion unsound, and my reasons for this view are the same as those given in connexion with the second argument of Sir Wazir Hasan. Unless it can be held that the present plaintiffs claim through their father and mother, it is not in my judgment possible to hold that the failure of their father and mother to sue has extinguished their right to recover possession of the property. These are the three grounds on which Sir Wazir Hasan has based his contention that the suit was barred by time.

e An analysis of the second paragraph of the grant yields the following results : (a) that the properties mentioned in the document were granted in perpetuity to the descendants of Rahmat Khan, the person in existence at the time of the grant being Ali Akbar Khan ; (b) that in order to find out the person or persons entitled to possession of the property on the death of a holder, it must be seen who the heirs of the last holder are under the Mussalman law ; (c) that each successive holder or group of holders shall be entitled to remain in possession only for his life or their lives ; and (d) that if any holder of the property makes an alienation of any portion of the property in his or her possession, such alienation shall cease to be operative upon the death of the alienor.

In my judgment the grant created a succession of independent life estates, beginning with Ali Akbar. f I am not using the expression of 'life estate' in any technical sense, but merely in the sense of an estate which is only enjoyed by the holder thereof during his life and which cannot be transferred by him for any period beyond his life. The successive life estate holders were nominated by words of description. Each successive life estate holder derived title, not from or through the previous holder, but directly from the grant. He has, of course, to answer to the description given in the grant which happens to be that he should be an heir according to the personal law by which the family was governed. The intention of the Government in making this grant must, in my opinion, be taken to have been to keep the property in the family of Rahmat Khan for the maintenance in perpetuity of his descendants, and to prevent strangers from coming in.

g The argument which has been strongly pressed on behalf of the appellants is this. It is said that, if the construction contended for by the plaintiffs is placed upon the grant, the result would be that a transferee from any particular holder of the property would be liable to be ejected after the lapse of many decades, may be centuries, even though successive generations of descendants of Rahmat Khan have come and gone, without assailing the transfer. In the present case itself, it is pointed out, the transfer was made as far back as 1853, and one generation of the descendants did not attack that transfer. All this is quite correct. The question remains, however, whether these considerations can justify a refusal to recognise the right which the grant, if the construction placed by me upon it is correct, confers upon the plaintiffs. In my judgh ment they cannot. In the first place, there can, in my opinion, be no doubt that the Crown has the right to create any kind of estate unfettered by the rules which apply to ordinary transfers. In the second place, any one who chooses to take a transfer from a person whose right to make the transfer is limited does so with his eyes open and deliberately runs the risk of being ejected at the suit of those who have the right to eject him. The fact that certain persons who also had the right to eject him, failed to do so cannot enlarge the right of the transferee, provided, of course, that those who do ultimately seek to eject him have the right to do so. I am satisfied that if the appellants' contention is accepted the very object of the grant will be defeated.

Learned counsel for the parties have referred to a number of decided cases. Sir Wazir Hasan besides citing (1851) 1 Rep. 93*b*,[1] and the case in (1897) A. C. 658[2] already mentioned, has cited the judgments of the Judicial Committee in 23 A. L. J. 667

=52 I. A. 294[3] at p. 301, 1936 A. L. J. 977,[4] 1938 A. L. J. 301,[5] 37 I. A. 168[6] and 50 I. A. 265.[7] He has also referred to the decision of the Chief Court at Lucknow in A. I. R. 1930 Oudh 481[8] and to that of the Bombay High Court in 55 Bom. 21.[9] None of these cases, in my opinion, affords any assistance in the decision of the case before us. It is not possible to construe the document which we have to construe in the light of the construction placed upon another document, in another case, or in the light of observations made in cases which were concerned with the interpretation of the sections of the Oudh Estates Act or with debutter or watan properties. Mr. P. L. Banerji for the plaintiffs-respondents has, in the first instance, placed reliance on four judgments of this Court in cases which related to properties covered by this very grant. Two of those judgments are on the record of this case and are printed at pages 104 and 120 of the paper book. They are both Bench decisions, the first being in Second Appeal No. 290 of 1921 and the other in Second Appeal No. 1140 of 1929. Learned counsel has read the judgments of the other two cases from copies which he had with him. One of them was the decision of a learned single Judge on 19th January 1939 in Second Appeal No. 236 of 1937 and the other a decision by a Bench on 29th April 1941 in First Appeal No. 262 of 1936. The contention is that these judgments embody rulings bearing on the question which we have to decide. An examination of these judgments, however, revealed—and learned counsel agreed—that the first three of the four cases mentioned above—namely, the decisions in the three second appeals—did not deal with the precise question which has arisen before us. The judgment dated 29th April 1941 in First Appeal No. 262 of 1936 does deal with this matter. The conclusion at which I have arrived is in accord with the view taken in that case.

The respondents have also cited the following cases : 48 I. A. 302,[10] 9 Pat. 885,[11] 12 Pat. 251,[12] 31 All. 239,[13] 35 All. 211,[14] 51 All. 367,[15] 57 All. 159[16] and (1887) 18 Q.B.D. 565.[17] It does not, however, seem to me that any of these cases is really in point. It has been argued on behalf of the appellants that if the decree of the Court below is upheld the result will be that the statute of limitation can never apply to a claim, brought by a descendant of Rahmat Khan for recovery of possession over any of the properties covered by this grant, against a transferee. This is correct in one sense and not correct in another. If any such descendant does not, within 12 years of his becoming entitled to possession on the death of the last preceding incumbent, attack a transfer made by any of his predecessors, his right to recover the property for himself will be barred. But that will not bar the right of any of those coming after him. My conclusion is that the decree passed by the Court below is correct. I would therefore dismiss this appeal with costs.

ALLSOP J. — The question in this appeal is whether the Government intended to grant a heritable estate to Ali Akbar Khan with a provision against absolute alienation or whether it intended to grant a series of independent life estates to him and his heirs and their heirs and so on for ever without creating an absolute remainder in anybody. If the Government had the latter intention the title to the estate must for ever remain in doubt because no judicial decision or rule of limitation can bind each succeeding generation. The Government can doubtless make a grant of any kind but I must confess to some reluctance in accepting their intention to produce an effect so manifestly contrary to public policy. On the other hand, it must be admitted if the former was the intention, that any holder of the estate could defeat the provision against alienation by the simple expedient of acquiescing in a trespass, unless a trespasser could be held to be prescribing only for the alienable life estate in which event the distinction between the two possible estates would lose its importance. My learned brother has found that the Court below is right and he is supported by a decision of two other Judges of this Court in a parallel case arising out of the same grant. In these circumstances I cannot differ from him and I concur in the order which he proposes to pass.

BY THE COURT. — The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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4. ('36) 23 A.I.R. 1936 P.C. 183: 162 I.C. 465 : 59 Mad. 809: 63 I. A. 261 : 1936 A. L. J. 977 (P. C.), Daivasikhamani Ponnambala Desikar v. Periyanan Chetti.

5. ('38) 25 A.I.R. 1938 P.C. 113: 173 I.C. 625 : 65 I.A. 137: 1938 A.L.J. 301: 32 S. L. R. 433 (P.C.), Suraj Kunwar v. Deo Singh.

6. ('10) 32 All. 599 : 7 I.C. 724 : 13 O. C. 316 : 37 I.A. 168 : 7 A.L.J. 1122 (P.C.), Debi Baksh Singh v. Chandra Bhan Singh.

7. ('23) 10 A.I.R. 1923 P.C. 160 : 76 I. C. 922 : 45 All. 596 : 50 I. A. 265 : 26 O. C. 257 (P. C.), Lal Ram Singh v. Deputy Commissioner of Partabgarh.

8. ('30) 17 A.I.R. 1930 Oudh 481: 132 I.C. 753: 6 Luck. 282 : 7 O. W. N. 1010, Abadi Begum v. Mohammad Khalil Khan.

9. ('31) 18 A. I. R. 1931 Bom. 24 : 129 I. C. 145 : 55 Bom. 21 : 32 Bom.L.R. 1398, Tuka v. Ganu.

10. ('22) 9 A. I. R. 1922 P. C. 123 : 65 I. C. 161 : 44 Mad. 831 : 48 I. A. 302 (P. C.), Vidya Varuthi Thirtha v. Balusami Ayyar.

11. ('30) 17 A.I.R. 1930 Pat. 455 : 127 I. C. 817 : 9 Pat. 885 : 11 P.L.T. 403, Naurangi Lal v. Ram Charan Das.

12. ('33) 20 A. I. R. 1933 P. C. 75 : 142 I. C. 214 : 12 Pat. 251 : 60 I. A. 124 (P.C.), Ram Charan Das v. Naurangi Lal.

13. ('04) 31 All. 239 : 3 I. C. 66 : 1904 A. W. N. 213, Richard Ross Skinner v. Durga Prasad.

14. ('13) 35 All. 211 : 19 I. C. 267 : 40 I. A. 105 : 11 A.L.J. 494 (P.C.), Skinner v. Nau Nihal Singh.

15. ('29) 16 A. I. R. 1929 P. C. 158 : 117 I. C. 22 : 51 All. 367 : 56 I. A. 192 (P. C.), James Richards R. Skinner v. Nau Nihal Singh.

16. ('35) 22 A.I.R. 1935 P. C. 44 : 153 I. C. 1100 : 57 All. 159 : 62 I. A. 47 (P. C.), Mahadeo Prasad Singh v. Karia Bharti.

17. (1887) 18 Q. B. D. 565 : 56 L. J. Q. B. 212 : 56 L. T. 687 : 35 W. R. 371, Pedder v. Hunt.

A. I. R. (29) 1942 Allahabad 405

YORKE J.

Ram Prasad — Plaintiff — Appellant

v.

Lalit Kishore — Defendant — Respondent.

Second Appeal No. 217 of 1941, Decided on 7th May 1942, from decision of Civil Judge, Farrukhabad, D/- 28th October 1940.

(a) Easement—Person relying on previously existing title cannot be allowed to fall back on

a plea of easement — Where he claims title by adverse possession he can plead alternative claim of easement.

A person who relies on a previously existing title cannot be allowed to fall back on an alternative plea of easement because if such a person had been exercising possession over a plot he would always have been exercising it as of right as owner and he can never plead that he had been exercising it with the intention of exercising it against and in spite of the wishes of a third person, the real owner. On the other hand, where the suggestion is that a person has exercised rights despite the real owner it may well be that he has failed to exercise those rights in such a manner as to effect an ouster and yet at the same time he may have exercised them so continuously and in such a manner as to establish an easement: ('26) 13 A. I. R. 1926 Mad. 728 (F.B.) and ('30) 17 A.I.R. 1930 All. 877, *Rel. on*; 34 Cal. 51 (F.B.) and 2 A.L.J. 59, *Ref.* [P 406*h*; P 407*a*]

b

(b) Civil P. C. (1908), S. 11—In previous suit plaintiff claiming title by adverse possession — Subsequent suit by plaintiff claiming easement — Decision in previous suit that land belonged to Government being incidental held could not operate as res judicata—Trial Court holding in subsequent suit that land was not proved to belong to Government — Appellate Court held not justified in upsetting that decision by relying on decision in previous suit.

In the previous suit the plaintiff claimed to have acquired a title by adverse possession. The sole question was whether in fact he had done so. In the subsequent suit by the plaintiff claiming a right of easement the trial Court held that it was not proved that the land belonged to Government:

c

Held that in the previous suit for the decision of question whether the plaintiff had acquired title by adverse possession it was not necessary to decide whether the land over which the right was claimed had previously belonged to the Government or to some one else and, therefore, although that point may have been incidentally decided, the decision could not be relied upon as res judicata on the point, and it was not open to the lower appellate Court to upset the trial Court's decision that it was not proved that the land belonged to Government merely by relying on the decision in the previous suit. [P 407*f*,*g*]

C. P. C. —

('40) Chitaley, S. 11 N. 13 Pt. 1.

d ('41) Mulla, Page 41 Note "Matter collaterally or incidentally in issue."

(c) Easements Act (1882), S. 15, last paragraph —Claim in S. 15, last paragraph refers to claim in suit made either in reply to suit or affirmatively by plaintiff — Plaintiff exercising his rights as easement for over 20 years against defendant's predecessor-in-interest and claiming them in suit against private person—Plaintiff's right must be taken to have become absolute whether defendant's predecessor-in-interest was Government or not.

The claim referred to in S. 15, last paragraph must mean a claim in a suit and the claim may be made either in reply to a suit or affirmatively by the plaintiff. Just as Art. 149, Limitation Act, confers a specific privilege upon the Secretary of State so also does the last paragraph of S. 15, Easements Act. It follows that once the plaintiff established that he had exercised his rights as an easement against the predecessor-in-interest of the defendant for over 20 years whether that predecessor in-interest was the Government or not, his rights at the time when they were claimed in a suit against a private person must be taken to have become absolute since that private person could not claim the privilege which is the personal privilege of the Government: ('29) 16 A. I. R. 1929 All. 382, *Rel. on*; ('18) 5 A. I. R. 1918 Mad. 120, *Dissent.*; ('24) 11 A.I.R. 1924 Cal. 394, *Ref.* [P 408*g*,*h*] e

J. Swarup — for Appellant.

S. N. Verma — for Respondent.

JUDGMENT. — This is a plaintiff's second appeal in a suit for injunction to restrain the defendant from interfering with certain rights claimed by the plaintiff by way of easement over a plot of land situated between his house and the public road. This was land which belonged to the Municipal Board but has been sold by it to the defendant. The defendant pleaded that the plaintiff had once before made a claim in respect of this land alleging himself to be the owner of it and his present claim was barred by the decision of the former suit. He further claimed that the use of and the constructions made by the plaintiff on this land were new and the plaintiff had not acquired any rights. The trial Court held that the prior decision did not affect the relief of establishing a right to flow water over this land or the right of way. The learned Munsif went on to consider the question whether the plaintiff had acquired a right of easement and he held that the plaintiff had exercised the rights which he claimed over this land for more than 20 years and that as the Government was not the defendant, that period was sufficient to establish his rights. He accordingly decreed the claim holding that the plaintiff might continue to discharge water from two parnalas on to this land, that he could maintain a drain across it and a latrine and Chhajja and had a right of way over it to the public road and to the latrine. He, however, confined the exercise of the right of way to certain specific areas demarcated on the map which formed part of the decree. Upon an appeal by the defendant, the learned Civil Judge of Farrukhabad has dismissed the plaintiff's suit. The most important finding at which he has arrived is that as the right of easement had previously been exercised against Government, a period over 20 years was not sufficient to make the right absolute, despite the fact that the defendant to the suit was not Government. Incidentally in arriving at this decision, he has relied on the decision in the previous suit as a decision that the land in suit belonged to the Government before it was transferred by the Municipal Board to the defendant. In other respects he has agreed with the trial Court that the decision in the previous suit could not bar the present suit. f g h

The first point for consideration in the present appeal is whether it was open to the plaintiff, having failed in a suit to establish his ownership of this property, to fall back upon a plea that he had rights of easement over it. In this connexion it is important to consider what the plaintiff's claim was in the previous suit. He had there alleged that he had ownership over this disputed plot *malikana wa mokhalifana*. It seems to me clear that by this statement he was not relying upon a previously existing title. What he was pleading was that he had been exercising certain rights or some sort of user over this land which had resulted in the ouster of the rightful owner and which user had ripened by the passage of time into an absolute ownership. It would, I think, be difficult to say that some one who relied on a previously existing title, as for

example by a purchase 20 or 30 years back, could be allowed to fall back on an alternative plea of easement because if such a person had been exercising possession over a plot he would always have been exercising it as of right as owner and he could never plead that he had been exercising it with the intention of exercising it against and in spite of the wishes of a third person, the real owner. On the other hand, where the suggestion is that a person has exercised rights despite the real owner it may well be that he has failed to exercise those rights in such a manner as to effect an ouster and yet at the same time he may have exercised them so continuously and in such a manner as to establish an easement. This view seems to me to be fully in accordance with the view taken in the Full Bench case of the Madras High Court, 49 Mad. 820,[1] the headnote of which runs as follows :

"An easement by prescription is capable of being acquired only if the user during the statutory period had been with the animus of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same. But a mere assertion of ownership in prior legal proceedings while the enjoyment was really as an easement is not conclusive against a right of easement."

It has been held by the Full Bench of the Calcutta High Court in 34 Cal. 51,[2] that "a suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights, (1) of ownership and (2) of easement."

The foundation of such a case, it was noted by one of the Judges, is as follows :

"In a case like the present a plaintiff may very well allege bona fide: 'I believe the land to be mine, but I may be unable to prove it; if I should fail to prove it I can at any rate prove that I have been using the right of way as an easement uninterruptedly and as of right for over 20 years.'"

There is of course some difference of view between this and the Madras case because in such a case the plaintiff will not have had the animus of using or possessing the land in derogation of the rights of a third person. There are two cases of this Court on the point and I am, in any case, bound by the case in 2 A. L. J. 59.[3] The headnote is as follows :

"The fact, that the plaintiff asserted a right of ownership over a land, which he afterwards found did not exist and in consequence of which he withdrew his suit, does not preclude the plaintiff from claiming a right of easement. If the plaintiff had enjoyed the right of user, of a land, for such a long period as is sufficient to confer on him a right by prescription, the circumstance that in a previous suit he had erroneously stated that he was the owner, would not deprive him of the right of easement which he had acquired."

Similarly, in 1930 A.L.J. 1537,[4] it was held that :

"A suit was not liable to dismissal because the plaintiff claimed in the alternative over the same plot of land both by rights of ownership and of easement. In order that the user should be 'as an easement and as of right,' it is absolutely essential that the said right should be claimed over the property of another and for the beneficial enjoyment of a property which belongs to the owner. From the very nature of the conception, easement is rather a fringe to property than property itself (S. 15, Easements Act). The question of animus is in each case a question of fact. Where the owner of one property exercises certain rights of enjoyment over the property of another for the beneficial enjoyment of the former, he must be presumed to possess an animus which is manifestly to his advantage."

This decision seems to me to bring out clearly the point on which I have laid some stress earlier and possibly to throw some doubt on the form in which the point has been put in this Court in the earlier case. It does not, however, cause any difficulty in the present case because the plaintiff never alleged that the property in dispute was his own property by origin. He claimed only to have acquired rights over it either by the exercise of adverse possession or by the exercise of certain kinds of user. Coming now to the second point, the first thing to notice is that the learned civil Judge has assumed that Government was the owner of this land before it was transferred by the Municipal Board to the defendant and he has based his finding upon the decision in the previous suit. In so doing he has, I think, made a mistake. In the previous suit the plaintiff claimed to have acquired a title by adverse possession. The sole question was whether in fact he had done so. For the decision of that question it was not necessary to decide whether the land over which the right was claimed had previously belonged to the Government or to someone else and therefore although that point may have been incidentally decided, the decision could not be relied upon as res judicata on the point. The learned Munsif has held that it was not proved that this land was Government land and it was not open to the lower appellate Court to upset that decision merely by relying on the decision in the previous suit. It follows that the very foundation of the view taken by the learned Munsif that the plaintiff had exercised his rights prior to the transfer as against the Government and therefore those rights had not become absolute is missing from the case. However, for the sake of argument let it be assumed that that point could be decided in favour of the defendant, still we have to be certain whether the view of the lower appellate Court that the plaintiff's rights had not become absolute because they had been exercised in the first instance and for the bulk of their life against the Government is correct. The learned Munsif had relied upon the decision of a single Judge of this Court in A. I. R. 1929 All. 382[5] in which it was held that "the provision in S. 15, Easements Act, requiring 60 years' use to establish an easement refers to the date when the easement is claimed."

Section 15, Easements Act, provides :

" where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years, ...

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next

1. ('26) 13 A.I.R. 1926 Mad. 728 : 96 I. C. 968 : 49 Mad. 820 (F.B.), Subba Rao v. Lakshmana Rao.
2. ('07) 34 Cal. 51 : 4 C.L.J. 437 : 11 C. W. N. 20 (F.B.), Narendra Nath v. Abhoy Charan.
3. ('05) 2 A.L.J. 59: 1905 A. W. N. 18, Chadammi Lal v. Shib Charan.
4. ('30) 17 A.I.R. 1930 All. 877 : 128 I. C. 755 : 53 All. 16 : 1930 A.L.J. 1537, Dwarka v. Ram Jatan.
5. ('29) 16 A.I.R. 1929 All. 382 : 116 I. C. 806, Municipal Board, Pilibhit v. Khalil-ul-Rahman.

before the institution of the suit wherein the claim to which such period relates is contested."

Then follow four Explanations and after them there is a final paragraph which runs as follows :

"When the property over which a right is claimed under this section belongs to Government, this section shall be read as if for the words 'twenty years,' the words 'sixty years' were substituted."

Now it seems to me that as this section is framed, the claim must mean a claim in a suit and the claim may be made either in reply to a suit or affirmatively by the plaintiff. The view taken by Ashworth J. in the reported case seems to be in accordance with the wording of the section, but there can be no doubt that the remark was obiter. This is shown by the wording of the judgment where he says: "So at the date of the suit the land belonged to the board. The provision in S. 15 requiring 60 years use to establish an easement refers to the date when the easement is claimed. It would not therefore be open to the appellant to plead that at some period antecedent to the bringing of the suit the road belonged to Government. Even if this might be argued it has not been argued." It seems to me that the last paragraph of this section prima facie gives a personal privilege to the Government when the Government is plaintiff or defendant in the suit just in the same way as by Art. 149, Limitation Act, a period of limitation of 60 years is prescribed for any suit by or on behalf of the Secretary of State, the effect of which is that a trespasser has to show 60 years' adverse possession against the Government whereas he would have only to show 12 years' adverse possession against a private person. As against this decision, which has not been supported by any discussion or argument, reliance has been placed on a Bench decision of the Madras High Court in 41 Mad. 622.[6] That was a case where the servient tenement had belonged to the Government until two years before the suit and was then assigned by the Government to the defendant. At the time of assignment the easement had been exercised only for 30 or 40 years and had therefore not become absolute as against the Government. The appellant contended that the transfer of ownership had the effect of rendering it absolute inasmuch as the servient tenement became the property of a private individual against whom the previous 30 or 40 years enjoyment would be sufficient under S. 15, Easements Act. The learned Judges rejected that contention and they said :

"We think the words 'belongs to Government' in the last paragraph of S. 15 must refer, not to the time of suit but to the time during which the easement is enjoyed. An easement can only be acquired by 20 years enjoyment against a private person or by 60 years enjoyment against Government. Here neither condition is satisfied." They went on to say: "If we adopted the view contended for by the appellant, we should have to hold that the transfer of of the servient tenement by a private owner to Government would have the effect of destroying any easement right, which had been legitimately acquired by 20 years enjoyment but which had not been enjoyed for the period of 60 years required as against Government."

I must confess that it seems to me impossible to read the words in the last paragraph of S. 15, Easements Act, in this way. The words are: "When the property over which a right is claimed under this section belongs to Government" and it seems to me that the question of claim only arises when there is a suit, vide the last paragraph preceding the explanations. As to the danger suggested towards the end of the judgment in the Madras case, that is a question which may be decided when it arises. In actual fact, it is not a question which is likely to arise at all frequently because transfers by private owners to Government are the result for the most part of proceedings under the Land Acquisition Act and in such cases Government gets the land free from all encumbrances. The argument put forward on behalf of the respondent is that at the date of the transfer by Government to its transferee the plaintiff had not so far acquired any rights against the transferor by his 20 years user. It follows that to get them against the transferee he will have to begin again. That however does not appear to me to be the intention of the section. Learned counsel for the appellant has relied upon the analogy of certain suits by assignees of property from Government and also on the analogy of the position of transferees from a minor, for example in cases where a trespasser has had more than 12 years adverse possession against the minor but the minor's right to sue still subsists. It is not in dispute that if the minor makes a transfer to a third person that transferee's suit will be barred by limitation. Similarly it has been held in A. I. R. 1924 Cal. 394[7] that where a purchaser of land from Government sued to recover possession within 60 years but after more than 12 years from the commencement of adverse possession although within 12 years of purchase, the suit was barred and there was only 12 years limitation under Art. 144. The period which has run against the plaintiff's predecessor-in-title, in this case the Government, must be reckoned against the plaintiff and it was pointed out in this case that the answer to the argument that this led to an anomaly was, as is often the case, a practical one, namely, that when a conveyance of property is taken from Government, against whom other persons are in adverse possession, it should not be taken until the Government has instituted proceedings and obtained an order for possession and is in a position to transfer the property free from such blot on the title.

I am clearly of opinion that just as Art. 149, Limitation Act, confers a specific privilege upon the Secretary of State so also does the last paragraph of S. 15, Easements Act. It follows that once the plaintiff established that he had exercised his rights as an easement against the predecessor-in-interest of the defendant whether that predecessor-in-interest was the Government or not, his rights at the time when they were claimed in a suit against a private person had become absolute since that private person could not claim the privilege which is the personal privilege of the Government. In my judgment, therefore, the learned Civil Judge has wrongly held that the plaintiff had not acquired the easement claimed by him. I accordingly allow this appeal, set aside the decision of the lower appellate Court and restore that of the trial Court. The plaintiff will be entitled to his costs in all the three Courts.

I should note that learned counsel for the defendant has put forward the argument that the plaintiff could not have a right of easement to maintain a latrine on the land in suit. It will be sufficient to say that he did not attempt to substantiate this pro-

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6. ('18) 5 A. I. R. 1918 Mad. 120 : 45 I. C. 98 : 41 Mad. 622 : 34 M. L. J. 396, Srinivasa Upadya v. Ranganna Bhatta.

7. ('24) 11 A.I. R. 1924 Cal. 394 : 81 I. C. 675 : 28 C. W. N. 66, Annada Mohan v. Kina Das.

position. As the point in regard to the interpretation of the last paragraph of S. 15, Easements Act, is one of some importance, I grant permission for a Letters Patent Appeal.

G.N./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Allahabad 409

ALLSOP AND VERMA JJ.

Sana Ullah — Plaintiff

v.

Jai Narain Singh and another — Defendants.

Misc. Case No. 642 of 1941, Decided on 16th April 1942; reference as per letter No. 1005/XV of Dist. Judge, Gorakhpur, D/- 17th November 1941.

Mortgage — Usufructuary mortgage of occupancy rights void as being contrary to statutory provisions — Mortgagee dispossessed by landlord through Court — Mortgagee can recover amount advanced only under S. 65, Contract Act — Cause of action arises at date of agreement—Suit filed beyond three years is barred—S. 68, T. P. Act, does not apply.

Where in the case of a usufructuary mortgage of occupancy rights which is void from its inception as being in contravention of the statutory provisions the mortgagee is dispossessed by the landlord through the intervention of the Court, the mortgagee can have no claim against the mortgagor for the amount advanced from the mere act of dispossession because the mortgagor did not dispossess him. Nor can he have any claim against the mortgagor under S. 68, T. P. Act, because there never was a valid mortgage. The only provision under which the mortgagee can lay claim to the amount advanced is S. 65, Contract Act. [P 409*f*,*g*]

In such a case there can be no question of any contract having become void under S. 65 because there was never a contract. The agreement being void in its inception must, in the absence of special circumstances, be considered to have been discovered to be void at the time when the parties entered into it. The parties must be deemed to have been aware of the statutory provisions and it must be assumed that they knew that the agreement was void when they entered into it. The cause of action to recover the amount advanced must therefore be taken to have arisen at the time when the parties entered into the agreement: ('23) 10 A.I.R. 1923 P. C. 189, *Rel. on.* [P 409*g*,*h*]

Even if the amount advanced is considered to be an advantage received by the mortgagor the cause of action under S. 65 must be taken to have arisen when the void agreement was entered into. [P 410*b*]

T. P. Act—

('36) Mulla, Page 433 Note "Sub-s. (1), Clause (c).

('34) Mitra, Page 424 N. 420.

M. Waliullah — for Applicant.

Shiva Prasad Sinha and N. D. Pant — for Defendants.

ALLSOP J.—This is a reference under O. 46, R. 1, Sch. 1, Civil P. C. It arises out of a suit in the Court of small causes at Deoria. One of the defendants and the predecessor-in-interest of the other executed a deed of usufructuary mortgage on 27th May 1926, in favour of the predecessor-in-interest of the plaintiff. This mortgage was intended to secure debt of Rs. 99-15-0 and the property mortgaged was an occupancy holding. The mortgagee was put into possession and remained in possession for many years. Ultimately the proprietor of the land ejected the so-called mortgagors and the so-called mortgagee under the provisions of S. 171, Agra Tenancy Act. The latter then instituted the suit which has given rise to this reference in order to recover the sum of Rs. 99-15-0 from the defendants. The learned Judge of the Court of small causes has said that the suit is presumably brought under the provisions of S. 65, Contract Act. He has suggested that the questions raised are of considerable importance and that they are not free from difficulty and doubt. He has, therefore, referred two matters to us. The first is whether a mortgagee under a void mortgage of occupancy plots, on being dispossessed by the landlord through the Court, can recover the amount advanced under S. 65, Contract Act, within three years of the date of dispossession.

We may at this stage say that the suit was instituted in the year 1941 and we are satisfied that the suit is barred by limitation. It has been urged before us that the plaintiff first obtained a right to recover the money which has been advanced to the defendants at the time when they were ejected from the land which was the subject-matter of the deed of mortgage. We cannot discover any ground for this contention. The plaintiff could have no claim againt the defendants from the mere act of dispossession because they did not dispossess him. He could have no claim against them under the provisions of S. 68, T. P. Act, because obviously there never was a valid mortgage. A mortgage of occupancy right is and was forbidden by law and the agreement was therefore void in its inception. If the alleged mortgagor had himself ejected the mortgagee there might possibly have been some cause of action under the provisions of S. 64, Easements Act, but this is a question upon which we need express no opinion. In the present case it seems clear to us that the plaintiff could have no claim against the defendants except under the provisions of S. 65, Contract Act. The provisions of that section come into play when an agreement is discovered to be void or when a contract becomes void. In the case before us there is no question of any contract having become void because there never was a contract. The question is when it was discovered that the agreement was void. Now in accordance with the decision of their Lordships of the Privy Council in 50 Cal. 929,[1] an agreement which is void in its inception is ordinarily to be considered to have been discovered to be void at the time when the parties entered into it.

It has not been alleged in this case that any special circumstances are in existence from which it could be inferred that the agreement was discovered to be void at some later date. The agreement was void under the provisions of the Agra Tenancy Act which was in force at the time when the parties entered into the agreement. It is an established principle of law that no person can plead ignorance of a statute. The parties must therefore be deemed to have had information of the provisions of the statute in the year 1926 and consequently it must be assumed that they knew that the agreement was void when they entered into it. The result is that the cause of action arose at the time when the parties entered into the agreement. There are only two elements which are necessary in order to enable a person to make a claim under the provisions of

1. ('23) 10 A.I.R. 1923 P.C. 189 : 74 I.C. 499 : 50 Cal. 929 : 50 I.C. 239 (P.C.), Annada Mohan Roy v. Gour Mohan Mullick.

S. 65, Contract Act, namely, (1) that the agreement has been discovered to be void or that the contract has become void and (2) that the other party has received some advantage under the agreement or contract. The advantage alleged in this case is that the defendants or their predecessors-in-interest obtained a sum of Rs. 99-15-0 from the plaintiff. That sum was paid at the time when the alleged deed of mortgage was executed. Consequently, the fact that the agreement was void and the fact that the defendants had received an advantage under the agreement were both in existence in the year 1926, i. e., 15 years before the suit was instituted. Learned counsel for the plaintiff has urged that he could not claim the money so long as he was in possession of the property. It may be that he did not feel inclined to claim the money so long as he was in possession but the fact that he was in possession of the property would not have prevented him from instituting a suit to recover the advantage received by the other party provided it was an advantage. It may be that the Court, if such a suit was filed, might have put the plaintiff upon terms and refused to give him a decree until he had returned the property or it might have held that the advantage was not so great as that alleged by the plaintiff, but the fact remains that the cause of action of the plaintiff arose when the void agreement was entered into and when the money was paid to the defendants or their predecessors-in-interest. No cause of action as against the defendants arose at the time when the plaintiff was ejected by the proprietor of the land.

In our judgment, the answer to the first question put to us by the learned Judge of the Court of Small Causes is that the alleged mortgagee under a void mortgage of occupancy plots can recover the amount advanced under the provisions of S. 65, Contract Act, within some period beginning from the execution of the agreement of mortgage. For the purposes of the case with which we are dealing, it is unnecessary to decide what that period is. In order to arrive at such a decision it would be necessary for us to discover which article of the Limitation Act applies. We are not called upon to make any enquiries into that question because it is not contended that any article could apply which would give a period of more than six years from the date when the cause of action accrued and whatever article might be applied it is obvious that the period of limitation had expired long before the suit was instituted. We are of opinion that the cause of action arose and time began to run at the date when the alleged deed of mortgage was executed.

The second point which has been put to us is whether an alleged mortgage of occupancy plots amounts to a loan under S. 2, sub-s. (9) of Act 13 of 1940. In view of our decision on the first point the second point does not arise. We, therefore, express no opinion on that point. Our order shall be conveyed to the learned Judge of the Court of Small Causes. The costs in this Court will be regarded as costs in the suit.

G.N./R.K. *Order accordingly.*

*** A. I. R. (29) 1942 Allahabad 410**

MOHAMMAD ISMAIL AND MULLA JJ.

Har Sarup after his death Bhagwati Sarup and others — Appellants

v.

Anand Sarup after his death B. Govind Sarup and others — Respondents.

First Appeals Nos. 501, 373 and 500 of 1930, Decided on 18th February 1942, from decision of Addl. Sub-Judge, Moradabad, D/- 10th March 1930.

(a) Civil P. C. (1908), O. 2, R. 2—Whether subsequent suit is founded upon same cause of action as previous suit is question of fact to be decided on facts of each case—Owner's right to maintain possession over particular item of property is distinct from his right to recover possession of other property from which he has been ousted by trespasser—Infringement of two separate rights by two separate acts of trespass by same trespasser—There are two separate causes of action—Separate suits are not barred by O. 2, R. 2.

The question whether a subsequent suit is founded upon the same cause of action on which a previous suit was based is essentially one of fact and must be determined upon the facts of each case. The right of an owner to maintain his possession over a particular item of property is quite distinct and apart from his right to recover possession of another item of property from which he has been ousted by a trespasser. Where there is an infringement of two separate rights by two separate acts of trespass which cannot be said to have formed part of the same transaction committed by the same trespasser there must be two separate causes of action, and a suit in respect of the one will not be barred by a prior suit in respect of the other by O. 2, R. 2, because O. 2, R. 2 does not make it incumbent upon the plaintiff to combine separate causes of action in the same suit. All that it lays down is that the plaintiff must "include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." ('42) 29 A. I. R. 1942 All. 122, *Disting.; Case law discussed.* [P 417*g*; P 418*b*,*c*; P 419*a*]

C. P. C. —

('40) Chitaley, O. 2 R. 2 N. 7; O. 2 R. 2 N. 23 Pts. 1, 2.

('41) Mulla, Page 529 Pts. (h) to (k); Page 533 Pts. (j), (k).

(b) Civil P. C. (1908), S. 11—Suit by son claiming certain property not only on his own behalf but also on behalf of his father and brothers—Suit dismissed on only ground that plaintiff failed to sue within three years of his attaining majority — Subsequent title suit by father in respect of same property is not barred by res judicata.

Where a suit by the son claiming certain property not only on his own behalf but also on behalf of his father and brothers was dismissed on the only ground that the plaintiff had failed to sue within three years of attaining his majority and the question of title raised by the plaintiff was never finally decided, a subsequent title suit in respect of that property brought by the father is not barred by res judicata. [P 419*d*]

C. P. C. —

('40) Chitaley, S. 11 N. 105 Pt. 1.

('41) Mulla, Page 80 Note "The decision in the former suit must have been one on the merits."

a * (c) Civil P. C. (1908), S. 11, Expl. 4—Constructive res judicata—Applicability—Identity of subject-matter is not necessary: 1930 A. L. J. 1572=('31) 18 A. I. R. 1931 All. 73=129 I. C. 734, *OVERRULED.*

If the decree made in the earlier suit is such as would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of res judicata, a final decision by necessary implication, otherwise the rule of constructive res judicata as formulated in S. 11, Expl. 4 would be rendered almost nugatory. In questions of res judicata, identity of the issues and not identity of the subject-matter is relevant. To say that there would not be a constructive res judicata unless the subject-matter be identical would be b to introduce in Expl. 4 to S. 11, words which are not to be found there : 1930 A. L. J. 1572=('31) 18 A. I. R. 1931 All. 73=129 I. C. 734, *OVERRULED* ; ('25) 12 A. I. R. 1925 P. C. 55; 157 I. C. 381 (Cal.) and 24 All. 112, *Rel. on*; 24 Cal. 711 *(Judgment of Banerji J.)* and 28 Cal. 17, *Not approved.* [P 421*a*]

C. P. C. —

('40) Chitaley, S. 11 N. 33.

('41) Mulla, Page 46 Pt. (u); Page 47 Pts. (y), (z); Page 57 Pt. (w).

(d) Estoppel—Death of widow — Mutation proceedings—Widow's brother's son *P* recognising widow's son's right to property A and in lieu thereof obtaining mutation in his favour of other property B belonging exclusively to widow and to which he was not otherwise entitled and c subsequently selling it in satisfaction of his own debts—*P* is estopped from denying title of widow's son to property A.

Where on the death of the widow her brother's son *P* recognized the right and title of the widow's son to property A and in lieu thereof obtained mutation in his favour of property B which belonged exclusively to the widow and to which he was not otherwise entitled and subsequently sold property B in satisfaction of his own debts, *P* is estopped from denying the title of the widow's son to property A. [P 421*c*]

S. N. Seth and B. S. Darbari — for Appellants.

G. S. Pathak, Shabd Saran, Waheed Ahmad Khan and Krishna Murari Lal —

for Respondents.

d MULLA J. — These three connected appeals arise out of three consolidated suits which have been decided by an Additional Subordinate Judge at Moradabad by one and the same judgment, dated 10th March 1930. Of these suits, the principal one and also the first in point of time is Suit No. 164 of 1928 which has given rise to Appeal No. 501 of 1930. This suit was instituted on 11th December 1928 by one Har Sarup who was the appellant in Appeal No. 501 of 1930 but who is now dead and is represented by his three sons, Bhagwati Sarup, Narain Sarup and Harnam Sarup. The sole defendant in this suit was one Anand Sarup, a brother of Har Sarup, who also died during the pendency of this litigation and is now represented by his two sons, Govind Sarup and Madhu Sudun Saran, and seven others who are his grandsons. This is a suit for possession of six items of zamindari property as given below :

(1) A 10 biswa zamindari share in village Sikri, Mahal Munshi Het Narain, Pargana Bilari, District Moradabad.

(2) A four biswa zamindari share in village Kanakpur (I) Mahal Shyam Sundar, Patti Munshi Het Narain. e

(3) A four biswa zamindari share in village Kanakpur (II) Mahal Shyam Sundar, Patti Munshi Het Narain.

(4) A half share in resumed milak land in village Nawabpura, recorded in the khewat as holding No. 13 and comprising an area of '87 acre.

(5) Zamindari shares in village Nagla Kamal, entered in the khewat as holding No. 3, resumed muafi land consisting of three items: (a) 42 sihams out of 84 sihams—proprietary right; (b) 54 sihams out of 108 sihams—mortgagee right; (c) 168 sihams out of 360 sihams—mortgagee right free from mortgage.

(6) Zamindari share in village Nagla Kamal, entered in the khewat as holding No. 5, 180 sihams out of 360 sihams. f

At the date of the suit the whole of this property was recorded in the revenue papers in the name of the defendant Anand Sarup. The plaintiff's claim with reference to these properties is that they formed part of the estate of one Sipahi Singh who adopted the plaintiff's father Het Narain as his own son, so that upon his death all his property devolved on Het Narain and on the latter's death was inherited by the plaintiff. The next suit No. 2 of 1929, which has given rise to Appeal No. 500 of 1930, was also filed by Har Sarup on 2nd January 1929. In this suit the principal defendant was Anand Sarup but his two sons Govind Sarup and Madhu Sudan Saran were also impleaded as co-defendants with him. The subject-matter of this suit is a large house situated in the city of Moradabad which originally belonged to one Raja Bansidhar and is referred to in the evidence as the Phatakwala house. g It consists of several blocks of buildings with open land in between and a large gate with some constructions thereon. The plaintiff's case is that the two principal portions of this house known as Hammamwala and Mahalsarai were acquired by Sipahi Singh and the rest by Het Narain. The plaintiff claims possession over three portions of this house, namely, Hammamwala, Diwankhana and Nashishtgah with a Garikhana attached to it. At the date of the suit these three portions were in the exclusive occupation of Anand Sarup. As regards the rest of the house which is divided into four portions, the plaintiff claims a declaration that they are exclusively owned by him and the defendants have no right or interest therein. The third Suit No. 14 of 1929 was filed by Anand Sarup on 6th November 1928 but appears to have been registered on 19th h January 1929. The subject-matter of this suit is a half share in two items of zamindari property as given below :

(a) Zamindari property held as muafi land comprising 360 sihams bearing an area as given in khewat at holding No. 3 together with all the rights and interests situate in Nagla Kamal, Pargana Bilari, District Moradabad.

(b) One grove comprising .87 acre known as Sharifawala, situate in Mauza Nawabpura, holding No. 13, Pargana Moradabad.

This property was at the date of the suit recorded in the revenue papers in the name of Har Sarup. The defendants in this suit are Har Sarup and a creditor of his named Lala Indarman. It appears that Lala Indarman having obtained a decree against Har Sarup put it into execution and attached the property in question as the property of his judgment-debtor Har Sarup. Anand Sarup thereupon filed an objection under O. 21, R. 58, Civil P. C.

a This objection was dismissed and Anand Sarup was thus driven to institute Suit No. 14 of 1929. Anand Sarup claimed a title to this property on the ground that he had been in adverse possession thereof for more than 12 years as against Har Sarup who had consequently lost all his rights therein. The factum of the adoption of the plaintiff's father Het Narain by Sipahi Singh was challenged in a previous litigation between the parties to which we shall refer in detail later on. The question was however finally determined by this Court in First Appeal No. 21 of 1925 which was decided on 20th July 1927 and it was held that Sipahi Singh had adopted Het Narain as his son. For the purposes of these appeals the adoption of Het Narain by Sipahi Singh must be taken as an established fact. It is also an admitted fact that Anand Sarup in spite of being the brother of Har Sarup lost all his rights to b a share in the estate of Sipahi Singh in consequence of his being adopted into another family. In view of these facts, the main question which will arise for consideration is whether the properties which form the subject-matter of these suits formed part of the estate of Sipahi Singh and if so whether Har Sarup lost his right to these properties or to any part of them by the operation of law. All the three suits have been wholly dismissed by the learned Additional Subordinate Judge with the exception of Suit No. 164 of 1928 in which the plaintiff's claim to a portion of item 6 of the properties in dispute has been decreed, hence these three appeals. There are also two cross-objections, one connected with First Appeal No. 373 of 1930 which has been made by Indarman one of the defendants in Suit No. 14 of 1929 and the other connected with First Appeal No. 501 of 1930 made by Anand Sarup in respect of c the small portion of the plaintiff's claim which has been decreed in Suit No. 164 of 1928. The former objection has not been pressed before us and the latter will be considered along with the connected appeal. The following pedigree gives the relationship of the parties to the suits out of which these appeals have arisen.

RAI SINGH

Sipahi Singh (died 1846-47) = Radha Kuar (died 1864)	Madho Ram — Het Narain (adopted by Sipahi Singh 1846-47)	Jai Lal

d

Lachhmi Kuar born 1833, died 1912 = Lalta Prasad (died 1899) — Anand Sarup (adopted son, born 1859, adopted in 1864)	Hat Narain (adopted son, born 1840 died 1905) — Anand Sarup (born 1859 adopted by Lachhmi Kuar and Lalta Prasad)	Har Sarup (born 1873)

Bhagwati Sarup	Narain Sarup	Harnam Sarup

Govind Sarup — Madhu Sudan Saran.

Before proceeding to consider the various questions which arise for determination in these appeals in view of the pleadings of the parties, it is necessary e to set out a brief history of the family to which the parties belonged and certain facts regarding which there is no contest and which form the background of the whole litigation. Sipahi Singh who was employed as a Peshkar acquired considerable property but he had only one daughter named Mt. Lachhmi Kuar who was born in 1833. It appears that shortly before his death somewhere in 1846 or 1847 he adopted Het Narain as his son. Het Narain was born in 1840, and was thus only about seven years of age when he was adopted. Lachhmi Kuar was married to a poor man named Lalta Prasad apparently because he consented to live with his wife in the house of Sipahi Singh who did not want to part with his daughter. Het Narain and Lachhmi Kuar thus lived together as brother and sister under the protection of Radha Kuar, the widow of Sipahi f Singh, uptill her death in 1864. All the properties left by Sipahi Singh were entered in the name of Radha Kuar. The management of the properties during this period was in the hands of Madho Ram, the natural father of Het Narain and the brother of Sipahi Singh. Nothing of any consequence happened uptill the death of Radha Kuar in 1864. The only transaction during the period between 1847 and 1864 of which there is some evidence on the record was a sale deed executed by one Mt. Rukmin in favour of Het Narain on 27th June 1861. A copy of this sale deed is Ex. 7 in Appeal No. 500 of 1930. It is admitted that this sale deed relates to a portion of the house which is the subject-matter of dispute in suit No. 2 of 1929 and is referred to as the diwankhana.

Anand Sarup was born in 1859 and he was only five years of age at the death of Radha Kuar in g 1864. It appears that in the same year, either before or after the death of Radha Kuar, Anand Sarup was given away in adoption by his father Het Narain to Lachhmi Kuar and Lalta Prasad. It is significant that he was the only son of Het Narain at that time. Lalta Prasad appears to have entered Government service as a petty clerk but he ultimately rose to be the Sharishtadar of the Collector's Court at Bijnore. It was admitted in a previous litigation between the parties that he was confirmed as Naib Sharishtadar on 22nd September 1862 and subsequently rose to be Sharishtadar at least in 1874. He retired from service in 1880. He had been living away from the family in connexion with his service between 1862 and 1880 but when he came back on his retirement he assumed the management of Het Narain's household. Het Narain also h appears to have entered service somewhere about 1863 or 1864 and he came back in 1893. During this period he was for the most part away from his home in connexion with his service in Pilibhit. In the meantime Har Sarup was born in the year 1873. Het Narain's wife died in 1877 when Har Sarup was only four years of age. It is an admitted fact that upon the death of Het Narain's wife Lachhmi Kuar came and settled in his house and took charge of his infant son Har Sarup. From that time uptill Het Narain came back in 1893 Lachhmi Kuar was admittedly in full control and management of Het Narain's household along with her husband Lalta Prasad who came back on his retirement in 1880. Peace and affection reigned in the household and Het Narain was naturally very grateful to Lachhmi Kuar. Even before the death of his wife in 1877, Het Narain and Lachhmi Kuar lived on very affectionate terms with each other and the evidence on the record shows that in the period between the death of Radha Kuar in 1864 and the

death of Het Narain's wife in 1877 Het Narain entered into some transactions jointly with Mt. Lachhmi Kuar. Exhibit R in Appeal No. 500 is a sale deed executed by one Muhammad Tafazul Ali Khan on 2nd November 1865 in favour of Het Narain and Lachhmi Kuar in respect of a zamindari share in village Manpur-Muzaffarpur. Exhibit PP in Appeal No. 501 is a judgment, dated 22nd January 1866 in a suit brought jointly by Het Narain and Lachhmi Kuar in respect of a village called Umarpur Tanda which had previously been purchased by Het Narain alone. These cordial relations appear to have continued without any disturbance of any kind uptill the death of Het Narain in 1905. There are several transactions evidenced by documents to show that in the period between 1878 when Lachhmi Kuar assumed the management of Het Narain's household and 1905 when Het Narain died Het Narain and Lachhmi Kuar jointly dealt with the family property as if they were co-owners. Exhibit C in Appeal No. 500 is a rent note dated 19th September 1884 executed by a tenant in favour of Het Narain and Lachhmi Kuar in respect of Mahalsarai which is admittedly a portion of the house in dispute in Suit No. 2 of 1929, though Har Sarup has not claimed any relief in respect thereof. Exhibit Z in First Appeal No. 500 is a judgment dated 30th August 1886 decreeing a claim made jointly by Het Narain and Lachhmi Kuar for pre-empting a zamindari share in village Manpur-Muzaffarpur.

Exhibit S in First Appeal No. 500 is a sale deed, dated 29th July 1888, showing that another zamindari share in village Manpur Muzaffarpur was jointly acquired by Het Narain and Lachhmi Kuar. Exhibit 12 in Appeal No. 373 is a rent note executed by a tenant on 19th August 1890 in favour of Het Narain and Lachhmi Kuar in respect of a house known as Shivalewala. Exhibits HH-1 and B in Appeal No. 500 are two documents which taken together show that Het Narain and Lachhmi Kuar jointly brought a suit in 1891 in respect of a wall of the house known as Mahalsarai to which reference has already been made above. The defendant in that suit raised the issue that Lachhmi Kuar had no title to sue and it was decided by the Court that from the evidence produced before it Lachhmi Kuar and Het Narain had both been proved to be heirs of Sipahi Singh. Exhibit 9 in Appeal No. 373 is a rent agreement executed by one Chheda on 1st July 1892 in favour of Het Narain and Lachhmi Kuar in respect of a house known as Sarai Kaharan with which we are not concerned in the present case because it has already been sold away by Har Sarup but which undoubtedly formed part of the family property. Exhibit W in First Appeal No. 500 is a decree dated 30th June 1893 in a suit brought jointly by Het Narain and Lachhmi Kuar in respect of the house known as Mahal Sarai to which reference has already been made above. A very important fact to be noted in this connexion is that in this suit Het Narain was examined on 1st March 1893 and he then made the following statement :

" After the death of Munshi Sipahi Singh my mother came into possession of his entire property as well as the house in question and my mother by an oral will gave the same to me and my sister."

This statement is the foundation stone of the defence case which we shall set out in its proper place. It must however be mentioned here that Lachhmi Kuar was also examined in that suit and she made the following statement :

" I have a brother Het Narain. I have not got any separate share. The names of both of us are entered and stand recorded just as our parents got them entered. I cannot say the extent of my share. I know that according to Hindu law a daughter has no share in the presence of a son. My father owned the house in dispute. When he died my mother, brother and myself became the owners."

Exhibit 6 in First Appeal No. 373 is a rent agreement executed by one Mt. Bhagwati on 1st September 1896 in respect of a house with which we are not concerned in the present case. Exhibit 6 in First Appeal No. 500 is a hypothecation bond executed jointly by Het Narain and Anand Sarup the adopted son of Lachmi Kuar in favour of Baldeo Das and Hardeo Das on 20th July 1900. By this deed the executants took a loan of Rs. 4700 for discharging a debt payable by Het Narain alone to one Mt. Janki under a hypothecation bond, dated 13th June 1890 which is Ex. O in Appeal No. 500. In the bond of 20th July 1900 Het Narain stated that he was the owner of certain properties and mortgaged them as a security for the loan which he had taken. The properties mentioned in the bond are : (1) A 20 biswa share in village Sikri together with groves in Mahal Kalan Munshi Het Narain. (2) A 10 biswa share in village Tanda Umarpur out of 20 biswas and half of the revenue free muafi property situate in the aforesaid village, pargana Bilari, district Moradabad. (3) The Sharifonwala grove No. 190 portion (c) comprising 5 bighas 19 biswas situate in Nawabpura, pargana Moradabad. (4) $2\frac{1}{2}$ biswas zamindari property out of 5 biswas patti separate situate in mouza Kanakpur.

In the present case, we are directly concerned with the properties Nos. 1, 3 and 4. Reference will also have to be made to item 2. It is difficult to understand why Anand Sarup was asked by Het Narain to join him as a co-executant in this deed, though he made a specific statement to the effect that he was the exclusive owner of the property covered by the deed. The explanation might well be that the name of Het Narain alone was entered in the revenue papers and the mortgagee, therefore, insisted that Het Narain should declare his exclusive title to the whole property covered by the mortgage. We find, however, that there is a specific provision in the deed as to the personal liability of both executants and it is obviously difficult to understand why Anand Sarup should have undertaken that liability if he or his mother, Lachhmi Kuar had no interest in the property. Again, it is to be noted that the loan under this deed was taken to pay off a previous debt incurred by Het Narain alone for purchasing Pain Bagh, a portion of the house in dispute in Suit No. 2 of 1929. As stated above, the previous debt was payable to Mt. Janki under a bond, dated 13th June 1890. This previous debt was actually discharged as shown by Ex. UU, in Appeal No. 500 which is a receipt, dated 24th July 1900 given by Mt. Janki to Het Narain and Anand Sarup. There is a clear recital in this receipt that she received her money from both of them.

It is necessary here to break the chronological order, in order to refer to a transaction which took place on 17th March 1915 which is related to the hypothecation bond, dated 20th July 1900 (Ex. 6 of First Appeal No. 500) which has been referred to above. Exhibit P in First Appeal No. 500 is a sale-deed of Manpur Muzaffarpur, jointly executed by Anand Sarup and Har Sarup on 17th March 1915. As stated above, Manpur Muzaffarpur had been acquired jointly by Het Narain and Lachhmi Kuar in three separate transactions but the whole of it was sold under the deed of 17th March 1915 in order to discharge the hypothecation bond dated 20th July 1900, which had been executed jointly by Het

Narain and Anand Sarup in order to pay off a previous debt with which Anand Sarup had no concern. These are the various transactions which took place between 1878 and 1900 and which tend to show that Het Narain and Lachhmi Kuar jointly entered into various transactions as if they were co-owners of the family property. Het Narain died in the year 1905 and a question then naturally arose as to the mutation of the family property. In the course of mutation proceedings in respect of various items of property Har Sarup, who was prima facie solely and wholly entitled to the whole property as the only heir of Het Narain, made two statements on two different occasions which are of considerable importance. One of these statements dated 15th January 1906 which relates to village Sikri, which is one of the items in dispute in Appeal No. 501, is to be found in Ex. B of First Appeal No. 501 and it runs as follows :

" Mouza Sikri, mahal Surkh of Het Narain comprises a 1 biswa, 15 biswansi, 11 kachwansi and 4 tanwansi share and mahal Het Narain comprises a 20 biswa share. Only the name of Munshi Het Narain is recorded but this property consists of the said two mahals. Mt. Lachhmi Kunwar is the owner of one half, and Munshi Het Narain is the owner of the other half. Now Het Narain is dead. I alone am the heir in possession thereof and there is no other heir. I pray that the name of Het Narain deceased may be expunged and my name may be entered, and the name of Mt. Lachhmi Kunwar may be entered against the one half of the property which belongs to her. I have no objection. "

The other statement, dated 22nd January 1906, relates to mouza Nawabpura, which is item 4 in dispute in Suit No. 164 of 1928 and Appeal No. 501 of 1930. This statement runs as follows :

"Het Narain, my father, the zamindar of mauza Nawabpura, died on 15th October 1905. I am his only heir, but as a matter of fact, this property belonged to Het Narain and Mt. Lachhmin Kunwar, his sister, therefore, we, i. e., I and Lachhmin Kunwar, are in possession of the property in equal shares. I pray that the name of Het Narain may be struck off and that my name and the name of Lachhmin Kunwar sister of the deceased, may be entered in equal shares."

These statements are obviously quite inconsistent with the claim set up by Har Sarup in the two suits brought by him. Though there is no other statement of Har Sarup on the record, yet it is an admitted fact that he gave his consent to the entry of Lachhmi Kuar's name in respect of a half share in the whole of the zamindari property belonging to the family and it is important to note that in pursuance of that consent the name of Lachhmi Kuar was actually entered in the revenue papers in respect of a half share not only in Sikri and Nawabpura but also in other properties including those which are the subject of dispute in Suit No. 164 of 1928 and Appeal No. 501. Mutation was thus made in favour of Mt. Lachhmi Kuar in respect of a half share in two villages named Raipur Khurd and Tanda Umarpur. This property has been the subject of a previous litigation between the parties to which we shall presently refer. Har Sarup maintains that these mutations in favour of Lachhmi Kuar were made purely for purposes of consolation. These transactions took place in or about the year 1906. It appears that subsequent to these proceedings Har Sarup and Lachhmi Kuar were associated in several transactions relating to family property uptill 1912 when Lachhmi Kuar died. In entering into these subsequent transactions Har Sarup, as it were, took the place of his father Het Narain. Exhibit 4 in Appeal No. 373 is a lease jointly executed by Lachhmi Kuar and Har Sarup in respect of the house known as Sarai Kaharan on 8th February 1909. Exhibit 5 of First Appeal No. 373 is a plaint in a suit brought jointly by Har Sarup and Lachhmi Kuar in respect of the same house on 2nd April 1909. Exhibit 7 in First Appeal No. 373 is a rent note executed by one Chandi Prasad in favour of Har Sarup and Lachhmi Kuar on 5th November 1910 in respect of another house known as the Shiwalewala house which has been referred to above.

Then there are four documents regarding which there is a contest between the parties as to the period when they were executed, though it is admitted that they are all in the handwriting of Har Sarup. These documents are Ex. PP (Appeal No. 500) Ex. 5H/1, (First Appeal No. 501), Ex. 5H/3 (First Appeal No. 501) and Ex. 5H/4 (First Appeal No. 501). Taken together these documents which are admittedly in the handwriting of Har Sarup show that he definitely proposed a partition of the whole family property both zamindari and house property, in equal shares between himself and Anand Sarup. According to the defence, one of these documents, namely, Ex. PP was written in 1903 or 1904 while the other three were written somewhere about 1912. Har Sarup's case is that these documents which are only tentative proposals for partition which was never actually effected were written somewhere about 1920 after disputes had arisen in the family. The documents themselves bear no date and the evidence bearing on that point which has been produced by the defendants is too meagre to enable us to fix the exact period when these documents were written. The fact however remains that these documents clearly indicate that Har Sarup admitted the title of Anand Sarup to one half of the family property. Lachhmi Kuar died in the year 1912 and a question then arose as to the mutation of the properties which stood in her name. In the course of one of the mutation proceedings which ensued upon Lachhmi Kuar's death Har Sarup was examined on 12th January 1913 and he then made a statement which is undoubtedly of great consequence. The statement runs as follows :

"The name of Munshi Anand Sarup who is the adopted son and heir of Mt. Lachmin Kunwar may be entered against the half share of Mt. Lachhmin Kunwar in the village of Indhanpur Hasanpur and my name may be entered against the other half. It was omitted to be entered during the life time of the Musammat. We continued to make realizations in equal shares and still do so. There is no other heir except us both, the equal sharers in the property aforesaid."

At this stage Anand Sarup, who was of course a party to the proceedings put a definite question to Har Sarup in the following terms :

"Whose name should be entered in the place of the name of Mt. Lachhmin Kunwar in respect of the villages of Sikri and Kanakpur parts 1 and 2 ?"

It will be noted that the properties specifically referred to in this question are items 1, 2 and 3 in Har Sarup's plaint in Suit No. 164 of 1928. In answer to this specific question Har Sarup made the following reply :

"In place of the name of the Musammat aforesaid only the name of Munshi Anand Sarup should be entered against the villages of Sikri, Kanakpur 1 and Kanakpur 2. There is no other heir besides him. I do not claim that I am the heir of the Musammat aforesaid."

a It is obviously quite impossible to explain this conduct on the part of Har Sarup except on the hypothesis that he admitted the title of Lachhmi Kuar as a co-owner with Het Narain in the whole of the family property. His statement is undoubtedly quite inconsistent with the claim now made by him. It is particularly to be noted in this connexion that Indhanpur Hasanpur in which Har Sarup obtained mutation in his favour in respect of a half share had been purchased solely by Lachhmi Kuar as proved by Ex. 5 L in First Appeal No. 501. From this document, which is a sale certificate dated 24th April 1872 it appears that 69 acres of land belonging to a rebel named Ghulam Husain which had been confiscated by Government were put up for sale and were purchased by Mt. Lachhmi Kuar for Rs. 3775. It is significant that no mutation in respect of any part of this property was made in fav-
b our of Har Sarup at any time during the period between 1872 and 1912 when Lachhmi Kuar died. One of the important pleas raised by the defendants rests upon this transaction of 12th January 1913 as evidenced by the statement of Har Sarup himself which has been referred to above and which is Ex. P in First Appeal No. 501. In this connexion reliance is also placed by the defendants upon the transaction, dated 17th March 1915, by which the whole of the zamindari property in village Manpur Muzaffarpur, which had been purchased jointly by Het Narain and Lachmi Kuar, was sold by Anand Sarup and Har Sarup in order to discharge a previous debt payable by Het Narain alone. This plea shall be considered later on in its proper place.

Exhibit P in First Appeal No. 500 is the deed, dated 17th March 1915, by which the whole of Manpur
c Muzaffarpur was sold jointly by Anand Sarup and Har Sarup. Exhibit VV in First Appeal No. 500 is a receipt, dated 22nd January 1916, showing that a sum of Rs. 5000 was paid by Anand Sarup to one Raghubir Saran, the grandson of Hardeo Das, in full discharge of the bound, dated 20th July 1900, executed jointly by Het Narain and Anand Sarup in order to pay off the debt incurred by Het Narain alone under a bond given by him to one Mt. Janki. Nothing appears to have happened until the year 1920 to disturb the perfectly peaceful relations that prevailed in the family. There is some documentary evidence, which need not be referred to in detail to show that sometime before the year 1917 when house tax was introduced for the first time in the city of Moradabad Har Sarup and Anand Sarup occupied separate portions of the house which is the subject of dispute in Suit No. 2 of 1929 and
d were separately assessed to that tax. Reference has already been made above to a document (Ex. PP of appeal No. 500) which is in the handwriting of Har Sarup himself and from which it appears that he proposed a partition in equal shares between himself and Anand Sarup of the family house which is the subject of dispute in Suit No. 2 of 1929. The defendants fix 1903 or 1904 as the date of that document and their case is that in pursuance thereof a partition of the family house did actually take place in or about 1905 and it was in consequence of that partition that the defendants came into separate possession of the three portions of the house from which Har Sarup seeks to eject them in Suit No. 2 of 1929. Har Sarup's case, however, is that no partition actually took place and the defendants remained in possession of some portions of the house only because they were members of the family closely related to him.

The year 1920 marks the commencement of dissension in this peaceful family. It is admitted that Har Sarup had by that time sold most of the pro- e
perty that stood in his name in satisfaction of the debts incurred by him. The property thus sold by Har Sarup included items 1, 2 and 3 of the plaint in Suit No. 164 of 1928 which has given rise to Appeal No. 501 of 1930. These were the zamindari shares in villages Sikri, Kanakpur (1) and Kanakpur (2). Anand Sarup set the ball of dissensions rolling by making three applications on 7th October 1920 in respect of these three villages. In each application it was alleged that Har Sarup who was the lambardar of the village, had sold away his entire zamindari share and was therefore liable to be removed and in his stead the applicant Anand Sarup was fit to be appointed lambardar. These three applications are Exs. 3-A, 3-B, and 4-C on the record of First Appeal No. 501. Exhibit 4-A of First Appeal No. 501 is a copy of an order passed by the revenue Court directing a notice of Anand f
Sarup's application relating to village Kanakpur (2) being issued to Har Sarup. It may safely be presumed though there is no documentary evidence on the record to that effect, that a similar notice was issued to Har Sarup with regard to the other two applications made by Anand Sarup in respect of villages Sikri and Kanakpur (1). Then we have two documents Exs. 3-Z and 4-B (First Appeal No. 501) to show that Har Sarup was removed from lambardarship of villages Kanakpur (2) and Kanakpur (1). There is no such document in respect of village Sikri but it may safely be presumed that a similar order was passed regarding that village. These proceedings naturally gave offence to Har Sarup and his sons with the result that his youngest son Harnam Sarup, who had just attained majority instituted a suit in the year 1921 against Anand Sarup, g
his two sons Govind Sarup and Madhu Sudan Saran as well as his seven grandsons. As already stated, all of them excepting Anand Sarup who is now dead are respondents in First Appeal No. 501. In this suit Har Sarup and his two sons Bhagwati Sarup and Narain Sarup were also impleaded as pro forma defendants. It was undoubtedly a representative suit in which Harnam Sarup claimed a title to the whole of the family property, including the properties which are the subject-matter of the present appeals, on behalf of himself and the three pro forma defendants, Har Sarup, Bhagwati Sarup and Narain Sarup. From Ex. U in First Appeal No. 500 it appears that Harnam Sarup claimed the following relief :

"On the establishment of the fact that defendants 1 to 10 (Anand Sarup and his descendants) have no proprietary concern in the property bounded h
and specified as below, being the joint ancestral property of the plaintiff, he (the plaintiff may be put in proprietary possession thereof, the defendants having been dispossessed therefrom and all their right as alleged by them having been declared null and void and the rights of defendants 11 to 13 (Har Sarup, Bhagwati Sarup and Narain Sarup) may be safeguarded."

In the written statement filed by Anand Sarup in that suit which is Ex. XX-2 of First Appeal No. 373 several pleas were raised, the principal ones being :

(1) That Het Narain was never adopted by Sipahi Singh. (2) That Radha Kuar, the widow of Sipahi Singh remained in adverse possession of the whole property left by Sipahi Singh for more than twelve years and having thus acquired an absolute title made a will by which she divided the property half and half between her daughter Lachhmi Kuar and Het Narain. (3) That Lachhmi Kuar abided by the will so made by Radha Kuar and as a favour allowed

Het Narain to obtain possession of half the property. (4) That the suit was barred by limitation. (5) That the plaintiff Harnam Sarup had attained majority more than three years before the date of the institution of the suit and the suit was consequently barred by limitation on that ground also.

The Court framed several issues relating to these pleas but decided only two of them, namely, what was the plaintiff's age at the time of the suit and whether the suit was time-barred. The decision on these two issues was in the following terms :

"The plaintiff has adduced no evidence. Defendant 1 deposes that the plaintiff was born on Ashtami of Katik 1899 (i. e., 26th October 1899). The extract C/90 from the register of births shows that the plaintiff was born on 26th October 1899. Defendant 1 deposes that the extract is of the entry of the plaintiff's birth. Defendant 2 also deposes that the plaintiff was born in October 1899. The plaintiff's age on the date of the suit was twenty-one years and eleven days. The suit is therefore time-barred. I find the issues accordingly. The suit fails on the above findings, so there is no need to enter into and determine any other issues."

It is evident from this that the Court never applied its mind to any other pleas of fact or law and did not actually decide any other issue in the case. This decision has however been made the basis of a plea of res judicata by the respondents. That plea shall be considered at its proper place. In the year 1922 there were several other manifestations of the dispute which had arisen between Anand Sarup and Har Sarup. On 2nd June 1922 Anand Sarup made an application to the Municipal Board for permission to make some new constructions in a portion of the family house known as the Phatakwala to which reference has already been made. A counter application to the same effect was made by Har Sarup on 5th June 1922. It appears that Anand Sarup obtained the necessary permission and hurriedly made some constructions in accordance therewith and having done so he instituted a suit on 11th July 1922 in which he prayed for a declaration that the constructions in question had been made by him. In his plaint in that suit Anand Sarup alleged that he was the owner in possession of the portion of the house in which the constructions in question had been made. This suit was decreed and Har Sarup's appeal from that decree was dismissed. It is important to note that from the deposition of Har Sarup in that suit, which is Ex. HH on the record of First Appeal No. 501, it is clear that he made an unequivocal admission of Anand Sarup's right to the half share in the whole family property. Simultaneously with this suit Anand Sarup instituted another suit for profits in respect of his share in villages Raipur Khurd and Tanda Umarpur to which reference has already been made.

It has already been stated above that there is a document on the record (Ex. PP in First Appeal No. 501) from which it appears that on 22nd January 1866 a suit was instituted jointly by Het Narain and Lachhmi Kuar in respect of village Umarpur Tanda which had previously been purchased by Het Narain alone. Mutation in respect of a half share in village Umarpur Tanda was made in favour of Lachhmi Kuar after the death of Het Narain with the consent of Har Sarup. At the same time a half share of village Raipur Khurd was mutated in Lachhmi Kuar's name upon a statement made by Har Sarup himself. Upon the death of Lachhmi Kuar in 1912, mutation in respect of these properties was made in favour of Anand Sarup with the consent of Har Sarup. Anand Sarup's name was thus recorded in the revenue papers as that of a cosharer in villages Khurd and Tanda Umarpur and it was upon that basis that he brought the suit for profits. Har Sarup resisted the suit on the ground that Anand Sarup had no proprietary title in spite of the mutation in his favour. It is evident that this plea could not have prevailed in the revenue Court and he was, therefore, driven to institute a Suit No. 114 of 1923 in which he alleged that he had inherited the whole family property from his father Het Narain who had been adopted by Sipahi Singh and that the mutation in favour of Lachhmi Kuar was only for her consolation and out of regard for the services which she had rendered to Het Narain by assuming charge of his household when his wife died and bringing up his infant son Har Sarup. He further alleged that he consented to the subsequent mutation in favour of Anand Sarup because the latter was his elder brother and had been managing the property as a trustee on his behalf. Upon these allegations he claimed a declaration that Anand Sarup was not entitled to any proprietary interest in villages Raipur Khurd and Umarpur Tanda and could not, therefore, claim any profits as he had done in the suit instituted by him. In resisting this suit Anand Sarup raised all the pleas which he had previously raised in suit No. 12 of 1921 brought by Harnam Sarup to which reference has already been made.

He further pleaded that the suit was barred by res judicata in view of the fact that the previous suit brought by Harnam Singh which related to the whole of the family property including the villages of Raipur Khurd and Umarpur Tanda had been dismissed. Har Sarup's suit was dismissed by the trial Court but was partly decreed by the High Court in First Appeal No. 21 of 1925, decided on 20th July 1927. Almost the whole of the documentary evidence referred to above which has to be considered in these appeals was before the High Court in that case with the exception of four documents, namely, Ex. PP (Appeal No. 500), Ex. 5H-1 (Appeal No. 501), Ex. 5H-3 (Appeal No. 501) and Ex. 5H-4 (Appeal No. 501). As stated above, these four documents which are admittedly in the handwriting of Har Sarup, tend to show when taken together that he definitely proposed a partition of the whole family property, both zamindari and house property, in equal shares between himself and Anand Sarup. Upon a consideration of the evidence before it the High Court arrived at the following conclusions : (1) That Het Narain was adopted by Sipahi Singh. (2) That nothing was done by Het Narain to divest him of the title which he had acquired to the property left by Sipahi Singh. (3) That the mutation in favour of Lachhmi Kuar upon Het Narain's death was only for her consolation. (4) That the possession of Radha Kuar over the family property after the death of Sipahi Singh was only that of a guardian on behalf of Het Narain and she could not, therefore, make any will.

Upon these findings the High Court decreed Har Sarup's suit in respect of village Raipur Khurd. With regard to Umarpur Tanda the High Court found that it was a property which had been acquired by Het Narain after Sipahi Singh's death and by his conduct in relation to that property he had allowed a share in it to Lachhmi Kuar as recompense for the services rendered by her to him and also because he wanted to make some provision for his eldest son Anand Sarup whom he had given away in adoption to Lachhmi Kuar in 1864 and who had thus been deprived of his share in the family

property. Har Sarup's claim with regard to Umarpur Tanda was, therefore, dismissed. It was also pleaded by Anand Sarup in that suit that the share acquired by Lachhmi Kuar in village Manpur Muzaffarpur jointly with Het Narain had been subsequently sold by Anand Sarup along with Har Sarup by a sale deed, dated 17th March 1915 (Ex. P in First Appeal No. 500) in order to satisfy a debt which was payable only by Het Narain and on this basis it was contended that Har Sarup was estopped from denying Anand Sarup's proprietary right in villages Raipur Khurd and Tanda Umarpur. This plea was rejected by the High Court on the ground that Manpur-Muzaffarpur was ancestral property and by selling Lachhmi Kuar's share in that property Anand Sarup did not in fact lose any property to which he was entitled. It is important here to note that Anand Sarup never pleaded in that suit that any part of the family property had come to Lachhmi Kuar and after her to him by virtue of any family arrangement. The High Court had, therefore, no occasion to consider in that case whether the conduct of Het Narain and Har Sarup during the long course of years as evidenced by the transactions referred to above did or did not tend to prove an arrangement or settlement by the family that the whole of the family property should be divided half and half between Het Narain and Lachhmi Kuar. Being thus encouraged by his partial success in suit No. 114 of 1923 Har Sarup filed the two suits (No. 164 of 1928 and No. 2 of 1929) which have given rise to Appeals Nos. 501 and 500 respectively. The circumstances in which Anand Sarup filed the suit which has given rise to Appeal No. 373 have already been stated above.

We shall now set out the pleas raised on behalf of the defendants in suits Nos. 164 of 1928 and 2 of 1929. In doing so we shall confine ourselves to the points actually urged before us in the course of argument. They are as follows : (1) That these suits are barred by O. 2, R. 2, Civil P. C. (2) That these suits are barred by res judicata. (3) That the properties which are the subject-matter of dispute in these suits came to Lachhmi Kuar and after her to Anand Sarup by virtue of a family arrangement. (4) That in any case Har Sarup is estopped from denying the right and title of the defendants in villages Sikri, Kanakpur (I) and Kanakpur (II) in consequence of the fact that upon his admission of that right and title on 12th January 1913 in the course of the mutation proceeding which ensued upon Lachhmi Kuar's death he obtained mutation in his favour in respect of a half share in village Indhanpur Hasanpur which belonged exclusively to Lachhmi Kuar and subsequently sold away that share in satisfaction of his own debts. (5) That Har Sarup's claim in suit No. 2 of 1929 in respect of certain portions of the family house which are exclusively in the possession of the defendants is barred by time, inasmuch as the defendants acquired possession of that property by virtue of a private partition between Har Sarup and Anand Sarup sometime in the year 1905 and have ever since that time been in possession thereof, openly asserting their own title to it and denying the title of Har Sarup. (6) That the conduct of Het Narain and Har Sarup during a long course of years amounted to a representation that Lachhmi Kuar was the owner of half of the family property and believing that representation and acting upon it the defendants spent their own money to the extent of about Rs. 10,000 in making fresh constructions between 1900 and 1909 without any objection having been taken by Har Sarup. (7) That in any case suit No. 2 of 1929 which relates to the family house alone is barred by O. 2, R. 2, Civil P. C., inasmuch as the claim in that suit being based upon the same cause of action should have been included in the previous suit No. 164 of 1928.

We shall now proceed to consider the first point raised by the defendants, namely, that the two suits brought by Har Sarup are barred by O. 2, R. 2, Civil P. C. The argument on behalf of the defendants is that the claim in these two suits rests upon the same cause of action on which the previous suit No. 114 of 1923 was founded. It is contended that even prior to Suit No. 114 of 1923 the defendants had openly asserted their title to a half share in the family property and had openly denied the title of Har Sarup to the property in their possession. Har Sarup had thus been ousted from the whole of the family property and he could not legally have confined his claim to villages Raipur Khurd and Umarpur Tanda as he did in instituting Suit No. 114 of 1923. He was bound under the law to include the whole of the claim in respect of the cause of action and he must therefore be deemed to have abandoned his claim with respect to the properties which are the subject-matter of dispute in the two suits which are now under consideration. In support of these contentions reliance is placed upon the various transactions which have already been set out in detail and which need not be repeated here. The argument is sought to be re-enforced by reference to the following decided cases : 1941 A. L. J. 721,[1] A. I. R. 1937 Rang. 324,[2] 16 All. 165,[3] A.I.R. 1931 Bom. 114,[4] 22 A.L.J. 753,[5] 30 All. 279[6] and A.I.R. 1926 Oudh 365.[7]

Upon a careful consideration of all the facts of the case and the authorities cited by the learned counsel for the defendants we find ourselves unable to accede to his contention. The question whether a subsequent suit is founded upon the same cause of action on which a previous suit was based is essentially one of fact and must be determined upon the facts of each case. Now, in the present case, the contention is that when Har Sarup instituted Suit No. 114 of 1923 in respect of village Raipur Khurd and Tanda Umarpur he had the same cause of action in respect of the properties which are the subject of dispute in the two suits now brought by him, namely, No. 164 of 1928 and No. 2 of 1929 and hence these latter suits must be held to be barred by O. 2, R. 2. It is, therefore, necessary to realise in the first instance the exact position of Har Sarup in relation to the property which was the subject of dispute in Suit No. 114 of 1923. He claimed to be in actual possession of that property and this claim was upheld by the Court in spite of a denial on the part of the defendants. With regard to the rest of

1. ('42) 29 A. I. R. 1942 All. 122 : 199 I. C. 190 : I.L.R. (1942) All. 103 : 1941 A. L. J. 721, Mohammad Khalil Khan v. Mahboob Ali Mian.
2. ('37) 24 A. I. R. 1937 Rang. 324 : 170 I. C. 946, Ma Pwa Shin v. U Po Sin.
3. ('94) 16 All. 165 : 1894 A. W. N. 65, Murti v. Bhola Ram.
4. ('31) 18 A.I.R. 1931 Bom. 114 : 129 I. C. 737 : 32 Bom. L. R. 1473, Anant Subrao v. Mahabeleshwarbhat Gurunath Bhat.
5. ('24) 11 A. I. R. 1924 All. 902 : 80 I. C. 31 : 46 All. 822 : 22 A. L. J. 753, Darbari Lal v. Govind Saran.
6. ('08) 30 All. 279 : 1908 A. W. N. 131 : 5 A.L.J. 278, Niaz Ahmad v. Abdul Hamid.
7. ('26) 13 A. I. R. 1926 Oudh 365 : 93 I. C. 269, Hem Singh v. Mt. Prag Kuar.

the family property which is the subject of dispute in the two suits with which we are now concerned his positiou was entirely different. The defendants were admittedly in possession of those properties. It is true that he alleged that they were in permissive possession but upon the facts already stated there can be little doubt that they were openly asserting their title to the properties in their possession. This open assertion of title began in the year 1920. The utmost that can be urged in favour of the defendants on the basis of that open assertion of title is that they had ousted Har Sarup from those properties. The position, therefore, was that Har Sarup was in actual possession of villages Raipur Khurd and Tanda Umarpur, whereas he had been ousted from other properties. With regard to the former a suit for profits had been launched by Anand Sarup and Har Sarup had to resist that suit. Anand Sarup was recorded as a cosharer in the village papers and hence his suit for profits was bound to succeed in the revenue Court until Har Sarup obtained a declaration of his title from the civil Court. It was in these circumstances that Har Sarup brought Suit No. 114 of 1923 in respect of villages Raipur Khurd and Tanda Umarpur.

It is now to be considered whether upon these facts it can be held that the cause of action for Suit No. 114 of 1923 was the same as the cause of action for the two subsequent suits relating to other properties with which we are now concerned. In our judgment, the answer is clearly in the negative. The right of an owner to maintain his possession over a particular item of property is quite distinct and apart from his right to recover possession of another item of property from which he has been ousted by a trespasser. Where there is an infringement of two separate rights by two separate acts of trespass committed by the same trespasser there must be two separate causes of action. It is true that in some cases it has been held upon the facts before the Court in those cases that several acts of trespass were so connected together in point of time as to form part of the same transaction and hence they did not give rise to separate causes of action but that does not affect the question in issue before us. Here we are concerned with distinct acts of trespass far removed from each other in point of time so that it is not possible to hold that they were parts of the same transaction. Again, as we have pointed out, we are concerned in the present case with separate infringements of two distinct rights. A careful perusal of the cases referred to by learned counsel for the defendants leaves no doubt in our mind that in each one of those cases there was an infringement of only one right and there was but one cause of action. We consider it unnecessary to refer in detail to the facts of each one of those cases and we shall confine ourselves to the latest case upon which reliance has been placed, namely 1941 A.L.J. 721.[1] In that case the plaintiffs had succeeded by inheritance to three separate items of property belonging to one Rani Barkatunnissa. Two of those properties were situated in Oudh, while the third lay in the district of Shahjahanpur. As regards the property in Shahjahanpur the defendants had obtained mutation in their favour. With regard to the other two properties the defendants had denied the title of the plaintiffs, though they did not actually succeed in obtaining mutation. It is important to note that the plaintiffs were not in actual possession of any one of the three items of property which they claimed in their suit. This is apparent from the following extract from the judgment of this Court in that case :

"The cause of action in the Oudh suit and in the present suit consisted of the facts that Rani Barkatunnisa was the owner of the disputed properties, that she died on 13th April 1927, that she was a Sunni by faith, that the plaintiffs were the heirs of Rani Barkatunnisa and entitled to inherit, that in the Oudh case the defendants had denied the title of the plaintiffs and in the other case the defendants in pursuance of the denial of title had obtained possession of the property. Mutation of names had already been obtained by the defendants over the Shahjahanpur property by reason of the order of the Collector dated 20th June 1928, when the Oudh suit was filed on 14th September 1928 and the plaintiffs were entitled to make a claim in respect of the Shahjahanpur property when they filed Suit No. 8 of 1928 in the Oudh Chief Court."

In these circumstances the plaintiffs first instituted a suit in respect of the Oudh properties alone and later on filed another suit in respect of the property in Shahjahanpur. Upon a consideration of all the facts of the case the learned Judges of this Court held that the plaintiffs had only one cause of action in respect of the properties and their omission to claim the Shahjahanpur property in the first suit barred their subsequent suit in respect of that property. It is clear from their judgment that upon the facts in that case the learned Judges came to the conclusion that the various acts of trespass were so connected together as to form part of the same transaction and thus the plaintiffs had only one cause of action. They refer to the following observations of their Lordships of the Privy Council in A. I. R. 1915 Mad. 732[8] :

"Where the title of the plaintiff is the same and the trespasser defendant is the same defendant in both suits, the question whether the second suit is barred by the first, under O. 2, R. 2 depends upon the answer to the following question, namely : Did the two trespasses take place in or about the same time and as part of the same transaction so that the two trespasses might be considered (taking a common sense view of the facts) as a single transaction forming one and the same cause of action ? If both trespasses had taken place before the first suit had been brought O. 2, R. 2 might be a bar to the second suit. "

Having referred to these observations the learned Judges proceeded to state :

" In the case before us the trespasses on title or slander of title in the case so far as the Oudh suit was concerned were not distinct and different either in point of time or in point of character from the trespass on possession in the case of the Shahjahanpur property and the present plaintiffs therefore ought to have included the claim regarding the Shahjahanpur property in the earlier suit."

In the case before us we find however that the separate acts of trespass were far removed in point of time and were also different in character so that they cannot be said to have formed part of the same transaction. We find further that the cause of action of the plaintiff with regard to the property which was the subject-matter of suit No. 114 of 1923 was, in our judgment, quite distinct and apart from his right to recover possession of other properties from which he had been ousted. He had clearly two different causes of action in respect of two different properties. It was of course open to him at the date of the institution of suit No. 114 of 1923 to combine his two causes of action and to claim not only a

8. ('15) 2 A. I. R. 1915 Mad. 732 : 25 I. C. 579, Jagathamba Ammal v. Ramaswami Ayyangar.

declaration of his title in respect of villages Raipur Khurd and Tanda Umarpur but also possession over other properties from which he had been ousted, but O. 2, R. 2 does not make it incumbent upon the plaintiff to combine separate causes of action in the same suit. All that it lays down is that the plaintiff must "include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." We are not therefore prepared to hold that suits No. 164 of 1928 and No. 2 of 1929 are barred by O. 2, R. 2.

The next contention on behalf of the defendants is that suits Nos. 164 of 1928 and 2 of 1929 are barred by res judicata. This contention is based upon the fact that Harnam Sarup, son of Har Sarup, had instituted suit No. 12 of 1921 in which he had claimed the whole family property not only on his own behalf but also on behalf of his father Har Sarup and his two brothers and that suit having been dismissed the two suits now brought by Har Sarup must be deemed to be barred by res judicata. It may be pointed out here that the same plea was raised by the defendants in suit No. 114 of 1923 but it was rejected by the trial Court and they did not even press it in appeal. It has however been strenuously contended before us that suit No. 12 of 1921 brought by Harnam Sarup was a representative suit and it must now be held in consequence of the dismissal of that suit that the present suits by Har Sarup are barred by res judicata inasmuch as Har Sarup must be deemed to be claiming under Harnam Sarup in view of Expln. 6 to S. 11, Civil P. C., which runs as follows :

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

The contention on behalf of Har Sarup on the other hand is that this plea raised by the defendants is itself barred by res judicata inasmuch as they raised this plea in suit No. 114 of 1923 and it was rejected. On behalf of the defendants it is argued that the judgment of the High Court in appeal made no reference to the defendants' plea of res judicata in Suit No. 114 of 1923 which had been rejected by the trial Court and the judgment of the High Court wiped away the judgment of the trial Court. We find however that it is quite unnecessary to discuss these points because the contention raised on behalf of the defendants is capable of an easy answer and that is that Suit No. 12 of 1921 by Harnam Sarup was never finally decided on the merits. We have already pointed out above that the only issue which the trial Court decided in that suit was whether Harnam Sarup had instituted the suit within three years of attaining his majority and that issue having been found in the negative the suit was dismissed. It was upon this very ground that the plea of res judicata raised by the defendants in Suit No. 114 of 1923 failed and it is obvious that the defendants could not press that plea in appeal. The question of title raised by Harnam Sarup was never finally decided and we must therefore hold that the two suits now brought by Har Sarup are not barred by res judicata. The next contention on behalf of the defendants is that the properties which are the subject-matter of dispute in Suits Nos. 164 of 1928 and 2 of 1929 came to Lachhmi Kuar and after her to Anand Sarup by virtue of a family arrangement. We must repeat here that no such plea was raised by the defendants in resisting Suit No. 114 of 1923. This plea applied as much to villages Raipur Khurd and Tanda Umarpur as to other items of family property and it is obvious that it might and ought to have been made a ground of defence in that suit. Upon this basis it is urged on behalf of Har Sarup that this plea is now barred by res judicata in view of Expln. 4 to S. 11, Civil P. C., which runs as follows :

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

As against this it is contended on behalf of the defendants that the principle of constructive res judicata embodied in Expln. 4 to S. 11, Civil P. C., cannot be applied where the property in the subsequent suit is different from the property in the previous suit. Upon the facts stated above, we would have been inclined to look with favour upon the plea of family arrangement raised by the defendants but we find that the matter was one which might and ought to have been raised in the previous suit by the defendants and hence it must now be deemed to be barred by res judicata. It is evident that the High Court in dealing with Suit No. 114 of 1923 could not have decreed Har Sarup's claim in respect of Raipur Khurd if the defendants had raised the plea of family arrangement and if that plea had been allowed to prevail. It is now urged on behalf of the defendants that Mt. Radha Kuar who had brought up Het Narain as her own son but who was equally anxious that her own daughter Lachhmi Kuar should not be totally deprived of the property to which she would have been entitled but for the adoption of Het Narain, expressed her desire in the shape of an oral will that the whole family property should be divided half and half between Het Narain and Lachhmi Kuar and all members of the family decided to respect her wishes and thus arrived at a family arrangement either shortly before or after Radha Kuar's death that the family property should be divided half and half between Het Narain and Lachhmi Kuar. It is pointed out with considerable force that all subsequent dealings with the family property at first jointly by Het Narain and Lachhmi Kuar and then by Har Sarup and Lachhmi Kuar as well as the mutation in favour of Lachhmi Kuar upon Het Narain's death and the mutation in favour of Anand Sarup with the consent of Har Sarup on the death of Lachhmi Kuar can be explained on that basis. The fact, however, remains that this matter could have been raised with equal force as a ground of defence in suit No. 114 of 1923 but it was not raised. The question is : What is the effect of this omission on the part of the defendants ? The answer to that question in our judgment, is that the matter must now be deemed to be barred by res judicata. The defendants' contention, however, is that the principle of constructive res judicata cannot be applied because the properties which are the subject of dispute in the two suits with which we are now concerned are different from the property to which suit No. 114 of 1923 related.

In support of this contention reliance is placed upon the following cases : 24 Cal. 711,[9] 28 Cal. 17[10] and 1930 A. L. J. 1572.[11] In 24 Cal. 711[9] the defendant in a suit for rent denied the relationship of landlord and tenant between him and the plain-

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9. ('97) 24 Cal. 711 : 1 C. W. N. 565, Kailash Mondul v. Baroda Sundari Dasi.

10. ('01) 28 Cal. 17, Woomesh Chandra Maitra v. Barada Das.

11. ('31) 18 A. I. R. 1931 All. 73 : 129 I. C. 734 : 1930 A. L. J. 1572, Abdul Shakur Khan v. Mt. Rafiqunnissa.

tiff but did not plead that the plaintiff was a mere benamidar. The plaintiff obtained a decree and in a subsequent suit by the same plaintiff against the same defendant for rent for subsequent years, the defendant inter alia contended that the plaintiff was a mere benamidar. The plaintiff objected that the previous decree was a bar to the defendant's contention. It was held by the learned Judges of the Calcutta High Court that even if the matter in issue might and ought to have been made a defence in the former suit yet as it was not finally heard and decided by the Court within the meaning of S. 13, Civil P. C., the defendant was not precluded in the subsequent suit from raising the objection that the plaintiff was a mere benamidar. It is noticeable that in his judgment in that case Maclean C. J. observed as follows :

"We have no materials before us to enable us to say that the matter which the defendant now desires to set up might or ought to have been made ground of defence in the particular action in respect of that particular rent. The matters he now desires to set up may not have been within the knowledge of the defendant in 1878. Can we say then that he is debarred from going into those matters now ? I think not. It may be that on looking further into the matter, some particular issue, precisely similar to some particular issue now raised, was then decided. If so, the principle of res judicata may apply, possibly, to that particular issue."

The other learned Judge, Banerji J., observed as follows :

"No doubt Expln. 2 is very comprehensive in its terms, but the question is, whether it would include a case like the present. Granting that the matter now in issue might and ought to have been made a ground of defence in the former suit, the question still remains whether it 'has been heard and finally decided' by the Court within the meaning of S. 13. All that Expln. 2 says is that 'any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit;' but it does not go on to say, 'and it shall be deemed to have been heared and finally decided,' notwithstanding that the question was never considered by the Court, and notwithstanding that the subject-matter of the subsequent suit is different from that of the former suit. It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and finally decided within the meaning of S. 13 of the Code, even though the matter was never raised in issue, but it is very difficult to hold that a matter which was never raised in issue actually in the former suit, and which is raised in defence in a subsequent suit in which the subject-matter is different from that of the former suit, shall, nevertheless, by virtue of Expln. 2 to S. 13, be deemed to have been, not only matter directly and substantially in issue, but matter which has been heard and finally decided."

It is pertinent to observe that Maclean C. J. does not appear to have based his decision in the case upon the want of identity of the subject-matter. As regards the observations made by Banerji J. we must say with great respect to the learned Judge that we are unable to appreciate the logic of his argument. He seems to have been prepared to hold that a matter which was never raised in a previous suit should be deemed to have been heard and finally decided if the property affected by the subsequent suit was the same as the property which formed the subject-matter of the previous suit. We do not see any reason for holding that a matter which is not raised should be deemed to be finally heard and decided if the property in the two suits is identical, even though as a matter of fact it has never been heard and finally decided. If it can be deemed to be heard and finally decided in such a case there is no reason why it should not also be deemed to have been heard and finally decided even where the property in the subsequent suit is different from the property which forms the subject-matter of the previous suit. This case was followed in 28 Cal. 17.[10] In this latter case the plaintiff sued for rent which expressly included an item which amounted to an illegal cess. The defendant raised no objection and the plaintiff obtained a decree. In a subsequent suit for rent for subsequent years by the same plaintiff the same defendant raised the plea that one of the items comprised in the rent sued for amounted to an illegal cess and the learned Judges of the Calcutta High Court held that this objection was not barred by res judicata and they referred to the previous decision of that Court in 24 Cal. 711[9] and particularly to the observations of Banerji J., which have been referred to above. In 1930 A. L. J. 1572[11] a learned Judge of this Court Mukerji J., observed as follows :

"To start with, Expln. 4 can apply only where the subject-matter of the two suits is identical. Explanation 4 runs as follows :

'Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.'

For an effectual application of the Explanation, evidently, the subject-matter of the suits must be the same, in both the cases; only the fresh ground on which the claim or defence is based in the second case, has to be different. Where the subject-matter is not identical, Expln. 4, from the very language used, cannot apply."

On the basis of these cases, it is contended that the doctrine of constructive res judicata as provided for by Expln. 4 to S. 11, Civil P. C., cannot be applied in the cases before us because there is no identity of subject-matter. We find on the other hand a decision of this Court in 24 All. 112[12] which holds a contrary view. In that case the plaintiff was assignee of the Government revenue of a certain village. The village was divided into khatas but the title to the revenue in respect of each and every khata was one and the same. The plaintiff sued to recover the arrears of the revenue due in respect of one of those Khatas with interest. He had previously brought a similar suit in respect of another Khata and in that suit the defendant had contested his liability to pay interest on the revenue but his plea had been rejected and a decree had been given to the plaintiff. In the subsequent suit the defendant again raised the same plea but it was held that it was barred by res judicata. It is clear from the judgment in that case that it was specifically argued on behalf of the defendant appellant that identity of subject-matter was necessary before the doctrine of constructive res judicata could be applied but this contention was rejected. We have also before us a decision of the Calcutta High Court in 157 I.C. 381[13] in which reference was made to the previous decisions of that Court mentioned above which have

12. ('01) 24 All. 112 : 1901 A. W. N. 177, Chandi Prasad v. Maharaj Mahendra Mahendra Singh.
13. ('35) 61 C.L.J. 301 : 157 I. C. 381 : 39 C.W.N. 692, Bishnupada Samanta v. Mohammad Esmail Sircar.

a been relied upon by the learned counsel for the defendants and it was held :

"If the decree made in the earlier suit is such as would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of res judicata, a final decision by necessary implication. Actual decision on a plea not taken cannot be possible and unless the principle be as formulated the rule of constructive res judicata as formulated in S. 11 of the Code would be rendered almost nugatory. In questions of res judicata identity of the issues and not identity of the subject-matter is relevant. To hold that there would not be a constructive res judicata unless the subject-matter be identical would be to introduce in Expl. 4 to S. 11, Civil P. C., words which are not to be found there."

b It was also pointed out by Mitter J., who decided that case that after the judgment of Lord Phillimore in 47 All. 158[14] the proposition laid down by Banerj J., in 24 Cal. 711[9] must be held to have been too broadly stated. We find ourselves in entire agreement with the view taken by Mitter J., in 157 I. C. 381.[13] We find also that the view which we take is supported by the decision of this Court in 24 All. 112.[12] In the case before us it is quite evident that the defendants could and ought to have raised the plea of family arrangement in resisting Suit No. 114 of 1923. If that plea had been raised and if it had succeeded the High Court dealing in appeal with Suit No. 114 of 1923 could not possibly have decreed it in favour of Har Sarup in respect of village Raipur Khurd. The defendants failed to raise the plea and it must, in our judg-
c ment, be held that it was by necessary implication rejected by the High Court in the previous suit. We are, therefore, of the opinion that it is now not open to the defendants to raise the plea of family arrangement.

The next contention on behalf of the defendants is that in any case Har Sarup was estopped from denying the right and title of the defendants in villages Sikri, Kanakpur (I) and Kanakpur (II) in consequence of the fact that upon his admission of that right and title on 12th January 1913 in the course of the mutation proceeding which ensued upon Lachhmi Kuar's death he obtained mutation in his favour in respect of a half share in village Indhanpur Hasanpur which belonged exclusively to Lachhmi Kuar and subsequently sold away that share in satisfaction of his own debts. In our judg-
d ment, the defendants stand on solid ground in raising this plea and it must prevail. The High Court in the previous suit was not concerned with this plea. The previous suit had nothing to do with villages Sikri, Kanakpur (I) and Kanakpur (II) and it was not open to the defendants to raise the plea which they have now put forward on the basis of the transaction dated 12th January 1913. It has already been stated that there is documentary evidence to show that Lachhmi Kuar purchased Indhanpur Hasanpur under a sale certificate in the year 1872. We do not find any basis for holding that the money with which she purchased this property must be deemed to have been a part of Het Narain's estate. It has no doubt been pointed out that Lachhmi Kuar's husband Lalta Prasad was a poor clerk and she could not, therefore, have received the money from him. That may or may not be correct because it has to be borne in mind that Lalta Prasad, though he entered Government service as a petty clerk, was confirmed as Naib Sarishtadar on 22nd September 1862 and subsequently rose to Sarishtadar at least in 1874. Sipahi Singh, who acquired a considerable estate, was himself no more than a Peshkar. We see no reason to hold that Lalta Prasad could not have acquired sufficient money to enable his wife Lachhmi Kuar to purchase Indhanpur Hasanpur in her own right. Again, it is possible that Lachhmi Kuar might have received monetary gifts from time to time from her mother Radha Kuar and also from Het Narain who had given his eldest son in adoption to her. There is consequently no reason for holding that Lachhmi Kuar did not acquire Indhanpur Hasanpur in her own right. That being so, it is evident that Har Sarup obtained a half share in Indhanpur Hasanpur in consideration of his consent to the mutation of f Sikri, Kanakpur (I) and Kanakpur (II) in favour of Anand Sarup. It is clearly established by evidence on the record that the value of the half share in Indhanpur Hasanpur so acquired by Het Narain was almost the same as that of the half share given to Anand Sarup in village Sikri, Kanakpur (I) and Kanakpur (II). It is admitted that Har Sarup sold away the share which he thus acquired in Indhanpur Hasanpur in satisfaction of his own debts. Upon these facts we think it is clear beyond all doubt that Har Sarup was estopped from claiming the half share in Sikri, Kanakpur (I) and Kanakpur (II) which he allowed to be mutated in favour of Anand Sarup in consideration of his getting a half share in Indhanpur Hasanpur to which he could not otherwise be entitled. We hold, therefore, that so far as these three items of property are con- g cerned Har Sarup's claim is barred by estoppel.

The next plea of the defendants which we have to consider is that Har Sarup's claim in suit No. 2 of 1929 in respect of certain portions of the family house which are exclusively in the possession of the defendants is barred by time, inasmuch as the defendants acquired possession of this property by virtue of a private partition between Har Sarup and Anand Sarup some time in the year 1905 and have ever since that time been in possession thereof openly asserting their own title to it and denying the title of Har Sarup. In support of this plea, the defendants rely upon four documents namely, Ex. PP (Appeal No. 500) Ex. 5H/1 (Appeal No. 501) Ex. 5H/3 (Appeal No. 501) and Ex. 5H/4 (Appeal No. 501). It has already been stated that taken together these documents which are admittedly in the handwriting of h Har Sarup, show that he definitely proposed a partition of the whole family property, both zamindari and house property, in equal shares between himself and Anand Sarup. Now, the defendants' case is that the family house was actually partitioned somewhere about 1905, while Har Sarup's case is that these were only tentative proposals for partition which was never actually effected. The case now set up by the defendants was also set up by them in resisting Suit No. 12 of 1921 brought by Harnam Sarup. They rely upon the evidence of Govind Sarup to prove the alleged actual partition of the family house in or about the year 1905 and this evidence is further supported by the testimony of one Shankar Lal who was a sub-Engineer at that time and who has stated on oath that he prepared a plan showing how the partition was effected between Har Sarup and Anand Sarup. That plan has also been produced by the defendants. The defendants further rely upon documentary evidence to show that Anand Sarup and Har Sarup were sepa-

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14. ('25) 12 A. I. R. 1925 P. C. 55 : 91 I. C. 280 : 47 All. 158 : 52 I. A. 100 : 27 O. C. 334 (P. C.), Fateh Singh v. Jagannath Bakshsh Singh.

rately assessed to house tax in respect of the different portions of the house in their possession.

It is a matter of common knowledge that the house tax was introduced for first time in the District of Moradabad in or about the year 1917. Inquiries in connexion with the house tax were instituted much earlier. From the evidence of Govind Sarup, it would appear that these inquiries were instituted in the year 1912 or 1913. We have already stated above that there is documentary evidence on the record to show that Har Sarup and Anand Sarup were separately assessed to house tax. On behalf of Har Sarup, it is pointed out that the plan of the partition prepared by Shankar Lal does not bear any date and is not signed by him and this, it is contended, shows that the plan was prepared for the purposes of the present case. It is also pointed out by reference to Ex. 4 (First Appeal No. 373) and Ex. 5 (First Appeal No. 373) that a particular item of property which according to the defendants was given to Har Sarup exclusively at the alleged partition in or about 1905, was dealt with jointly by Har Sarup and Lachhmi Kuar in the years 1905 and 1910. Upon a careful consideration of the evidence bearing on the point we are inclined to hold that a partition of the family house did actually take place as alleged by the defendants, though it may not have taken place in or about 1905. There can be no doubt, however, that it must have taken place some time between the year 1912 when Lachhmi Kuar died and the years 1916-17 when the house tax was introduced in Moradabad and Anand Sarup and Har Sarup were separately assessed. It is important to note that the defendants rely principally upon a proposal made by Har Sarup himself and Har Sarup did not have the courage to enter the witness box in order to explain the documentary evidence appearing against him. The defendants on the other hand have produced evidence which we are unable to reject in toto merely on the ground that the map of the alleged partition prepared by Shankar Lal which has been produced by the defendants does not bear any date and signature. Har Sarup undoubtedly proposed a partition of the family house and we have definite evidence on the side of the defendants to show that the proposal was carried out and an actual partition took place by virtue of which the defendants came into possession of the three portions of the family house from which Har Sarup sought to eject them while the remaining four portions were alleged to remain as joint property.

In our judgment it was the duty of Har Sarup in these circumstances to enter the witness box in order to rebut the case set up by the defendants and his failure to do so must be taken to be a very important circumstance in favour of the defendants' case. We therefore hold that a partition of the family house did actually take place between Anand Sarup and Har Sarup with the latter's consent some time between the years 1912 and 1917 and that it was in consequence of that partition that the defendants came into possession of the three portions of the house from which Har Sarup has sought to eject them. It is clear upon these facts that the defendants have been in possession of certain portions of the house in their own right and that they have openly asserted their title to that property and have denied the title of Har Sarup. This possession of the defendants undoubtedly commenced much more than 12 years before the date of the institution of Suit No. 2 of 1929. Har Sarup was never in possession of the portions of the house in dispute within 12 years of the date of the institution of his suit. The defendants were openly in possession of those portions and asserted their own title and denied his title. In these circumstances it must be held that Suit No. 2 of 1929 is barred by time. In view of the above finding the next two pleas raised by the defendants in relation to Suit No. 2 of 1929 need not be considered. Having considered all the pleas raised by the defence in resisting Har Sarup's claim, we shall now proceed to state the effect of our findings on each one of the three suits with which we are concerned in these appeals.

Suit No. 164 of 1928.

First Appeal No. 501 of 1930.

Har Sarup's claim is based upon the admitted fact that his father Het Narain was adopted by Sipahi Singh and Anand Sarup was given away in adoption to Mt. Lachhmi Kuar and Lalta Prasad. This claim should have prevailed in respect of all properties belonging either to Sipahi Singh or to Het Narain, but for the reasons which we have mentioned above it cannot now succeed in respect of some of those properties. Of the six items of property which are the subject-matter of Suit No. 164 of 1928 Har Sarup's claim is barred by estoppel so far as the first three items are concerned, namely, the zamindari shares in villages Sikri, Kanakpur (I) and Kanakpur (II). Item 4 in dispute in this suit is a half share in resumed mulak land in village Nawabpura, recorded in the khewat as holding No. 13 and comprising an area of .87 acre. The claim is confined to a half share only because Anand Sarup's name was recorded in the revenue papers in respect of this portion. The remaining half share in this item was recorded in the name of Har Sarup and that portion forms the subject-matter of the suit brought by Anand Sarup which has given rise to Appeal No. 373 of 1930. The circumstances which compelled Anand Sarup to bring his suit have already been set out above. Now, the question for consideration is whether the Nawabpura property comprising the two portions just referred to formed part of the estate of Sipahi Singh. Upon the evidence before us we find that the answer must be in the affirmative. This property was one of the items in dispute in Suit 12 of 1921 brought by Harnam Sarup to which reference has already been made. In that suit Anand Sarup filed a written statement on 2nd March 1921 which is Ex. XX-2 on the record of Firt Appeal No. 373. In para. 4 of that written statement Anand Sarup alleged that the properties in dispute, with the exception of some which he mentioned at the close of his written statement, did not form part of the estate of Sipahi Singh. Amongst the exceptions we find a mention of the particular property which is now under consideration, namely, Milak Nawabpura. Again, in his own suit with reference to the portion which was recorded in the name of Har Sarup all that Anand Sarup alleged was that he had acquired a title to it by adverse possession. There was no suggestion that the property did not form part of Sipahi Singh's estate. Then we have the statement of Anand Sarup's counsel in his own suit which is No. 19-A on the record of First Appeal No. 373. The relevant portion of the statement runs as follows :

"Part of milak Nawabpura in dispute which stands in the name of Har Sarup was orally conveyed to the plaintiff by way of a family arrangement and from that very time he has been in proprietary and adverse possession thereof."

We have already held that it is not open to the defence to raise the plea of family arrangement and learned counsel for the defendants was unable to

point out to us any evidence worth the name in support of the allegation that Anand Sarup was in adverse possession of the property. Lastly we have the statement of Anand Sarup's counsel in suit No. 164 of 1928 to the following effect :

"As regards the property in Mouza Nawabpura it cannot be said with certainty as to whether or not it belonged to Munshi Sipahi Singh nor can it be said whether or not Lachhmi Kuar or her husband Lalta Prasad purchased any portion of this property. It is possible that the whole or a portion of the property might be of the time of Sipahi Singh."

It is evident from this statement that the defendants were unable to set up any definite case in respect of the Nawabpura property and virtually admitted that the said property formed part of the estate of Sipahi Singh. There is not an iota of evidence on the record to show that any portion of this property was ever purchased by Lachhmi Kuar. In this state of the evidence, the only possible conclusion is that the Nawabpura property formed part of the estate of Sipahi Singh and Har Sarup did not lose his title to this property by operation of law. Item 5 in dispute in suit No. 164 of 1928 is : Zamindari shares in village Nagla Kamal, entered in the Khewat as holding No. 3 resumed muafi land consisting of three items. (a) 42 sihams out of 84 sihams proprietary right. (b) 54 sihams out of 108 sihams mortgagee right. (c) 168 sihams out of 360 sihams mortgagee right, free from mortgage.

All the three items were at the date of the suit recorded in the name of Anand Sarup. Now, with regard to item (a) the evidence is indisputable that it was property acquired by Het Narain. Khewat No. 3 of Nagla Kamal comprising 360 sihams was originally owned by one Mehdi Ali Khan who died leaving six sons and three daughters. Amongst his sons were Murtaza Husain Khan, Raza Husain Khan and Zaki Husain Khan and we have before us on the record of First Appeal No. 373 of 1930 a sale deed Ex. FF-2 executed by these three sons in favour of Het Narain on 18th December 1872. It is admitted that the property covered by this deed represents 60 out of 360 sihams of khewat No. 3. Then we have an extract from the khewat of Nagla Kamal for the year 1284 Fasli corresponding to 1876-77 (Ex. Q-2 of First Appeal No. 373) from which it appears that Het Narain was recorded as the owner of 84 sihams out of 360 sihams of khewat No. 3. The same document shows that Het Narain was recorded as a mortgagee of 108 sihams. With regard to the remaining 168 sihams the defendants have produced seven documents, all being sale deeds executed by some or other of the heirs of Mehdi Ali Khan. The earliest sale deed is dated 2nd March 1881. All these deeds, with the exception of the last one which is dated 28th October 1889, were executed in favour of Lachhmi Kuar. The last one was executed in favour of Anand Sarup. It is significant to note that Lalta Prasad, the husband of Lachhmi Kuar who had risen to be the Peshkar of the Collectorate at Bijnore retired in 1880 and all the sale deeds referred to above are subsequent to that date. Now, Har Sarup's case with regard to the property covered by these deeds is that though it stands in the name of Lachhmi Kuar, yet she was only a benamidar for Het Narain. This is no more than an allegation unsupported by any evidence. A similar allegation was made in respect of the purchase of Indhanpur Hasanpur by Lachhmi Kuar and we have already given our reasons in detail for rejecting it. The same observations apply to the allegations in respect of the property covered by the above-mentioned sale deeds which stand in the name of Lachhmi Kuar. We have, therefore, no hesitation in rejecting Har Sarup's allegation in respect thereof. It may also be mentioned here that in all the sale deeds standing in the name of Lachhmi Kuar there is a recital that a part of the consideration was left with her for discharging a previous mortgage standing in favour of Het Narain dated 23rd March 1849. It was in consequence of this deed of mortgage that Het Narain was recorded as a mortgagee of 108 sihams. One of the items of Har Sarup's claim with reference to Khewat No. 3 of Nagla Kamal is "54 sihams out of 108 sihams—mortgagee right." With regard to this item the only question for consideration is whether the mortgage still subsists. As stated above, the mortgagors purported to discharge the mortgage by leaving a part of the consideration of the sale deeds executed in favour of Lachhmi Kuar with the vendee. There is, of course, no proof that the money so left with her by the mortgagors was paid by Lachhmi Kuar to Het Narain but the obvious fact remains that the mortgage in favour of Het Narain was executed in the year 1849 and no claim was ever made by him in respect of that mortgage until his death in 1905. 79 years had elapsed since the date of the mortgage when Suit No. 164 of 1928 was instituted. It is quite impossible in these circumstances to hold that the mortgage still subsisted.

All that now remains for consideration is item 6 in Suit No. 164 of 1928 which consists of a zamindari share in village Nagla Kamal entered in the khewat as holding No. 5. With regard to this item, it is admitted that there are two sale deeds standing exclusively in the name of Mt. Lachhmi Kuar, one dated 11th November 1880 and the other dated 24th August 1881. The learned counsel for Har Sarup had to concede that he could not press the claim with respect to this item with any show of force. The lower Court decreed Har Sarup's claim in respect of this item on the ground that there was a family arrangement by which the whole property of the family was divided half and half between Het Narain and Lachhmi Kuar. We have already rejected the defendants' plea of family arrangement as being barred by res judicata. The defendants have filed cross-objection with regard to this item. The result, therefore, is that we decree the claim of Har Sarup in respect of item 4, namely, a half share in resumed mulak land in Nawabpura, recorded in the khewat as holding No. 13 and comprising an area of .87 acres and also in respect of one of the three portions of item 5, namely, 42 sihams out of 84 sihams proprietary right. The defendants' cross-objection with respect to item 6 is allowed and Har Sarup's claim in respect thereof which has been decreed by the lower Court is dismissed. Appeal No. 501 of 1930, therefore, fails except in respect of the two items indicated above. The parties will pay and bear costs in proportion to their success.

Suit No. 2 of 1929.

We have held above that this suit is barred by time and in consequence of that finding Appeal No. 500 of 1930 which arises out of this suit fails and is hereby dismissed with costs.

Suit No. 14 of 1929.

This suit was brought by Anand Sarup in respect of a half share in Nawabpura property which stood recorded in the name of Har Sarup. The claim was based on the allegation that Anand Sarup had acquired a title to this property by adverse possession. We have already held that there is no evidence

worth the name to support that allegation. Appeal No. 373 of 1930 which arises out of this suit, therefore, fails and is hereby dismissed with costs. The cross-objection in Appeal No. 373 of 1930 not having been pressed is dismissed with costs.

G.N./R.K. *Order accordingly.*

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MULLA J.

Ramain Rai — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 212 of 1942, Decided on 6th August 1942, from order of Second Addl. Sess. Judge, Gorakhpur, D/- 6th February 1942.

(a) Criminal P. C. (1898), S. 54 — Being in company of revolutionary or bad character is not cognizable or any offence.

There is nothing in law to prevent any person from being seen in the company of a revolutionary or a bad character. That does not by any means constitute a cognizable offence. [P 424*g*]

Cr. P. C. —

('41) Chitaley, S. 54, N. 4.

('41) Mitra, Page 25, N. 12.

(b) Criminal P. C. (1898), S. 51—Person can be searched only after he is arrested under warrant or without warrant.

Section 51 comes into operation only after a person has been arrested either under a warrant or without a warrant. The law gives to a police officer no authority whatsoever to search a person until he has arrested him. [P 425*c*]

Cr. P. C. —

('41) Chitaley, S. 51, N. 2.

(c) Criminal P. C. (1898), Ss. 54 and 51—Police Sub-Inspector suspecting that accused had papers with him "connected with Congress" attempting to search him on platform of railway station—On refusal by accused Sub-Inspector attempting to take accused's jhola by force — Accused catching hold of Sub-Inspector's arm whereupon Sub-Inspector throwing accused down and beating him—Accused prosecuted under S. 353, Penal Code — Having papers "connected with Congress" held not cognizable offence — Sub-Inspector held could not arrest accused without warrant and could not have searched him under any provision of law — Accused held not guilty under S. 353, Penal Code.

A Police Sub-Inspector suspecting that the accused had some papers with him "connected with the Congress" wanted to search the accused on the platform of a railway station. When the accused refused to allow a search of his person the Sub-Inspector caught hold of the jhola which the accused was carrying with him and wanted to remove it by force. It was then that the accused caught hold of the Sub-Inspector's hand whereupon the accused was thrown down by the Sub-Inspector and beaten. The accused was prosecuted under S. 353, Penal Code :

Held that the only section which could have enabled the Sub-Inspector to arrest the accused without a warrant was S. 54, Criminal P. C., cl. (1) of which alone applied to the facts of the case. Having papers "connected with the Congress" was not a cognizable offence and therefore S. 54 could not come into operation and therefore the Sub-Inspector could not have arrested the accused without a warrant and could not have searched the accused under any provision of law without first arresting him. The conviction of the accused under S. 353, Penal Code, therefore was not justified. The conduct of the Sub-Inspector was very high-handed and utterly without any justification in law. [P 425*d*,*e*]

Penal Code —

('40) Ratanlal, Page 861, Note "In the execution of his duty as such public servant."

('36) Gour, Page 1177, Para. 4030.

Shiv Charan Lal and Gopalji Mehrotra — for Applicant.

Deputy Government Advocate — for the Crown.

ORDER. — This is an application in revision by one Ramain Rai who has been convicted by the Courts below of an offence under S. 353, Penal Code. The facts upon which the applicant was put upon his trial before a Magistrate under S. 353, Penal Code, may briefly be stated as follows : On 26th April 1941, a Sub-Inspector of the District Intelligence Service, Dalsingar Singh by name, was proceeding by a train from Gorakhpur to some other place in search of a man named Har Bhajan Misra who was wanted for some offence under the Defence of India Rules. The Sub-Inspector was accompanied by a head-constable. On reaching Deoria, the Sub-Inspector saw the applicant Ramain Rai with another man named Rama Nand Bharti on the station platform. The Sub-Inspector who has been examined by the prosecution says nothing as to who this Rama Nand Bharti is and why there should have been any suspicion against the applicant merely on the ground that he was seen with Rama Nand Bharti on the station platform at Deoria. Even assuming that Rama Nand Bharti is some bad character or a revolutionary, still the point remains that there is nothing in law to prevent any person from being seen in the company of a revolutionary or a bad character on the platform of a railway station. That does not by any means constitute a cognizable offence. The Sub-Inspector, however, alleges in his evidence that he suspected that the applicant had some papers with him "connected with the Congress." It is not suggested, and I do not think that it can reasonably be suggested, that having papers "connected with the Congress" is a cognizable offence for which any person can be arrested without a warrant. The Sub-Inspector, however, thought that he was entitled to follow the applicant and to search his person presumably in order to recover the papers "connected with the Congress." He accordingly followed the applicant to Bhatni where both of them got down and then the Sub-Inspector stopped the applicant and wanted to search his person. The applicant was carrying a jhola with him and the Sub-Inspector admits that when the applicant refused to allow a search of his person he caught hold of the applicant's jhola and wanted to remove it by force. It was then that the applicant according to the evidence caught hold of the Sub-Inspector's hand.

It is clear from the evidence that the applicant was then thrown down by the Sub-Inspector and was also beaten because there is medical evidence to show that he received a wound on his head. Over and above it all, he was prosecuted on a charge under S. 353, Penal Code. On these facts, curiously enough the learned trying Magistrate, who happens to be a Special Magistrate of the first class at

Gorakhpur, came to the conclusion that the prosecution had proved beyond all reasonable doubt that the applicant had assaulted and used criminal force to Sub-Inspector Dalsingar Singh who was a public servant in the execution of his duty and he was further of the opinion that this was a very high-handed action on the part of the applicant who deserved a very severe punishment for it. From the judgment written by the learned Special Magistrate it is clear that he never applied his mind to the questions which really arose for determination in the case. What is still more strange is that when the accused went up in appeal the learned Second Additional Sessions Judge of Gorakhpur who heard the appeal came to the conclusion that the Sub-Inspector's conduct was justified in law and in resisting him the applicant was technically guilty of an offence under S. 353, Penal Code. The applicant's conviction was therefore, maintained by the learned Second Additional Sessions Judge, though the sentence of nine months' rigorous imprisonment which had been passed upon him by the learned Special Magistrate was set aside and only a fine of Rs. 150 was imposed upon him. The applicant has now come up in revision to this Court. The questions which arise in this case are perfectly simple and they admit of only one answer. The first question is what authority had Sub-Inspector Dalsingar Singh to search the person of the applicant Ramain Rai? The answer is obviously "none." The only provision of law which allows a police officer to search a person is to be found in S. 51, Criminal P. C., which runs as follows :

"Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him."

It is evident that this section comes into operation only after a person has been arrested either under a warrant or without a warrant. In the present case there is not the slightest suggestion in the evidence that Sub-Inspector Dalsingar Singh ever arrested the applicant. In fact the evidence is quite clear that all that Sub-Inspector Dalsingar Singh wanted was to search the person of the applicant and for that the law gave him no authority whatsoever until he had arrested the applicant. The next question is : did Sub-Inspector Dalsingar Singh have any authority to arrest the applicant without a warrant ? The learned Second Additional Sessions Judge seems to have been under the impression that there was no harm done because the Sub-Inspector could have arrested the applicant without a warrant and he could then have searched his person and the mere fact that he did not formally put the applicant under arrest before searching his person was not of any importance. In my judgment the learned Second Additional Sessions Judge was wholly wrong in taking that view. The only section which could have enabled Sub-Inspector Dalsingar Singh to arrest an applicant without any warrant is S. 54, Criminal P. C. Clause (1) of that section which could alone have applied to the facts of the case runs as follows :

"Any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned."

It has already been stated above that all that Sub-Inspector Dalsingar Singh suspected was that the applicant had some papers with him "connected with the Congress." It is evident that it is not the prosecution case that the applicant had committed any cognizable offence or that any reasonable complaint had been made against him for having committed any such offence or that even the Sub-Inspector had a reasonable suspicion of his having committed a cognizable offence. Section 54, therefore, could not come into operation and I am constrained to observe that the conduct of Sub-Inspector Dalsingar Singh in this case was very high-handed and utterly without any justification in law. He could not have arrested the applicant without a warrant and he could not have searched the applicant's person under any provision of law. The result, therefore, is that I allow this application and set aside the conviction and sentence of the applicant Ramain Rai. The fine, if any, paid by him shall be refunded.

G.N./R.K. *Application allowed.*

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DAR J.

Ram Baran Dube and others —
Defendants — Appellants

v.

Bahadur Khan, Plaintiff and another,
Defendant — Respondents.

Second Appeal No. 1412 of 1938, Decided on 25th March 1941, from decision of Dist. Judge, Ghazipur, D/- 1st August 1938.

(a) Civil P. C. (1908), S. 100—Whether mortgage subsists and mortgagee is holding property under mortgage or under sale deeds set up by him is question of fact.

The question whether the mortgage sought to be redeemed subsists and whether the mortgagee is holding the property under the mortgage or under sale deeds set up by him is a pure question of fact.

[P 426*h*]

C. P. C. —

('40) Chitaley, Ss. 100 and 101, N. 28 Pt. 3.

('41) Mulla, Page 367 "No second appeal lies on the ground of an erroneous finding of fact."

(b) Evidence—Old documents—Genuineness of — Proof.

In order to decide the genuineness of old documents the important consideration should be whether they were acted upon or not or whether they were supported by possession or not and too much importance cannot be attached to resemblance of signatures or to the opinion of experts about them.

[P 427*h* ; P 428*a*]

(c) U. P. Land Revenue Act (3 of 1901), S. 233K — S. 233K may bar claim which is not barred under S. 11, Civil P. C. — Two bars though may overlap are independent—Question of res judicata in revenue Court partition must be determined under principles of S. 11, Civil P. C. — Bar of S. 233K when comes into play explained.

A claim may be barred under S. 233K even when it is not barred under S. 11, Civil P. C., and the two bars though sometimes they may overlap are independent of each other and the question of res judicata arising in a revenue Court partition is really a matter to be determined under principles of S. 11, Civil P. C. The bar of S. 233K comes into play even when it is possible to grant the plaintiff a relief without disturbing the pattis or mahals formed at partition or the liability of revenue which was assessed on it and it is sufficient to attract the statute if a fraction of share or revenue is affected provided the title to that share or liability to pay revenue was adversely determined at the partition expressly or impliedly against a claimant who wants to avoid the effect of partition : ('38) 25 A. I. R. 1938 P. C. 210, *Rel. on.* [P 428*d*,*e*]

C. P. C. —

('40) Chitaley, S. 11, N. 76.
('41) Mulla, Page 75 Pts. (d) to (j).

(d) U. P. Land Revenue Act (3 of 1901), S. 233K — Principle underlying application of S. 233K explained.

The principle underlying the application of Section 233K is that if *A*'s property is treated as *B*'s property at the revenue Court partition to which *A* and *B* are both parties and regarding it as *B*'s property and not of *A* it is allotted to *B*'s share and not to *A*'s share and revenue is assessed on it as on *B*'s share and not as on *A*'s share then a subsequent suit by *A* for declaration of his title to the property against the entry of partition proceeding would be a suit affecting the partition of a mahal and would be barred by S. 233K. But if *A*'s property is allotted to *B* treating it as *B*'s property and there is a contract between *A* and *B* or a trust between them under which *B* is entitled to own and hold the property and to pay the revenue assessed on it subject to a contract or trust between them and *A* is not entitled to immediate possession of property or to pay revenue about it and there is no conflict of interest between them at the partition and in ignorance of the contract of trust or in disregard of it or without providing for it in the partition the property is allotted to *B* then a subsequent suit by *A* against *B* for his right against that property on the basis of contract or trust would not be barred by S. 233K. [P 428*g*,*h*]

(e) U. P. Land Revenue Act (3 of 1901), S. 233K — Mistakes at revenue Court partition unless they attract principles of res judicata cannot destroy contracts or trusts between parties — S. 233K cannot bar claims arising under those contracts or trusts — Mortgagee in possession under mortgage by conditional sale or usufructuary mortgage — Revenue Court partition—Mortgage property allotted to mortgagee's share as full owner — No conflict between mortgagor and mortgagee qua title to property at time of partition — Allotment to mortgagee cannot destroy contract between parties — Mortgagor can sue for redemption.

A revenue Court partition except when such a result can be reached by application of the principles of res judicata or S. 11, Civil P. C., cannot have the effect of destroying contracts or trusts subsisting between the parties simply because entries have been made at the partition in disregard of terms of contract or trust between the parties. The mistakes made at a partition so long as they do not attract the principles of res judicata cannot have the effect of destroying contracts or trusts between the parties and S. 233K would not bar claims arising under contracts or trusts. [P 429*a*]

If a mortgagee is in possession of property under a mortgage by conditional sale or usufructuary mortgage and in a revenue Court partition the mortgaged property is allotted to the share of the mortgagee treating him as full owner at a time when there was no conflict between the mortgagor and mortgagee qua the title to property such an allotment cannot have the effect of destroying the contract between the parties and it will be open to the mortgagor in such a case to bring a suit for redemption of the property at the proper time when he gets a cause of action for the suit or is in a position to enforce his right : 10 I. C. 630 (All.), *Rel. on* ; (38) 25 A. I. R. 1938 P. C. 210, *Expl.* [P 428*h*]

A. P. Pandey and K. N. Gupta—for Appellants.

Mushtaq Ahmad and M. N. Agarwala — for Respondents.

JUDGMENT. — On 15th July 1876, Jhagru Rai who owned a one anna six pie share in village Sikandarpur with its asli and dakhili villages executed a mortgage deed in favour of Nand Gopal Dube for a sum of Rs. 1100 by which he mortgaged with possession a six pie share in the said village. The mortgage deed provided that the usufruct of property would be appropriated towards interest and at the end of 11 years on payment of principal sum in the month of Jeth the property would be liable to redemption. On 7th January 1932, the plaintiff Bahadur Khan purchased a three pie share, that is, half the property mortgaged, from Suraj Bhan Rai a great grandson of Jhagru Rai and alleging that half the property had been redeemed by Baldeo Rai and Dud Nath Rai two other great grandsons of Jhagru Rai in 1910 and half of which came to be vested in Suraj Bhan Rai the other great grandson had been conveyed to him, brought a suit for redemption of half the property, on payment of half the principal sum secured by the mortgage. It is not disputed that Bahadur Khan is a speculator who has purchased a litigation on condition, that in the event of success half the property would be retained by him and half would be returned to the vendor Suraj Bhan Rai. Some other reliefs were included also by Bahadur Khan in this claim but these do not arise for consideration in this appeal. The defendants to the suit are in addition to defendant 8 Suraj Bhan Rai the vendor, defendants 1 to 7, and these may be described as one son, one grandson, two daughters-in-law and two nephews and one grand nephew of Nand Gopal Dube the mortgagee. The mortgagee Nand Gopal Dube were three own brothers, Nand Gopal, Maula and Kesar and defendants 1 to 7 are sons and grandson of these brothers and the wives of a deceased son of Nand Gopal.

The trial Court decreed the claim for redemption on payment of Rs. 550 and this decree was affirmed in appeal and in this second appeal two questions arise for consideration, one is a pure question of fact viz., whether the mortgage of 1876 qua three pie share which is now sought to be redeemed subsists and whether the defendants are holding the property specified in the plaint under the mortgage of 1876 or under sales of 1893, 1895 and 1897 and the other question is a question of law, viz., whether the claim is barred by S. 233K, Land Revenue Act (Act 3 of 1901). At the time of the mortgage of 1876 the property mortgaged was an undivided share expressed in terms of pies in a village together with its Dakhili and Asli villages. In the settlement of 1882 which followed the mortgage one vil-

lage was split up into five villages with Asli and Dakhili villages and the share owned by the mortgagor was expressed in gandas and bats; and the mortgage was recorded in revenue record not as a mortgage but as a theka, the mortgagor being recorded as Asl Malik and the mortgagee being recorded as thekadar. On 2nd may 1893 Sahdeo Rai a grandson of the mortgagor is alleged to have executed a sale deed in favour of Maula Dube the brother of mortgagee Nand Gopal for a sum of Rs. 600 of certain property in the said five villages and it is further alleged that out of the sale consideration Rs. 550 were left with Maula Dube for payment of Nand Gopal which payment he did make in fact and as a result of this payment Nand Gopal released half the property from mortgage in favour of Sahdeo Rai and thus half the mortgage was extinguished. On 27th August 1895, Sahdeo Rai and his brother, Deo Narain Rai sold some property in the said villages to Ram Baran Dube defendant 5 for Rs. 1000 and on 22nd February 1897, Sahdeo Rai sold some more property in the said villages to Nand Gopal for Rs. 600 some time after 1882 and prior to 1903 the entry of the theka disappeared from village records and whatever property remained recorded in village papers in the name of mortgagor's family or in the name of mortgagee's family it was recorded in full proprietary interest. Between 1903 and 1908 a revenue Court partition was effected in the said villages and inter alia a patti of Suraj Bhan in the mortgagor's family and a patti of Ram Baran Rai in the mortgagee's family was formed and whatever property was allotted in these two pattis was full proprietary property and not a mortgagee's property.

In 1910 two great grandsons of the mortgagor's viz., Baldeo Rai and Dud Nath Rai brought a suit for redemption of half the mortgage on payment of half the money alleging that half the equity of redemption had been purchased by the mortgagee and by this purchase integrity of the mortgage was broken and piecemeal redemption of mortgage was permissible. Nand Gopal Dube, the mortgagee, contested the redemption inter alia on the ground that he had not purchased half the equity of redemption and entire mortgage was subsisting but eventually without trial by a compromise half the property was redeemed and went in possession of Dud Nath Rai and Baldeo Rai. The plaintiff therefore claims that half the mortgage is still subsisting and that half the property he alleges to be included in patti Ram Baran Rai or in other words it is the property specified in the plaint and is in possession of defendants 1 to 7 by some kind of arrangement made between them inter se. The defendants on the other hand contend that the mortgage of 1876 was redeemed in 1893 by sale of 1893 as a result of payment of Rs. 550 mentioned above and whether it was redeemed or not the property in possession of defendants from which the plaintiff seeks to evict them was not the property held under mortgage of 1876 but was held under sales of 1893, 1895 and 1897 mentioned above and under other independent titles and that the property which is now in possession of Suraj Bhan Rai the mortgagor is a part of the six pie share which was mortgaged in 1876 and it is not a part of 12 pie share which had remained free from mortgage. The Courts below have found that the alleged redemption of mortgage in 1893 is not proved and that the alleged sale of 1893 is not proved and that the sale of 1897 related to property other than that mortgaged in 1876 and that the property in possession of defendants is the property mortgaged in 1876. In arriving at these findings the Courts below were influenced by two main considerations, firstly the interpretation of the defendants' written statement. According to this interpretation the defendants' case was supposed to be that the property mortgaged in 1876 was conveyed to defendants by sales of 1893, 1895 and 1897 and that the defendants relied upon the redemption of 1893 and if that redemption fails they had no other defences to the claim. Secondly, upon the importance which the Courts below attached to the pleading of Nand Gopal in the redemption suit of 1910 to the effect that the mortgage was subsisting and half of it had not been redeemed.

Now, in my opinion, in both these matters the Courts below have fallen into an error. The defendants' case as I understand is this : In 1893 certain property was sold to Maula Dube. The purchase-money was not paid to the vendor but was left with the vendee to pay the mortgage money in satisfaction of the mortgage. The consideration money having been paid by the vendee to the mortgagee, the mortgagee by mutual arrangement with the mortgagor released the property from operation of the mortgage. If this case is proved it amounts to an extinguishment of mortgage. But even if this case is not proved the defendants' alternative case remains that the property now in the defendants' possession is not held under the mortgage of 1876. On the other hand, it is held under independent titles arising under the sales of 1893, 1895 and 1897 or some other independent titles, and the plaintiff cannot evict the defendants unless the plaintiff proves that the property in their possession is the same which was mortgaged in 1876. The defendants further contend that the property now in possession of Suraj Bhan Rai is not the balance of one anna share which was never mortgaged but is a part of six pie share which was mortgaged. It may be that the defendants may not be able to prove that the mortgage was redeemed in 1893 but that will not finish the case, still they will have a good defence if they can show that the property in their possession is held under independent titles or that plaintiff has got back whole or portion of property which was mortgaged in 1876. Again the admission of Nand Gopal in 1910 may be a piece of evidence on the question whether the mortgage was redeemed or not in 1893, but it cannot operate as an estoppel and it has not much value on the other question whether the property now in possession of the defendant is held under the sales of 1893 &c., or under independent titles or not.

Not only the Courts below have fallen into error in appreciating the defendants' case and in attaching undue importance to Nand Gopal's pleading in the suit of 1910 but they have misdirected themselves in other matters also. The plaintiff is a speculator who has brought a suit to enforce a stale claim. Admittedly there was a mortgage transaction and certain sale transaction between the predecessor-in-interest of the parties. The property mortgaged has undergone transformation by settlement and by partition. Long prior to partition the mortgage entry had disappeared from revenue records and for years prior to suit the property was treated as full proprietary property. The heirs and representatives of the mortgagee after the lapse of 60 years cannot be expected to give all the details of old transactions and cannot be expected to bring full evidence relating to execution of old documents. In order to decide the genuineness of old documents the important consideration should be whether they were acted upon or not or whether they were supported by possession or not and too much importance cannot be

attached to resemblance of signatures or to the opinion of experts about them. The main problem in the case is under what title the property in possession of the defendant from which they are sought to be evicted is held. If the plaintiff establishes that it is held under the mortgage of 1876 he succeeds and if the defendants prove that it is held under independent titles they succeed and if it is further proved that the plaintiff has got back the property which was mortgaged again the defendants succeed. And connected with this question of identity of property is the entire history of 18 pie share as it has been subject of devolution by transfer or inheritance or as it has been subject of transformation by settlement or partition and wound up with the history of share are three sales of 1893, 1895, 1897, mentioned above. Before the case can be satisfactorily disposed of it is necessary that the following two issues should be determined by the lower appellate Court after giving the parties an opportunity to produce fresh evidence: (1) Whether the property sought to be redeemed whole or any portion of it as specified in the plaint is held by defendants 1 to 7 under the mortgage of 15th July 1876? (2) Whether the entire property or any portion of it from which the defendants are sought to be evicted is held by them or any one of them under sales dated 2nd May 1893, 27th August 1895 and 22nd February 1897?

With regard to one of the sales mentioned above there is a question of genuineness and there are previous findings on various facts of the case. I have not considered them and I express no opinion about their correctness or otherwise. But so far as the two issues now remitted are concerned I leave the entire matter at large for the consideration of the Court. If as a result of fresh investigation which will now take place the Court considers it proper to accept or confirm any previous finding it will be at liberty to do so and equally it will be at liberty to come to a fresh finding of its own. The Court will determine the issues and send the findings in three months and usual ten days will be allowed for objections. The contention of the defendants regarding the bar of S. 233K, Land Revenue Act, need not however await for the return of findings and this point can be disposed of on the assumption of facts. I shall assume on this part of the case that the mortgage of 1876 was subsisting and for some reason or other it was not recorded in the revenue record and in 1903 to 1908 a revenue Court partition took place to which both the mortgagor or mortgagee were parties not as mortgagors or mortgagees but as cosharers and separate pattis were formed and the mortgaged property was allotted to a patti allotted to mortgagee not as mortgaged property but as in full proprietary interest and it was not allotted to the separate patti of the mortgagor. And no record was made of this mortgage at the partition and no question was raised about it by any party. What then is the result?

The scope of S. 233K, Land Revenue Act (Act 3 of 1901) and the controversy which has grown round it was recently considered by the Judicial Committee in 1938 A. L. J. 786.[1] It is now settled that a claim may be barred under S. 233K even when it is not barred under S. 11, Civil P. C., and the two bars though sometimes they may overlap are independent of each other and the question of res judicata arising in a revenue Court partition is really a matter to be determined under principles of S. 11, Civil P. C. It is also settled that the bar of S. 233K comes into play even when it is possible to grant the plaintiff a relief without disturbing the pattis or mahals formed at partition or the liability of revenue which was assessed on it and it is sufficient to attract the statute if a fraction of share or revenue is affected provided the title to that share or liability to pay revenue was adversely determined at the partition expressly or impliedly against the claimant who wants to avoid the effect of partition. But I do not understand the Judicial Committee to lay down that the revenue Court partition except when such a result can be reached by application of the principles of res judicata or S. 11, Civil P.C., has the effect of destroying contracts or trusts subsisting between the parties simply because entries have been made at the partition in disregard of terms of contract or trust between the parties. Indeed at the end of their judgment in 1938 A. L. J. 786[1] at p. 794, their Lordships observed as follows:

"The facts of the present case raise no question as to rights of any one to bring a civil suit pending the partition proceedings, or as to the rights of a person who is not a recorded cosharer or was not a party to the proceedings or as to any case between persons whose interests were not opposed for the purpose of the partition. A considerable number of decisions have been given upon such cases but their Lordships have not had occasion to hear argument upon them and do not deal with them more especially as their Lordships consider that their decision upon the point arising in the present case is the confirmation of the main current of authority in India."

The principle underlying the application of S. 233K seems to be that if *A's* property is treated as *B's* property at the revenue Court partition to which *A* and *B* are both parties and regarding it as *B's* property and not of *A* it is allotted to *B's* share and not to *A's* share and revenue is assessed on it as on *B's* share and not as on *A's* share then a subsequent suit by *A* for declaration of his title to the property against the entry of partition proceedings would be a suit affecting the partition of a mahal and would be barred by S. 233K, Land Revenue Act. But if *A's* property is allotted to *B* treating it as *B's* property and there is a contract between *A* and *B* or a trust between them under which *B* is entitled to own and hold the property and to pay the revenue assessed on it subject to a contract or trust between them and *A* is not entitled to immediate possession of property or to pay revenue about it and there is no conflict of interest between them at the partition and in ignorance of the contract or trust or in disregard of it or without providing for it in the partition the property is allotted to *B*, then a subsequent suit by *A* against *B* for his right against that property on the basis of contract or trust would not be barred by S. 233K.

If a mortgagee is in possession of property under a mortgage by conditional sale or usufructuary mortgage and in a revenue Court partition the mortgaged property is allotted to the share of the mortgagee treating him as full owner at a time when there was no conflict between the mortgagor and mortgagee qua the title to property such an allotment in my opinion does not have the effect of destroying the contract between the parties and it will be open to the mortgagor in such a case to bring a suit for redemption of property at the proper time when he gets a cause of action for the suit or is in a position to enforce his rights. The mortgagor in such a suit

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1. ('38) 25 A.I.R. 1938 P. C. 210 : 175 I. C. 775:13 Luck. 508 : 32 S. L. R. 845 : 65 I. A. 314 : 1938 A.L.J. 786 (P.C.), Bajrang Bahadur Singh v. Beni Madho Bakhsh Singh.

is not trying to disturb the partition, its distribution of share or of its revenue or the questions of title to share or liability to revenue determined by the partition. He accepts all this; he is trying to enforce his contract which entitles him to recover possession of the property in certain events which have happened. At the partition the property was rightly allotted to the mortgagee, he was entitled to hold it and to pay its revenue, the only mistake which was made was that he was treated as full owner whereas in fact he was not a full owner but was a mortgagee liable to be evicted in certain circumstances. In my opinion, mistakes like these made at a partition for whatever cause such mistakes may be made so long as they do not attract the principles of res judicata cannot have the effect of destroying contracts or trusts between the parties and S. 233K would not bar claims arising under contracts or trusts. In my opinion, the claim of the plaintiff if otherwise valid would not be barred under the provisions of S. 233K, Land Revenue Act. This was also the view taken on different consideration in 10 I.C. 630.[2] As a result I remit the above mentioned two issues for determination of the lower appellate Court.

G.N./R.K. *Order accordingly.*

2. ('11) 10 I.C. 630 (All.), Balbhadar Rai v. Birjraj Rai.

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* A. I. R. (29) 1942 Allahabad 429

FULL BENCH

IQBAL AHMAD C. J., DAR AND PLOWDEN JJ.

Raja Pande — Appellant

v.

Sheopujan Pande and others — Respondents.

Second Appeal No. 12 of 1938, Decided on 17th September 1942, from decision of Dist. Judge, Ghazipur, D/- 25th February 1938.

*** (a) Provincial Insolvency Act (1920), S. 9 (1) (c) — Period of three months under S. 9 (1) (c) — S. 10, General Clauses Act, applies** (Per *Full Bench*).

Section 10, General Clauses Act, applies to a creditor's petition of insolvency filed under S. 9. Consequently, if the period of three months prescribed by S. 9 (1) (c) expires on a day when the Court is not sitting the petition can be validly presented on the next day when the Court is sitting: ('35) 22 A.I.R. 1935 Mad. 857 (F.B.), *Dissent.*; 34 All. 496 (F.B.), *Expl.*; *Case law discussed.*

[P 434*a*, *b*]

(b) Provincial Insolvency Act (1920), Ss. 9 (1) (c) and 78—Period prescribed by S. 9 (1) (c) is period of limitation (Per *Full Bench*).

A period of limitation is synonymous with a "time limit" for proceedings in a Court of law. The period of three months prescribed by S. 9 (1) (c) is a period of limitation. [P 434*a*]

*** (c) Provincial Insolvency Act (1920), S. 9 (1) (c)—Creditor's petition for insolvency under S. 9 (1) (c) — Sections specified in S. 29 (2), Limitation Act, do not apply** (Per *Iqbal Ahmad C. J., and Plowden J.*; *Dar J.*, Dissenting).

(Per *Iqbal Ahmad C. J., and Plowden J.*) — If a special or local law is a complete code in the matter of "limitation" or if the phraseology of the sections enumerated in S. 29 (2), Limitation Act, makes those sections inapplicable to proceedings under a special or local law, the application of those sections to the special or local law must be deemed to have been expressly excluded by the Legislature: ('29) 16 A. I. R. 1929 Cal. 325 and ('30) 17 A. I. R. 1930 Sind 93, *Not approved.* [P 433*f*, *g*]

The Provincial Insolvency Act is a "special law" within the meaning of S. 29 (2), Limitation Act : 34 All. 496 (F.B.), *Rel. on.* [P 431*e*]

But the Provincial Insolvency Act is a self-contained Act in the matter of "limitation" with respect to proceedings contemplated by it and therefore S. 29 (2), Limitation Act, has no application to that Act. [P 432*g*; P 433*e*]

The very phraseology of the sections specified in S. 29 (2) except S. 12, Limitation Act, makes those sections wholly inapplicable to the petitions for insolvency under the Provincial Insolvency Act and therefore the application of those sections must be deemed to have been expressly excluded by the Legislature. [P 433*f*]

A petition for insolvency is not a suit or appeal within the meaning of S. 29 (2) (a), Limitation Act. In ordinary parlance the words "petition" and "application" no doubt connote the same meaning but the Legislature has used the word "petition" in the Provincial Insolvency Act with reference to matters relating to acts of insolvency and the word "application" has been used with respect to motions other than those that have direct reference to acts of insolvency. Therefore, a petition for insolvency either under S. 9 or S. 13, Provincial Insolvency Act, is not an "application" and hence cannot attract the provisions of S. 29 (2) (a), Limitation Act. The provisions of the Limitation Act have no reference to "petitions" and as such those provisions cannot apply to petitions under the Provincial Insolvency Act. Since the Legislature in the Provincial Insolvency Act has made provisions about the applicability of Ss. 5 and 12, Limitation Act, to proceedings under that statute, the conclusion is irresistible that the Legislature intended only the enumerated sections and no other sections of that Act to apply to proceedings under the Provincial Insolvency Act. [P 431*e*, *g*, *h*; P 432*f*]

(Per *Dar J.*) — The words "expressly excluded" in S. 29 (2), Limitation Act, mean that the sections specified in S. 29 (2) shall apply unless an express reference is made to those sections in the special law and by that reference they are expressly excluded. Those words contemplate exclusion of express words that is by express words of the reference and not exclusion as a result of a logical process of reasoning : ('29) 16 A.I.R. 1929 Cal. 325; ('30) 17 A.I.R. 1930 Sind 93 and ('32) 19 A.I.R. 1932 Bom. 259, *Rel. on.* [P 435*g*]

The Provincial Insolvency Act is a special law and it does not expressly exclude the provisions contained in S. 4, Limitation Act; but S. 29 (2), Limitation Act, can only apply 'for the purpose of determining any period of limitation prescribed for any suit or application by special law,' and if the special law does not prescribe any period of limitation for any petition S. 29, Limitation Act, will have no application. The petition of insolvency under S. 9 is substantially in the nature of a plaint and the act of insolvency in substance partakes the nature of a cause of action. The condition in S. 9 (1) (c) that the petition should be presented within three months of the act of insolvency substantially

provides a period of limitation for the petition, so as to attract the provisions of S. 29 (2) and therefore of S. 4, Limitation Act. [P 435*h*; P 436*a*,*b*]

Limitation Act —
('42) Chitaley, S. 29 N. 3.
('38) Rustomji, Page 529 Pt. 6.

(d) Limitation Act (1908), S. 4—S. 4, Limitation Act and S. 10, General Clauses Act — Construction—Aforesaid sections do not extend limitation nor do they furnish any data for computation of limitation (Per *Dar J.*).

Section 4, Limitation Act, and S. 10, General Clauses Act, give expression to the general principle of law enunciated by the maxims "*lex non cogit ad impossibilia*"—the law does not compel a man to do that which he cannot possibly perform, and "*actus curiæ neminem gravabit*"—an act of the Court shall prejudice no man. These sections do not in any way extend the period of limitation, nor do they furnish any data for computation of time; they merely embody a rule of elementary justice that if the time allowed by statute to do an act or to take a proceeding expires on a day when the Court is closed, it may be done on the next sitting of the Court: ('35) 22 A.I.R. 1935 P.C. 85, *Rel. on.* [P 437*f*,*g*]

Limitation Act —
('42) Chitaley, S. 4 N. 2 Pt. 7.
('38) Rustomji, Page 75 Pt. 1.

(e) Provincial Insolvency Act (1920), Ss. 9 (1) (c) and 6 — Period of three months under S. 9 (1) (c) applies to all eight acts of insolvency specified in S. 6—Fact that act dealt with under S. 6 (c) can be avoided under S. 54 within same period as that for making petition under S. 9 is no reason for interpreting period under S. 9 (1) (c) in same manner as under S. 54 (Per *Dar J.*).

The period of three months given under S. 9 (1) (c) to make a petition from an act of insolvency applies to all eight acts of insolvency specified in S. 6 including three acts of transfer and five other kinds of acts and the fact that for one act of transfer specified in S. 6 (c) there is the same period under S. 54 to avoid the transfer as it is for making the petition is a mere accident and this coincidence furnishes no adequate reason for holding that the period of three months in S. 9 (1) (c) is used in exactly the same sense and is subject to same legal interpretation as in S. 54. [P 437*e*]

Chaturbhuj Sahai — for Appellant.

K. L. Misra — for Respondents.

IQBAL AHMAD C. J. — This appeal is directed against an order of remand passed by the District Judge of Ghazipur in an insolvency case and arises under the following circumstances. On 5th July 1937, Sheopujan Pande respondent filed an application in the Court of the Civil Judge of Ballia for the adjudication of Raja Pande appellant as insolvent. In his application, Sheopujan alleged that on 8th March 1937, Raja Pande had fraudulently transferred almost all his properties with intent to defeat or delay his creditors and had thus committed an act of insolvency within the meaning of S. 6, Provincial Insolvency Act (5 of 1920). Raja Pande contested the application of Sheopujan inter alia on the ground that "the petitioner's application has been made after the expiry of three months from the date of the execution of the sale deed, that is the alleged act of insolvency, and is not entertainable according to law." This contention of Raja Pande was based on sub-cl. (c) of S. 9 (1), Provincial Insolvency Act, which runs as follows:

"A creditor shall not be entitled to present an insolvency petition against a debtor unless (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition."

The rejoinder of Sheopujan to this contention was that, as the civil Courts were closed for the long vacation from 4th June to 4th July 1937, and as the period of three months prescribed by S. 9 (1) (c) expired during the long vacation, the petition was within time, presented as it was on the day that the Court reopened after the long vacation. Sheopujan in support of this assertion placed reliance on S. 4, Limitation Act, which provides:

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred, or made on the day that the Court re-opens."

The learned Additional Civil Judge of Ballia relying on the Full Bench decision of the Madras High Court in 58 Mad. 794,[1] held that the application was not maintainable and, accordingly, dismissed the same. It was held in that case that the period of three months fixed in S. 9 (1) (c), Provincial Insolvency Act, is not a period of limitation but is a condition to an adjudication, and accordingly an act of insolvency which has occurred more than three months prior to the presentation of the petition is not available as a ground of adjudication, even though on the day on which the three months expired the Court was closed, and the petition for insolvency was filed on the date that the Court reopened. This case is an authority for the proposition that neither S. 4, Limitation Act, nor S. 10, General Clauses Act (10 of 1897) apply to a petition for insolvency filed under the Provincial Insolvency Act. To the same effect are the decisions in A. I. R. 1937 Mad. 433,[2] and I. L. R. (1939) 1 Cal. 425.[3] Section 10, General Clauses Act, enacts:

"*10.* (1) Where, by any (Central Act) or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open:

'Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.'

"(2) This section applies also to all (Central Acts) and Regulations made on or after the 14th day of January, 1887."

Sheopujan being dissatisfied with the decision of the civil Judge appealed to the District Judge and the District Judge, relying on 9 Rang. 150,[4] held that S. 4, Limitation Act, does apply to petitions

1. ('35) 22 A.I.R. 1935 Mad. 857 : 158 I. C. 1 : 58 Mad. 794 : 69 M.L.J. 283 (F.B.), Chenchuramana Reddi v. Arunachalam.
2. ('37) 24 A. I. R. 1937 Mad. 433 : 170 I. C. 65, Venkata Rama Lakshmayya v. Subba Rao.
3. ('39) 26 A. I. R. 1939 Cal. 313 : 182 I. C. 701 : I.L.R. (1939) 1 Cal. 425 : 69 C. L. J. 84, Muradan Sardar v. Secy. of State.
4. ('31) 18 A.I.R. 1931 Rang. 209 : 134 I. C. 223 : 9 Rang. 150, Ma Than May v. Bailiff of the Township Court of Kyaunggon.

made under S. 9 (1) (c), Provincial Insolvency Act, and that the application of Sheopujan was within time. He accordingly set aside the decisions of the Additional Civil Judge and remanded the case for decision according to law. It was held in the Rangoon case that by reason of the express terms of S. 29 (2) (a), Limitation Act, S. 4, Limitation Act, applies to applications made under the Provincial Insolvency Act. Section 29 (2), Limitation Act, inter alia provides that "for the purpose of determining any period of limitation prescribed for any suit or appeal or application by any special or local law, (a) the provisions contained in S. 4, Ss. 9 to 18, and S. 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law."

The decision of the Rangoon High Court was based on a Full Bench decision of this Court in 34 All. 496.[5] The question before the Full Bench in 34 All. 496[5] was whether a person filing an appeal under S. 46 of the then Provincial Insolvency Act (3 of 1907) was entitled to the benefit of S. 12, Limitation Act? Section 12 lays down inter alia that in computing the period of limitation prescribed for any appeal the time requisite for obtaining a copy of the judgment and decree shall be excluded. There was no provision in the Insolvency Act of 1907 for the exclusion of such time. The Full Bench however held that the Provincial Insolvency Act is a special law within the meaning of S. 29, Limitation Act, and inasmuch as it is not in itself a complete code, there is nothing to prevent the application thereto of the general provisions of the Limitation Act and that those general provisions do not "affect or alter" the period prescribed by a special law, but only indicate the manner in which that period is to be computed.

It would appear from what has been stated above that there is divergence of judicial opinion on the question as to whether the provisions of the sections of the Limitation Act enumerated in S. 29 (2) (a) of that Act, and in particular the provisions of S. 4 of that Act, are applicable to petitions for insolvency filed under the Provincial Insolvency Act. I confess that much can be said in favour of either view, but, after giving the matter my best consideration, I have come to the conclusion that the sections of the Limitation Act specified in S. 29 (2) (a) of that Act have no application to petitions under the Insolvency Act. The question that I have to decide did not and could not arise for consideration in 34 All. 496[5] for the simple reason that in the year 1912, when that case was decided, cl. (2) of S. 29 in its present form did not exist. This clause was introduced for the first time by the Limitation (Amendment) Act (10 of 1922). In 1912 the provision in S. 29 was that "nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India." There was then conflict of judicial opinion on the question whether the application of the general provisions of the Limitation Act to special or local statutes did or did not "affect or alter" the period of limitation prescribed by such statutes, and the question was answered in the negative in 34 All. 496.[5] In view of the amendment to S. 29 of Act 10 of 1922 that question can no longer arise.

The decision of the question under consideration must, in view of the provisions of cl. (2) of S. 29, depend on the answer to the questions whether, within the meaning of that clause: (1) the Provincial Insolvency Act is a special or local law; (2) a petition for insolvency is a "suit, appeal or application"; and (3) the provisions contained in S. 4, Ss. 9 to 18 and S. 22 are to any extent not expressly excluded by the Provincial Insolvency Act. I respectfully adopt the decision in 34 All. 496[5] that the Provincial Insolvency Act is a "special law." The Act affects the status of a citizen, deals with a special branch of law and creates special jurisdiction. I am, however, of the opinion that a petition for insolvency is not a "suit, appeal or application" within the meaning of cl. (2) of S. 29. No argument is needed to demonstrate that a petition for insolvency is not a "suit" or an "appeal". Both the words "suit" and "appeal" are technical expressions and have been used in cl. (2) of S. 29 in contradistinction to the word "application". A suit generally speaking, starts with a plaint and not with an application, and a study of the Provincial Insolvency Act will show that the Legislature has not used the word "suit" in relation to a "petition" or "application" under that Act. Similarly, the word "appeal" connotes the idea of a motion by a party for the reversal or modification of a decision by which he is aggrieved. It is needless to observe that a petition for insolvency is not a motion for redress being granted against a certain decision. It follows that a petition for insolvency is neither a suit nor an "appeal" within the meaning of cl. (2) of S. 29, Limitation Act. The question however remains whether a petition for insolvency is or is not an 'application" within the meaning of that clause.

A perusal of the various sections of the Provincial Insolvency Act discloses that the Legislature has, in that Act, used the expressions "petition" and "application" for different purposes and with different legal significations. The word "petition" has, for instance, been used in S. 6 (f) and in all the sections from S. 8 to S. 28 of the Act. The word "petition" also finds a place in Ss. 52, 53 and 54 of the Act. The words "application" or "apply" on the other hand, have been used in Ss. 10 (2), 31, 35, 41, 52, 68 and other sections of the Act. In ordinary parlance the words "petition" and "application", no doubt, connote the same meaning, but when one finds that in a statute the Legislature has, in different sections, used the one or the other word, the conclusion is irresistible that the Legislature intended to use the one word in a sense different from the other.

Sections 6 to 28 are under the sub-heading "Acts of Insolvency", "Petition" or "Order of adjudication", and sections 52 to 54 are preceded by the sub-heading "Effect of insolvency on antecedent transactions." The words "apply" or "application" have, on the other hand, been used in relation to applications for protection order, for order of discharge, for annulment of adjudication, for reversal of the decisions of a receiver and for other kindred matters. I conclude from this that the Legislature has used the word "petition" in the Act with reference to matters relating to acts of insolvency, and the word "application" has been used with respect to motions other than those that have direct reference to acts of insolvency. It follows that petition for insolvency either under S. 9 or S. 13 of the Act is not an "application." If I am right in the above conclusions, S. 29 (2), Limitation Act, which makes provision for the determination of the periods of limitation prescribed "for any suit, appeal or application by special or local law," can obviously have no application to petitions under the Provincial Insolvency Act.

5. ('12) 34 All. 496 : 16 I. C. 149 : 10 A. L. J. 3 (F.B.), Dropadi v. Hira Lal.

There is yet another reason that leads me to hold that the sections enumerated in S. 29 (2), Limitation Act, cannot apply to petitions under the Insolvency Act. By S. 46, Provincial Insolvency Act (3 of 1907), which was in force when 34 All. 496[5] was decided, provision was made for appeals against orders made in the exercise of insolvency jurisdiction, and by cl. (4) of that section it was provided that "the periods of limitation for appeals to the District Court and to the High Court under this section shall be 30 days and 90 days respectively." There was however no provision in that Act, similar to S. 12, Limitation Act, as to the exclusion of time taken in obtaining certified copy of the judgment or of the formal order of the Insolvency Judge, in computing the period of limitation for appeals prescribed by that Act. This gave rise to difference of judicial opinion that necessitated the reference in 34 All. 496[5] to a Full Bench and the Full Bench held that the general provisions of the Limitation Act, including the provision of S. 12 of that Act, were applicable to appeals under the Insolvency Act of 1907. While replacing the Provincial Insolvency Act of 1907 by the present Provincial Insolvency Act (5 of 1920) the Legislature, for the first time, introduced S. 78—a section which did not find a place in the Act of 1907. Sub-clause (1) of S. 78 of the present Act (5 of 1920) enacts that "the provisions of Ss. 5 and 12, Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said S. 12, a decision under S. 4 shall be deemed to be a decree."

It is permissible to assume that the Legislature was cognizant of the conflict of judicial opinion referred to above and, it appears to me, that it introduced S. 78 with a view to set that conflict at rest. The main reason assigned in 34 All. 496[5] for holding that the general provisions of the Limitation Act applied to proceedings under the Provincial Insolvency Act was that the latter Act was "not in itself a complete code," and, as such, recourse could be had to the general provisions of the Limitation Act for the computation of the periods of limitation prescribed by the Provincial Insolvency Act. By enacting S. 78 in the new Act the Legislature, to my mind, intended to make good the omission in the Act pointed out in 34 All. 496,[5] and to make that Act a self-contained Act or in other words "a complete code." That the Act is self-contained so far as the procedure to be followed in proceedings under the Act is concerned admits of no doubt. By S. 18 "the procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of plaints," has been made applicable to insolvency petitions. The procedure to be followed at the hearing of such petitions is set out in para. 24 of the Act. Similarly, the Act contains detailed provisions as to the procedure to be adopted after the order of adjudication, or in applications for annulment of adjudication or order of discharge. Part 3 of the Act also contains detailed provisions for the procedure to be followed in the administration of the insolvent's property. By S. 75 in Part 6 provision is made for appeals. It is true that the procedure to be followed at the hearings of the appeals is not prescribed by the Act, but, by S. 79 of the Act, the High Courts are empowered to make rules "for carrying into effect the provisions of" the Act. Under this rule-making powers the High Courts can, therefore, prescribe the procedure for the admission and hearing of appeals. It follows that in the matter of procedure the Act is a self-contained Act.

Leaving aside, for the present, the controversial question whether the period of three months prescribed by S. 9 (1) (c) of the Act is a period of limitation or a "condition" to an adjudication, there can be no room for doubt that the Act has prescribed periods of limitation for applications and appeals: *vide* for instance, Sections 68 and 75. Then by cls. (1) and (2) of S. 78 the Act has made the provisions of Ss. 5 and 12, Limitation Act, applicable to appeals and applications under the Act, and has also made provision for exclusion of time in the computation of the periods of limitation prescribed for any suit or application for the execution of a decree in certain cases. It is, therefore, manifest that, unlike many other "special or local law," the Provincial Insolvency Act does not stop short at merely prescribing periods of limitation, but also makes provisions for the computation of such periods and for exclusion of certain time in such computations. This, I feel, is a strong indication of the fact that the Legislature intended to make the Act a self-contained Act in the matter of "limitation" for proceedings contemplated by the Act. If the Legislature had intended that, apart from Ss. 5 and 12, Limitation Act, other sections of that Act should apply to proceedings under the Provincial Insolvency Act, one would have expected the Legislature to enumerate those sections of the Limitation Act also in S. 78. When one finds that the Legislature, in a particular statute, has made provisions about the applicability of certain sections of the Limitation Act to proceedings under that statute, the conclusion is irresistible that the Legislature intended only the enumerated sections and no other sections of that Act to apply to proceedings under that statute. It, therefore, appears to me that the Provincial Insolvency Act is a self-contained Act in the matter of "limitation" with respect to proceedings contemplated by the Act. It follows that the general provisions of the Limitation Act, other than those specified in the Provincial Insolvency Act, cannot be appealed to for determining the periods of limitation as regards proceedings under the latter Act. I have already given my reasons for holding that the provisions of the Limitation Act have no reference to "petitions", and as such, those provisions cannot apply to petitions under the Insolvency Act. There was also, to my mind, very good reason for the Legislature to exclude the application of the sections enumerated in S. 29 (2), Limitation Act (except section 12) to appeals and applications under the Insolvency Act.

The sections referred to in S. 29 (2) (a) are S. 4, Ss. 9 to 18 and S. 22. I shall presently show that S. 4, which for all practical purposes is a reproduction of S. 10, General Clauses Act, was not made applicable to the Insolvency Act as S. 10, General Clauses Act, applies to that Act. Section 9 is confined in its operation to suits and no suits are contemplated by the Insolvency Act, and as such, that section could not be made applicable to the Insolvency Act. Similarly, Ss. 10, 11, 13, 14 (1), 16 and 22, Limitation Act, are applicable only to suits, and as such, could not be made applicable to proceedings under the Provincial Insolvency Act. Again S. 15, Limitation Act, makes provision for computation of period of limitation prescribed for "any suit or application for the execution of a decree" and, as no suit or application for execution of a decree is contemplated by the Provincial Insolvency Act, that section could not be made applicable to proceedings under the latter Act. Section 12, Limitation Act, has been, as already pointed out, made applicable to appeals and applications under the Provincial Insolvency Act.

The only sections out of the sections enumerated in S. 29 (2) (a) that are thus left are 14 (2), 17 and 18. Out of these sections, S. 17 deals with the effect of death of a person who, if living, would have a right to institute a suit or make an application or against whom, if he were living, a right to institute a suit or make an application would have accrued. This section by any stretch of imagination cannot be applied to proceedings under the Provincial Insolvency Act. We are thus left only with S. 14 (2) and S. 18. Section 14 (2) enacts that "in computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding .... against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it." There was, in my judgment, very good reason for the Legislature not to apply this provision to applications under the Insolvency Act. In the first place the Insolvency Act, as already observed, creates a special jurisdiction, and, as such, no applicant could be expected to entertain a bona fide belief that a Court other than the insolvency Court could grant reliefs of the nature contemplated by the Insolvency Act. There could, therefore, be no question of any applicant prosecuting with due diligence another civil proceeding in a Court other than the insolvency Court with respect to a relief which the insolvency Court alone could grant on an application. In the second place the policy underlying the Insolvency Act is that the proceedings in bankruptcy should be brief and swift and the stigma of bankruptcy should be removed from the insolvent as soon as possible. This object would have been frustrated by making the provisions of S. 14 (2), Limitation Act, applicable to applications under the Provincial Insolvency Act.

There remains S. 18 which provides about the computation of the periods of limitation when a person "having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him." This section, so far as it deals with suits, could obviously not apply to the Provincial Insolvency Act, and, there were, in my opinion, very good reasons for excluding its applicability to applications under that Act. The applications contemplated by the Insolvency Act are applications consequent on and not antecedent to the making of an order of adjudication; an order of adjudication can be made only after due notice to all concerned has been given under S. 19 of the Act. On the passing of an order of adjudication, the right to make an application under the Act must, therefore, be presumed to have come to the knowledge of the person interested in making an application under the Insolvency Act, and there could be no question of his being kept from the knowledge of such right by the exercise of fraud. The above analysis would demonstrate that out of Ss. 9 to 18 and S. 22, Limitation Act, the only section that could apparently be made applicable to the Insolvency Act was S. 12 and this the Legislature did by enacting S. 78. The utmost that can be urged against this conclusion is that, by some farfetched reasoning, Ss. 14 (2) and 18 could be made applicable to applications under the Insolvency Act. The short answer to this contention, in my opinion, is that, if these sections could be made applicable, the Legislature instead of specifying only two sections of the Limitation Act in S. 78, Provincial Insolvency Act, would also have specified these sections in S. 78.

For the reasons given above, I have no hesitation in holding that the Provincial Insolvency Act is a self-contained Act and S. 29 (2), Limitation Act, has no application to that Act. In arriving at this conclusion I have not overlooked the fact that S. 29 (2) was enacted in 1922, i. e., two years after the present Provincial Insolvency Act was passed; nor have I overlooked the phrase "expressly excluded" in S. 29 (2) (a). I am aware of the decisions in 56 Cal. 805[6] and A. I. R. 1930 Sind 93,[7] in which it has been held that the sections enumerated in S. 29 (2) cannot be held to be "expressly excluded" within the meaning of that section, unless specific reference is made in the special or local law to each section and it is provided that they shall not apply to that particular special or local law. With all respect I am not prepared to go as far as that. The fact, that the Legislature thought fit to make a special or local law a self-contained Act in the matter of limitation, is proof positive of its intention to forbid recourse to the Limitation Act for the ascertainment of the periods of limitation prescribed for proceedings under that special or local law. Again, if the very phraseology of most of the sections specified in S. 29 (2) makes those sections wholly inapplicable to a particular special or local law, it would be verging on absurdity to attempt to apply those sections to that special or local law. I would, therefore, hold that if a special or local law is a complete code in the matter of "limitation" or if the phraseology of the sections enumerated in S. 29 (2), Limitation Act, makes those sections inapplicable to proceedings under a special or local law, the application of those sections to the special or local law must be deemed to have been expressly excluded by the Legislature.

I, however, consider that S. 10, General Clauses Act, applies to proceedings under the Provincial Insolvency Act. That section has been quoted above, and it has been pointed out that its practical effect is the same as that of S. 4, Limitation Act. It is well known that the Provincial Insolvency Act of 1920 was modelled on the lines of the English Bankruptcy Act of 1914, and, indeed, some sections of the Indian Act have been copied verbatim from the English Act. In the English Act there exists a provision similar to S. 10, General Clauses Act: *vide* S. 145, Bankruptcy Act. The Legislature did not reproduce S. 145 of the English Act in the Provincial Insolvency Act for the simple reason that the General Clauses Act governs the Provincial Insolvency Act, and, as such, the provisions of S. 10, General Clauses Act, apply to proceedings under the Provincial Insolvency Act. It would be noted that S. 10 does not speak of the period of limitation" and applies to "any act or proceeding" which is directed or allowed to be done by any Central Act or Regulation. That the presentation of an insolvency petition under S. 9 (1) (c), Provincial Insolvency Act, is an "act or proceeding" within the meaning of S. 10 admits of no doubt. I am, therefore, clear that, in view of the provisions of S. 10, the petition presented by Sheopujan on the

6. ('29) 16 A. I. R. 1929 Cal. 325: 121 I.C. 673: 56 Cal. 805: 33 C. W. N. 227, Sati Prosad Garga v. Govinda Chandra.
7. ('30) 17 A. I. R. 1930 Sind 93: 122 I. C. 398: 24 S. L. R. 344, Rewachand Fatehchand v. Karachi Municipality.

date that the Court re-opened was within time. Before concluding this judgment, I must deal with the question whether or not the period of three months referred to in S. 9 (1)(c), Provincial Insolvency Act, is a period of limitation. To my mind it is. A "period of limitation" is, I consider, synonymous with a "time limit" for proceedings in a Court of law. The period of three months in sub-cl. (c) of S. 9 (1) does impose a limit of time about the presentation of an insolvency petition and is therefore a "period of limitation." A period of limitation is in one sense a condition precedent to the enforcing of rights and remedies in a Court of law. It is in this sense that one may call the period of three months prescribed for the presentation of insolvency petitions as a condition governing such petitions. Nevertheless, it does not cease to be a period of limitation. But, as already indicated, whether it is or it is not a period of limitation, S. 10, General Clauses Act, must apply to petitions for insolvency. For the reasons given above, I hold that the order of remand passed by the learned District Judge is perfectly correct and accordingly, I would dismiss this appeal with costs.

DAR J. — This is an appeal against an order of the District Judge of Ghazipur, dated 25th February 1938, by which he reversed an order of the Additional Civil Judge of Ballia dated 5th October 1937, whereby a creditor's application for adjudication of an insolvent was dismissed. On 8th March 1937, Raja Pande, a resident of village Rampur in Ballia District, executed a sale deed of his grove and of his fixed rate holdings situated in certain villages in Ballia District in favour of his two cousins, Ram Tapesa Pande and Ram Iqbal Pande, for an ostensible consideration of Rs. 2488. On 4th June 1937, the insolvency Court at Ballia was closed for summer vacation and it reopened on 4th July 1937. On the re-opening of the Court on 4th July 1937, Sheopujan Pande, another resident of village Rampur, presented a petition in the Court of the Insolvency Judge of Ballia under S. 13 (2), Provincial Insolvency Act (5 of 1920) against Raja Pande and Ram Tapesa Pande and Ram Iqbal Pande, the said transferor and transferees. In this petition it was alleged that Raja Pande, opposite Party No. 1, owed a debt for Rs. 1012-4-0 to the petitioner, Sheopujan Pande, that in order to defeat this debt and his other creditors Raja Pande had made a sham and fraudulent transfer without any consideration in favour of his two relations, Ram Tapesa Pande and Ram Iqbal Pande, Opposite Party Nos. 2 and 3, that the said transfer was void and unenforceable and was not binding upon the petitioner and other creditors of the Opposite Party No. 1 and that the said transfer was an act of insolvency and the petitioner prayed that Raja Pande the Opposite Party No. 1, be adjudged insolvent. This petition was opposed both by Raja Pande as also by Ram Tapesa Pande and Ram Iqbal Pande and one of their pleas in defence was that the petition made by Sheopujan Pande was made three months after the alleged act of insolvency and consequently under S. 9 (1) (c), Provincial Insolvency Act, the petition was incompetent. The Insolvency Judge considered this objection as a preliminary issue and holding that inasmuch as the period of three months from the act of insolvency expired during the summer vacation the petition for adjudication was filed beyond three months of the act of insolvency and was consequently incompetent, dismissed the petition with costs. On appeal, the District Judge of Ghazipur came to the conclusion that inasmuch as the period of three months from the act of insolvency expired during the summer vacation the petitioner was entitled to present his petition on the next sitting of the Court which he did and consequently the petition must be taken in law to have been made within three months of the act of insolvency and was properly made. On this finding he set aside the order of the insolvency Judge and remanded the case for disposal according to law. Against this order Raja Pande has made this appeal and the only question for my consideration in this case is that in a creditor's petition of insolvency if the period of three months from the act of insolvency expires on a day when the Court is not sitting can the petition be validly presented on the next day when the Court is sitting?

The law of England as enacted in Bankruptcy Act, 1914, with amendments up-to-date contains similar provisions as are to be found in the Indian statute about the right of a creditor to move a petition of insolvency and to avoid fraudulent transfers or transfers which give preference to one creditor. Sections 9 and 54, Provincial Insolvency Act (5 of 1920) have been modelled on Ss. 4 and 44, Bankruptcy Act, 1914, and their language is substantially the same in regard to the matter which I am considering. In the English statute as also under the Indian Act, it is one of the conditions of a creditor's petition that it should be made within three months of the act of insolvency and under the English statute as also under the Indian Act a transfer by way of preference to a creditor shall be declared void if the transferor is adjudged insolvent on a petition presented within three months after the date of the transfer. By S. 145 the English statute further provides as follows:

"*145.* (1) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day: and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter Week, or a day appointed for public fast, humiliation, or thanks giving, or a day on which the Court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified. (2) Where by this Act any act or proceeding is directed to be done or taken on a certain day, then, if that day happens to be one of the days in this section specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards which is not one of the days in this section specified."

It is therefore manifest that according to law of England if the period of three months of an act of insolvency or of a transfer by way of fraudulent preference of a creditor expires on a day when the Court is not sitting on account of vacation the petition can be made and transfer can be avoided on the next day when the Court is sitting and the period of three months shall be taken to expire not on the day when the Court is closed but it shall be deemed in law to expire on the next day when the Court is sitting. The Provincial Insolvency Act (5 of 1920) contains in Ss. 9 and 54 corresponding provisions to Ss. 4 and 44, English Bankruptcy Act; in other words, they require a petition to be presented and a transfer by way of fraudulent preference to be

avoided within three months of the act of insolvency or of the act of transfer. But it contains no provision corresponding to S. 145, Bankruptcy Act which enjoins that if time expires on a holiday it must be deemed to expire on the next working day. But we have two provisions in our statute which practically serve the same purpose. Section 4, Limitation Act (9 of 1908), is as follows :

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

Section 10, General Clauses Act (10 of 1897) is as follows :

"*10.* (1) Where, by any Act of the Governor-General in Council or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open : Provided that nothing in this section shall apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

(2) This section applies also to all Acts of the Governor-General in Council and Regulations made on or after the fourteenth day of January, 1887."

The main problem in the case is whether in a creditor's petition presented under S. 13 (2) read with Ss. 6, 7 and 9, Provincial Insolvency Act, the said provisions of the Limitation Act and the General Clauses Act, one or the other, can be applied. Prior to the year 1920 on the wording of the Provincial Insolvency Act (3 of 1907) and on the wording of the Limitation Act (9 of 1908), as they stood enacted in those days, there existed a great deal of controversy and opposite views were held on the question whether general sections of the Limitation Act applied to the provisions of the Provincial Insolvency Act. By the enactment of a new Provincial Insolvency Act (5 of 1920) which is now in force and by the amendment in the year 1922 of the Limitation Act (5 of 1908) a good deal of this controversy has now been set at rest and good deal of case law which had grown round the question whether the Provincial Insolvency Act was a self-contained code or not and whether the application of the provisions of the Limitation Act affected the period of limitation prescribed by the Provincial Insolvency Act or only furnished a mode of computation of time has ceased to be of any value. There is now a provision in the Provincial Insolvency Act, namely, S. 78, which is as follows and which provides for the application of two specific sections of the Limitation Act to the Provincial Insolvency Act, namely, Ss. 5 and 12, and there is a provision in the Limitation Act, namely, S. 29, which is as follows and which provides for the application of certain sections of the Limitation Act to special laws.

The Provincial Insolvency Act.

"*78.* (1) The provisions of Ss. 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said S. 12, a decision under S. 4 shall be deemed to be a decree. . . . . "

The Indian Limitation Act.

"*29.* . . . . . .

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by Sch. 1, the provisions of S. 3 shall apply, as if such period were prescribed therefor in that schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law —

(a) the provisions contained in S. 4, Ss. 9 to 18, S. 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and (b) the remaining provisions of this Act shall not apply."

It will be observed that by the Provincial Insolvency Act of 1920 which is the earlier Act, two specific sections of the Limitation Act, namely, Ss. 5 and 12, were made applicable to appeals and applications under the Provincial Insolvency Act and one matter of controversy which has arisen now is whether applications include petitions for adjudication of insolvency or whether applications are only confined to those applications which are made during the pendency of the petition of insolvency. The Madras High Court in 55 Mad. 766,[8] has expressed the view that the word 'application' under S. 78 is in contradistinction with the word 'petition' as used in the Provincial Insolvency Act and Ss. 5 and 12 do not apply to petitions for adjudication of insolvency, but only apply to other applications which are made after proceedings have originated by a petition of insolvency. Apart from this controversy, it is generally agreed that Ss. 5 and 12, Limitation Act, apply to appeals and applications under the Provincial Insolvency Act by virtue of S. 78 which was enacted by the Provincial Insolvency Act of 1920.

After the coming into force of the Provincial Insolvency Act of 1920 by an amendment of the Limitation Act, S. 29 (2) was introduced in the year 1922 and it will be observed that S. 29 enjoins that for the purpose of determining any period of limitation prescribed for any application by special law the provisions contained in S. 4, Ss. 9 to 18 and S. 22 shall apply only in so far as and to the extent to which, they are not expressly excluded by such special law. The words "expressly excluded" as used in this section have been judicially considered in 56 Cal. 805[6] and they are held to mean "that express reference is made to the specific section in the Act; and unless such reference is made to the section and by that reference they are expressly excluded then they would apply", and in A.I.R. 1930 Sind 93,[7] they were held to mean "an exclusion of express words that is by express words of the reference and not exclusion as a result of a logical process of reasoning;" *see also* 56 Bom. 135.[9]

It is now generally agreed that the Provincial Insolvency Act is a special law and it does not expressly exclude the provisions contained in S. 4, Limitation Act ; but it is also generally agreed that S. 29 (2) can only apply 'for the purpose of determining any period of limitation prescribed for any suit or application by special law,' and if the special law does not prescribe any period of limitation for any petition S. 29 will have no application; and the main controversy which arises in the case is whether the period of three months from the act of insolvency within which a petition has to be presented under the Provincial Insolvency Act is a

8. ('32) 19 A. I. R. 1932 Mad. 352 : 137 I. C. 740 : 55 Mad. 766 : 63 M. L. J. 152, Gangjee Premjee & Co. v. O. L. K. K. N. Firm, Colombo.
9. ('32) 19 A.I.R. 1932 Bom. 259 : 137 I. C. 545 : 56 Bom. 135 : 34 Bom. L. R. 143, Chhaganlal Sakerlal v. Municipality of Thana.

period of limitation so as to attract the provisions of S. 29 (2), Limitation Act, or it is a period which cannot be regarded as a period of limitation, but is laid down as one of the conditions precedent under which the petition for insolvency has to be made.

The phrase 'period of limitation' has nowhere been defined in the statute. Generally speaking, it may mean a time prescribed by law for enforcing rights and remedy by presenting a plaint, appeal or application. By S. 7, Provincial Insolvency Act, a right is given to a creditor to present a petition of insolvency. By S. 9 of the Act conditions are laid down on which a creditor may present a petition and one of the conditions thus set out in cl. (c) is that 'the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.' Section 13 (2) lays down the contents of the creditor's petition, and in cl. (a) of S. 13 (2) the creditor is required to set out 'the act of insolvency committed by such debtor, together with the date of its commission' and by S. 18 of the Act it is laid down that 'the procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of plaints, shall so far as it is applicable, be followed in the case of insolvency petitions.' It is, therefore, permissible to take the view that the petition of insolvency is substantially in the nature of a plaint and the act of insolvency in substance partakes the nature of a cause of action and the condition that the petition should be presented within three months of the act of insolvency substantially provides a period of limitation for the petition. It is true that the Act nowhere says that the period of three months within which the petition is to be made is a period of limitation. It is also true that the Act nowhere lays down the consequences which would follow in neglecting the period of limitation. It is also true that the wording of S. 9 is such that the period of three months mentioned therein may be regarded as a condition on which petition has to be made. But, at the same time, the Act nowhere provides any period of limitation for a petition of insolvency with reference to a particular act of insolvency and the Act definitely says that the petition is to be made within three months of the act of insolvency. Is it, therefore, unreasonable to take the view that in substance this period of three months is a period of limitation ? In I. L. R. (1939) All. 647,[10] a Full Bench of this Court had to consider whether a period of 12 years in S. 48, Civil P. C., is a period of limitation and though the question which arose in that case was somewhat different from that which is now before me, the late Sir John Thom C. J. in his judgment thus defined a period of limitation :

"It appears to me that if the result of a statutory provision is in substance to fix a period within which a person must take appropriate and necessary action if he desires to assert his rights in a Court of law, that provision prescribes a period of limitation."

With this observation I respectfully agree. But if there be any difficulty in applying S. 4, Limitation Act, to a creditor's petition of insolvency on the ground that Ss. 9 and 13, Provincial Insolvency Act, do not prescribe any period of limitation and only lay down a condition precedent, then I see no reason why S. 10, General Clauses Act, may not apply to the facts of this case. Section 10, General Clauses Act, applies in all those cases where the Limitation Act does not apply and where within a limited time any act or proceeding 'is directed or allowed to be done or taken in any Court by any Act of the Governor-General in Council.' This section does not take into consideration the purpose for which time is allowed, whether it is by way of condition precedent or for any other purpose, nor does it in any way extend or affect the period of limitation ; it only furnishes a rule of interpretation by which time expiring on a day when Court is not sitting is deemed to expire on the next day of the sitting of the Court. Now Ss. 9 (1) (c) and 54, Provincial Insolvency Act, allow a limited time, namely a period of three months for making a petition of insolvency and for avoiding fraudulent preference respectively and this limited time, in my opinion, should be interpreted in accordance with S. 10, General Clauses Act.

In 58 Mad. 794,[1] a Full Bench of the Madras High Court has expressed the view that the period of three months within which a creditor's petition is to be made from the act of insolvency is a condition precedent and not a period of limitation and that a creditor's petition in which three months' time from the act of insolvency expired during vacation was incompetent on the re-opening of the Court ; and this view was followed in A. I. R. 1937 Mad. 433[2] and A.I.R. 1938 Mad. 898.[11] In I. L. R. (1939) 1 Cal. 425,[3] the Calcutta High Court has expressed the view that S. 9 (1) (c), Provincial Insolvency Act, lays down a condition precedent and not a period of limitation and consequently S. 5, Limitation Act, read with S. 78, Provincial Insolvency Act, does not apply to a creditor's petition.

On the other hand, in I.L.R. (1931) Rang. 150,[4] the Rangoon High Court has held that S. 68, Provincial Insolvency Act, prescribes a period of limitation and S. 4, Limitation Act, applies to proceedings under S. 68. In A.I.R. 1934 Mad. 294[12] Pandalai J. held that S. 4, Limitation Act, applies to a petition to avoid a fraudulent preference under S. 54, Provincial Insolvency Act, and in I. L. R. (1939) Nag. 377,[13] Niyogi J. held that S. 4, Limitation Act, and S. 10, General Clauses Act, one or the other applied to a petition of the creditor under S. 54, Provincial Insolvency Act, to avoid a fraudulent preference. There is undoubtedly high authority in favour of the view that the period of three months prescribed by S. 9 (1) (c), Provincial Insolvency Act, for a creditor's petition is a condition precedent and not a period of limitation. But the main grounds in support of this view as expressed in the Full Bench case in 58 Mad. 794[1] are these that under English authorities a fraudulent preference if not challenged within three months ceases to be voidable and becomes absolutely valid both as a transfer and as an act of insolvency, that the period of three months within which a fraudulent preference can be avoided under S. 54, Provincial Insolvency Act, is not a period of limitation and therefore the period of three months under S. 6, cl. (c), Provincial Insolvency Act, in which a fraudulent preference is mentioned as an act of insolvency cannot also be a period of limitation and if for the purpose of cl. (c) of S. 6 the period of three months cannot be a period of limitation, it cannot be for the purposes of other clauses also, i. e., from (a) to (h) of S. 6, and the

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10. ('39) 26 A.I.R. 1939 All. 403 : 183 I. C. 242 : I.L.R. (1939) All. 647 : 1939 A. L. J. 522 (F.B.), Durgapal Singh v. Pancham Singh.

11. ('38) 25 A.I.R. 1938 Mad. 898 : 178 I. C. 737 : (1938) 2 M. L. J. 385 : I. L. R. (1939) Mad. 24, Kumarappa Chettiar v. Chidambaram Chettiar.

12. ('34) 21 A.I.R. 1934 Mad. 294 : 150 I. C. 339, Narayana Ayyar v. Official Receiver, South Malabar.

13. ('38) 25 A.I.R. 1938 Nag. 454 : 178 I. C. 479 : I.L.R. (1939) Nag. 377, Balkisan v. Bhanuprasad.

wording of S. 9 and its marginal note suggest that the period of three months mentioned therein is a condition precedent and not a period of limitation.

With greatest respect I cannot see that these grounds are really decisive of the controversy. The English cases, (1879) 12 Ch. D. 314[14] and (1870) 5 Ch. A. 577,[15] referred to in the Full Bench case in 58 Mad. 794,[1] do not deal with the question whether in a case of fraudulent preference if the period of three months expires on a day when the Court is closed and a petition is presented on the next day, such a petition is incompetent. They only lay down what, no doubt, is the law and what our S. 54 reproduces that a fraudulent preference can only be adjudged void if a petition is presented within three months of the transfer and if such a petition is not presented the transfer becomes absolute and also ceases to be available as an act of insolvency. The question whether the expiration of the time of three months would be taken on the date when the Court is closed or would be taken at the next sitting day of the Court was not considered in those cases and in view of S. 145, English Bankruptcy Act, cannot arise in England.

Again, S. 54, Provincial Insolvency Act, no doubt enacts that a fraudulent preference shall be annulled if the transferor is adjudged insolvent on a petition presented within three months after the date thereof. And it may be that the period of three months specified in S. 54 is not a period of limitation, but a time given by the statute within which transfer is liable to be impeached and at the expiration of which it becomes absolutely valid. Still the question remains how the period of three months is to be interpreted and if the three months expire on a date when the Court is closed whether the holiday is to be taken the date of the expiration of the period or the day of the next sitting of Court. This again raises the question whether a period of three months is to be interpreted according to calendar in disregard of all statutory rules of interpretation of time or it is to be interpreted subject to the law prevalent in a country which lays down a rule of interpretation of such time ; and this again raises the question that failing S. 4, Limitation Act, why S. 10, General Clauses Act, does not apply to the time given in S. 54, Provincial Insolvency Act ? Sir Owen Beasley C. J. in his judgment in the Madras Full Bench case referred to above, has not considered S. 10, General Clauses Act, at all and though Cornish J. has considered it and has not applied it, in my opinion, he has given no convincing reasons for rejecting it.

Nor do I see that it necessarily follows that because the period of three months for purposes of S. 54 is not a period of limitation, therefore it must not be so for purposes of S. 9 (1) (c) also, because S. 9 (1) (c) relates back to S. 6 and one of the clauses of S. 6, namely cl. (c) relates to fraudulent preference which is also a subject-matter of S. 54. In cls. (a) to (h) of S. 6, eight acts of insolvency are specified, three of which are transfers made by the debtor specified in cls. (a) to (c) and five are other kind of acts of insolvency specified in cls. (d) to (h). Of these three kinds of transfers specified in cls. (a) to (c) which are regarded as an act of insolvency, one dealt with in cl. (b) is provided in S. 53 and can be avoided in two years and the other dealt with in cl. (c) is provided in S. 54 and can be avoided within three months and there is no period for the transfer dealt with in cl. (a). It seems to me that the period of three months given under S. 9 (1) (c) to make a petition from an act of insolvency applies to all eight acts of insolvency including three acts of transfer and five other kind of acts and the fact that for one act of transfer out of these three is the same period to avoid the transfer as it is for making the petition is a mere accident and this coincidence furnishes no adequate reason for holding that the period of three months in S. 9 (1) (c) is used in exactly the same sense and is subject to same legal interpretation as in S. 54.

There remains the argument on the wording of S. 9 and on its marginal note. I realise the force of it, but the problem is a problem of interpretation of the section and the whole question is whether the Legislature in enacting that no creditor shall be entitled to present a petition for adjudication unless he does so within three months of the act of insolvency on which the petition is grounded, was providing a period of limitation or laying down a condition precedent. It seems to me that having regard to the fact that no period of limitation is provided elsewhere for such a petition which is in the nature of a plaint, the sounder interpretation is that the time specified by the statute should also be regarded as a period of limitation. Section 4, Limitation Act, and S. 10, General Clauses Act, give expression to the general principle of law enunciated by the maxims "*lex non cogit ad impossibilia*" — the law does not compel a man to do that which he cannot possibly perform, and "*actus curiæ neminem gravabit*"—an act of the Court shall prejudice no man. These sections do not in any way extend the period of limitation, nor do they furnish any data for computation of time ; they merely embody a rule of elementary justice that if the time allowed by statute to do an act or to take a proceeding expires on a day when the Court is closed, it may be done on the next sitting of the Court. In 57 All. 242,[16] Lord Tomlin in delivering the judgment of the Judicial Committee has thus explained the true nature of S. 4, Limitation Act :

"The language employed in S. 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that, where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court reopens ; so that there is nothing in the section which alters the length of the prescribed period."

I see no reason why the creditor's petition in this case may not also be protected and governed by one or other of these provisions. For the reasons given above, I am of opinion that the petition of Sheopujan Pande for adjudication of Raja Pande as an insolvent was competent as having been made within three months of the act of insolvency and this appeal should be dismissed with costs.

PLOWDEN J. — I agree with the conclusion arrived at in this case by the Hon'ble the Chief Justice.

BY THE COURT. — We dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

14. (1879) 12 Ch. D. 314 : 40 L. T. 789 : 27 W. R. 744, Ex parte Games; In re Bamford.

15. (1870) 5 Ch. A. 577 : 23 L. T. 437 : 18 W. R. 874, Allen v. Bonnett.

16. ('35) 22 A.I.R. 1935 P. C. 85 : 155 I. C. 205 : 62 I. A. 80 : 57 All. 242 (P. C.), Maqbul Ahmad v. Onkar Pratap Narain Singh.

Advocate High Court
Jammu & Kashmir
Srinagar.

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A. I. R. (29) 1942 Allahabad 438

BAJPAI AND DAR JJ.

Kunwar Hira Singh — Applicant — Appellant

v.

Bishambhar Nath and others — Creditors — Respondents.

First Appeal No. 412 of 1938, Decided on 31st July 1942, from decision of Special Judge, First Grade, Cawnpore, D/- 23rd December 1937.

U. P. Encumbered Estates Act (25 of 1934), S. 14 (5) and (6) — Statement or settlement of account or contract referred to in S. 14 (5) and (6) must be by act of parties and not under decree of Court.

b The words "statement or settlement of accounts or by any contract made in the course of the transactions" in S. 14 (5) and (6) signify that all those things must be by act of parties and not under any decree of Court. When the conversion of interest into principal has taken place after 31st December 1916 by means of a decree of the Court, and by that decree a single integral sum is awarded to the creditor as a judgment-debt, S. 14 (6) can have no application : ('18) 5 A.I.R. 1918 Bom. 95, *Rel. on.* [P 438*f*,*h*]

S. B. Johari — for Appellant.

A. P. Pandey — for Respondents.

BAJPAI J.—This is an appeal by Kunwar Hira Singh who is a landlord. He was an applicant under S. 4, Encumbered Estates Act, before the Collector.

c In due course the enquiry went before the Speciai Judge. There, a controversy arose between Kunwar Hira Singh on the one hand and Lala Bishambhar Nath and others on the other, a controversy with which we are concerned in this appeal. It appears that Narain Singh, the brother of Hira Singh, executed a mortgage in favour of Lala Pheki Lal, the father of Bishambhar Nath, for Rs. 2000 on 12th September 1904. This mortgage was not paid, and on 9th May 1914 Narain Singh and Hira Singh executed another mortgage in favour of Pheki Lal for Rs. 6600. The various items of the consideration of these two mortgages need not be mentioned. The mortgage of 9th May 1914 was not paid and therefore a suit was brought on the basis of the same (Suit No. 134 of 1924). On 5th December 1924 a decree was passed for Rs. 15,247. Subsequently, on

d 9th January 1926 (by this time Pheki Lal was dead and was succeeded by his son Bishambhar Nath) another mortgage was executed by Narain Singh and Hira Singh in favour of Bishambhar Nath for Rs. 21,000. This was made up of Rs. 15,247, the decretal amount in Suit No. 134 of 1924, and other sums which were either left with the mortgagee for payment of other creditors or for Government revenue and expenses of registration. We need not particularise them. When the applicant landlord filed an application under S. 4 and filed a written statement in the Court of the Special Judge he pleaded that decree No. 134 of 1924 ought to be ripped open, and as it was passed upon the mortgage dated 9th May 1914 for Rs. 6600, more than Rs. 13,200 should not be allowed. This contention was considered by the learned Special Judge and repelled. Hira Singh therefore filed an appeal in this Court and he repeats the same contention and draws our attention to S. 14, Encumbered Estates Act. The relevant provisions of that section with certain omissions are as follows :

"Clause (4).—In examining each claim the Special e Judge shall . . . . decide the questions in issue . . . . subject to the following provisions, namely,

(a) the amount of interest held to be due on the date of the application shall not exceed that portion of the principal which may still be found to be due on the date of the application.

(5) For the purpose of ascertaining the principal under clause (a) of sub-s. (4) the Special Judge shall treat as principal any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transaction on or before 31st December 1916.

(6) For the purpose of ascertaining the principal under cl. (a) of sub-s. (4) the Special Judge shall not treat as principal any accumulated interest which has been converted into principal at any statement or settlement of accounts or by any contract made f in the course of the transactions after 31st December 1916."

It is conceded that as the mortgage of 9th May 1914 was executed before 31st December 1916, it cannot be touched, but what is contended is that there was a statement of account or settlement of accounts on 5th December 1924 and on that date under the rule of damdupat which is indicated in S. 14 the principal could not be more than rupees 13,200, namely double of Rs. 6600. We would have agreed with this contention if a decree had not been passed on 5th December 1924 and if a fresh mortgage had been executed or if there had been a statement of accounts or settlement of accounts. The words "statement or settlement of accounts or by any contract made in the course of the transactions" signify that all these things must be by act of g parties and not under any decree of Court. No authority has been cited by learned counsel for the appellant in support of this contention. There is however an authority reported in 43 Bom. 1,[1] which is against the contention of the appellant. Batchelor A. C. J., was construing the words of the Dekkhan Agriculturists' Relief Act as they occur in S. 13 of that Act. That section reads as follows :

"In the account of principal there shall not be debited to the debtor any accumulated interest which has been converted into principal at any statement or settlement of account or by any contract made in the course of the transactions."

The learned Judge then observed :

"But here this original interest has not been converted into principal at any statement or settlement of account or by any contract made between the h parties. The conversion has taken place by means of the decree of the Court, and by that decree a single integral sum was awarded to the defendant as a judgment-debt."

We also hold that there was no statement or settlement of accounts or a contract made in the course of transactions after 31st December 1916. There was an adjudication by Court after 31st December 1916, namely on 5th December 1924. The mortgage of 9th January 1926 therefore has got to be accepted at its face value and that is what has been done by the Court below. Of course, proper relief in the shape of reduction of interest has been allowed to the landlord applicant. There is no force in this appeal, and we dismiss it with costs.

G.N./R.K. *Appeal dismissed.*

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1. ('18) 5 A. I. R. 1918 Bom. 95 : 46 I. C. 166 : 43 Bom. 1 : 20 Bom. L. R. 469, Gundo Annaji v. Mareppa Panditeppa.

a **A. I. R. (29) 1942 Allahabad 439**

ALLSOP J.

Kunj Behari Lal — Applicant

v.

Braham Datta—Opposite party.

Criminal Revision No. 360 of 1942, Decided on 25th August 1942, from order of Sessions Judge, Mirzapur, D/- 11th March 1942.

Penal Code (1860), S. 405 — First part of S. 405 is positive while second part is negative —Applicability of both parts explained—Fact of consequences of offence occurring at a place do not give jurisdiction to Court at that place unless consequences are necessary ingredients to offence — Trust at Mirzapur — Complaint by b **trustee *A* filed at Mirzapur against trustee *B* at Bombay that *B* had misappropriated trust money by depositing same in his firm at Bombay and had failed to send same for purposes of trust at Mirzapur—Offence falls under first part of S. 405 — Mirzapur Court held had no jurisdiction.**

The first part of S. 405 is a positive part and applies where it is known that the accused had dishonestly misappropriated or converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. The second part of S. 405 is a negative part, that is, a failure to prove that the property entrusted to the accused had been used by him in accordance with any direction of law or any c legal contract by which he was bound and applies where it is alleged that the accused has failed to account for the property, and jurisdiction exists at the place where the property should have been delivered by the accused. The second part of S. 405 is to be invoked only when the first part cannot. The fact that there are consequences of an offence does not give any Court jurisdiction in the place where those consequences occur unless those consequences are necessary ingredients to the offence itself. [P 440*a*,*b*]

A, a trustee, filed a complaint at Mirzapur against *B* another trustee at Bombay alleging that *B* had misappropriated the trust money by depositing the same in his own firm at Bombay and had failed to send money for purposes of the trust at Mirzapur as he had been doing prior to the filing of the complaint :

d *Held* that the offence was committed under the first part of S. 405 and the breach of trust if any having been committed at Bombay the Court at Mirzapur had no jurisdiction : ('36) 23 A.I.R. 1936 All. 193 and ('34) 21 A. I. R. 1934 All. 499 (F. B.), *Expl.*, and *Rel. on.* [P 439*f*; P 440*b*]

Penal Code —

('40) Ratanlal, Page 1011 Pt. 24.
('36) Gour, Page 1372 N. "Venue."

E. V. David—for Applicant.

Deputy Government Advocate—for the Crown.

ORDER. — This is an application in revision against an order of a Magistrate of Mirzapur refusing to take cognizance of a complaint of an offence of criminal breach of trust. The complainant said that he and the accused were members of a body of trustees who were in charge of certain money left by a lady for certain charitable and religious purposes. Part of the money left by this lady consisted of pro- e missory notes to the value of Rs. 15,000. These were handed over to the accused who was living in Bombay. That was in the year 1925. More recently the accused was authorised to convert the promissory notes into cash which he did. The complaint is that he sent sufficient money from Bombay for a certain time to meet the expenses of the trust but that some time before the complaint was filed he had ceased to send any money. The complainant referred to a letter from the solicitors of the accused and said that it showed that the accused had misappropriated the money of the trust in his hands. The letter was to the effect that the accused had sold the promissory notes under the authority of all the trustees and, having received no further instructions, had deposited the proceeds in his own concern. He seems to carry on a business of the banker and the solicitors said that he had opened an account f in the name of the trust. They went on to say that he had been sending money from time to time to Mirzapur for the purposes of the trust and that he was willing to return the whole capital provided he was allowed to do so within a reasonable time by instalments.

The complainant filed this complaint in Mirzapur. The Court held that the breach of trust, if any, was committed in Bombay and that the Court at Mirzapur had no jurisdiction. The decision was based on the case in A.I.R. 1934 All. 499.[1] Learned counsel for the applicant who has come here in revision has relied upon the case in A. I. R. 1936 All. 193.[2] The two cases are not intended to lay down contradictory principles. The learned Chief Justice of the time, Sir Shah Sulaiman, was a party to both of them. They are intended between them g to clarify the law. It was laid down in the first of the two cases that an offence of criminal breach of trust should be tried in the place where the breach took place, that is, at the place where the money was misappropriated or converted to the use of the accused. In the course of the judgment the learned Judges mentioned *O'Brien's case*[3] which was decided by Sir John Edge C. J. That was a case where a man was sent to collect money and eventually failed to produce it at the place where it should have been produced. The learned Judges agreed that in those circumstances it might be perhaps assumed that the misappropriation occurred at that place because it was not possible to say at what other place there had been a misappropriation. The later case to which learned counsel for the applicant has referred is really a case similar to that of *Queen-Empress* v. *O'Brien*.[3] The learned Judges distinguished between h offences described in the first part of S. 405, Penal Code, and offences described in the second part. They said :

"The first part of S. 405 will apply where it is known that the accused had dishonestly misappropriated or converted to his own use certain property at a particular place and the jurisdiction to try the accused will be at the place where that dishonest misappropriation or conversion has taken place. But where it is alleged that the accused has failed to account for the property, then the second part of

1. ('34) 21 A.I.R. 1934 All. 499 : 149 I.C. 420 : 35 Cr. L. J. 982 : 56 All. 1047 : 1934 A. L. J. 308 (F.B.), Kashi Ram Mehta v. Emperor.
2. ('36) 23 A.I.R. 1936 All. 193 : 160 I.C. 356 : 37 Cr.L.J. 284 : 58 All. 644 : 1936 A.L.J. 3, Mohru Lal v. Emperor.
3. ('96) 19 All. 111 : 1896 A. W. N. 191, Queen-Empress v. O'Brien.

S. 405, Penal Code, will apply and jurisdiction exists at the place where the property should have been delivered by the accused."

They had already distinguished between the first part of the section which they described as a positive part dealing with dishonest mis-appropriation or conversion of property and the second part which they described as a negative part, that is, a failure to prove that the property entrusted to the accused had been used by him in accordance with any direction of law or any legal contract by which he was bound. In the case before me the charge obviously is that the accused had misappropriated the property by depositing the money in his own firm. Whether that amounts to a criminal offence is not the question before me. That is the charge and in accordance with the judgment in A. I. R. 1936 All. 193[2] the offence was committed under the first part of S. 405, Penal Code. The second part is to be invoked only when the first part cannot. It was clearly held in the decision in the earlier case of this Court that the fact that there are consequences of an offence does not give any Court jurisdiction in the place where those consequences occur unless those consequences are necessary ingredients to the offence itself. I am satisfied that there is no reason for holding that the learned Magistrate was wrong in his decision and I, therefore, reject the application.

G.N./R.K. *Application rejected.*

A. I. R. (29) 1942 Allahabad 440

MULLA J.

Sat Narain and another — Applicants

v.

Emperor.

Criminal Revn. Appln. No. 298 of 1942, Decided on 21st August 1942, from order of Sessions Judge, Farukhabad, D/- 2nd February 1942.

(a) Interpretation of statutes—Every word in particular statute must be construed in its technical sense — It is not satisfactory to refer to other statutes for that purpose.

Every word used in a particular statute must be construed in its technical sense and it is not a satisfactory proceeding to refer to other statutes for the definition of that term: ('29) 16 A.I.R. 1929 P. C. 181, *Rel. on.* [P 441*c*]

C. P. C. —

('40) Chitaley, Preamble N. 7 Pt. 6.

('41) Mulla, Page 2 Pt. (b).

(b) U. P. District Boards Act (10 of 1922), S. 174 (2), Item (k) — Setting up of brick kiln or preparing of bricks is offensive trade within S. 174 (2), Item (k).

The setting up of a brick kiln or the preparing of bricks is a business which is liable or calculated to cause annoyance to the residents of the neighbourhood and it is, therefore, an offensive trade within the meaning of Item (k), S. 174 (2). [P 441*d*]

(c) Criminal trial—Sentence — Every offence for which punishment is provided is several offence — Every person participating in it is punishable with maximum penalty provided by law irrespective of whether person joint with him in committing offence is punished separately or not.

The general principle in criminal cases is that every offence for which a punishment is provided is a several offence and every person who participates in that offence is punishable to the extent of the maximum penalty provided by the law, irrespective of the fact whether any person joint with him in committing the offence is or is not punished separately: Mukerjee J. in ('17) 4 A.I.R. 1917 Cal. 348 (F. B.), *Rel. on.* [P 441*f*]

Babu Ram Avasthi — for Applicants.

Deputy Government Advocate — for the Crown.

ORDER.—This is an application in revision by two persons named Sat Narain and Ganga Prasad who have been convicted by a Magistrate of the first class for a breach of a bye-law framed by the District Board of Farrukhabad under the power vested in it by S. 174, District Boards Act, 1922. Each applicant has been sentenced to a fine of Rs. 50. The criminal proceeding which resulted in the conviction of the two applicants was instituted upon a complaint made by the secretary of the District Board, Farrukhabad. The charge brought in that complaint against the applicants was that they had made excavations and buildings for burning a kiln in the town of Jalalabad near the public road. Section 174, District Boards Act, 1922, sub-s. (1) runs as follows :

"A board by special resolution may, and where required by the Local Government shall, make bye-laws applicable to the whole or any part of the rural area of the district, consistent with this Act, and with any rule for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of such area and for the furtherance of the administration of the district under this Act."

It is this section which gives the District Board power to frame bye-laws in respect of the various matters referred to therein. Sub-s. (2) of the same section enumerates various matters in respect of which bye-laws can be framed by the District Board but it clearly lays down that this list is not exhaustive and that it is without prejudice to the generality of the power conferred by sub-s. (1). One of the items mentioned in sub-s. (2) of S. 174 is: "Regulating slaughter-houses and offensive, dangerous or obnoxious trades, callings, or practices and prescribing fees to defray the expenditure incurred by a board for this purpose."

In the exercise of the power given to it by these provisions the District Board of Farrukhabad framed bye-laws for the regulation of brick and lime kilns in the rural area of the district. They are to be found in notification No. 2995-II-IX-49-1932, dated 9th December 1935. These bye-laws have been confirmed by the Governor of the Province acting with his ministers. The first bye-law with which we are concerned in the present case runs as follows :

"No person shall burn lime or bricks within 300 and 1000 feet respectively of a hospital, institution or building used for residential purposes or for the storage of petroleum, jute, cotton, clothes or other inflammable articles."

The second bye-law provides :

"No person shall be allowed to construct and burn such kilns or make any excavations within a distance of 300 feet of a public road."

Section 175, District Boards Act, provides that in making a bye-law the board with the sanction of the Local Government may direct that a breach of it shall be punishable with fine which may extend to Rs. 100 and when the breach is a continuing breach with a further fine which may extend to Rs. 5 for every day after the date of the first conviction during which the offender is proved to have persisted in the offence. In accordance with the

power given by S. 175 the District Board of Farrukhabad prescribed a penalty for a breach of the bye-laws referred to above in the following terms:

"A breach of any of the provisions of these bye-laws shall be punishable with fine, which may extend to Rs. 50, and in the event of a continuing breach, with a further fine which may extend to Rs. 5 for every day after the date of the first conviction during which the offender is proved to have persisted in the offence."

The two applicants in this Court are admittedly partners and joint owners of a brick kiln and the case which the prosecution put forward against them was that they had made excavations in connection with a brick kiln in contravention of the bye-laws referred to above. The trying Magistrate found that case established against them and he convicted each one of the two applicants and sentenced each one of them to pay a fine of Rs. 50. The applicants went up in revision to the learned Sessions Judge of Farrukhabad but he refused to interfere, though it appears from his judgment that he was impressed by a point urged before him by learned counsel for the applicants. The applicants have now come up in revision to this Court. Two points have been urged by learned counsel for the applicants: firstly, that the bye-laws referred to above which have been framed by the District Board of Farrukhabad were ultra vires of the Board and secondly, that the maximum penalty imposed upon each one of the applicants separately is illegal. The first contention is based upon Item (k) of sub-s. (2) of S. 174 which I have set out above. It is argued that the business of making bricks is not an offensive trade or calling or practice and hence it was not within the competence of the District Board of Farrukhabad to enact any bye-laws in order to regulate that business. With reference to this argument the learned Sessions Judge has pointed out that in the U. P. Municipalities Act, 1916, the setting up of a kiln and the making of bricks has been mentioned amongst many other trades and callings under the heading of "offensive trade". Learned counsel for the applicants argues that we must interpret the word "offensive trade" as it stands in Item (k) independently of any reference to anything contained in the U. P. Municipalities Act. Reference has been made in this connection to a Privy Council case, A.I.R. 1929 P. C. 181,[1] which lays down that every word used in a particular statute must be construed in its technical sense and it is not a satisfactory proceeding to refer to other statutes for the definition of that term. I may state at once that I have no quarrel with that proposition, for nothing of the sort has been done in the present case. The simple question for consideration in the present case is whether the business of making bricks is or is not an offensive trade within the meaning of Item (k) of sub-s. (2) of S. 174, District Boards Act. The word "offensive" has got no technical meaning assigned to it in any legal enactment and it is not, therefore, possible to say that this word must be interpreted in that particular technical sense. We must, therefore, resort to the dictionary meaning of the word which is "liable or calculated to cause annoyance." Now, I have no hesitation in holding that the setting up of a brick kiln or the preparing of bricks is a business which is liable or calculated to cause annoyance to the residents of the neighbourhood and it is, therefore, an offensive trade within the meaning of Item (k) of sub-s. (2) of S. 174, District Boards Act. It is merely to fortify that conclusion that a reference may be made to the fact that in the U. P. Municipalities Act, which also contains similar provisions, this trade of preparing bricks and the setting up of a kiln has been mentioned along with several others in a list under the heading of "offensive trades." I would, therefore, overrule the first contention of the learned counsel for the applicants.

The next contention is that the Magistrate was not entitled to impose any penalty in excess of a fine of Rs. 50 which is provided by the penal clause incorporated at the end of the bye-laws referred to above. It is argued that there was in fact only one breach and that was punishable at the utmost by a fine of Rs. 50. The fact that the breach was committed by two persons did not legally justify the trying Magistrate in imposing the maximum penalty upon each one of the two persons committing the breach. Learned counsel for the Crown has referred me to the Full Bench case in 44 Cal. 1025[2] and I find that the judgment of Mukerji J. in that case totally repels every possible argument that can be advanced in support of the contention pressed by learned counsel for the applicants. The general principle in criminal cases is, in my judgment, quite clear and that is that every offence for which a punishment is provided is a several offence and every person who participates in that offence is punishable to the extent of the maximum penalty provided by the law irrespective of the fact whether any person joint with him in committing the offence is or is not punished separately. This principle has been fully discussed and enunciated by Mukerji J. in the judgment in the case to which I have referred and I very respectfully adopt it for the purposes of the present case. The result, therefore, is that I see no reason to interfere with the conviction and sentence of the two applicants and dismiss this application in revision.

G.N./R.K. *Application dismissed.*

1. ('29) 16 A. I. R. 1929 P. C. 181 : 115 I. C. 740 (P. C.), Lawrence Arthur Adamson v. Melbourne and Metropolitan Board of Works.

2. ('17) 4 A. I. R. 1917 Cal. 348 : 42 I. C. 305 : 44 Cal. 1025 : 18 Cr. L. J. 945 : 21 C. W. N. 1016 : 26 C. L. J. 215 (F. B.), Amrita Lal Bose v. Corporation of Calcutta.

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ALLSOP J.

Mathura Prasad — Applicant

v.

Emperor.

Criminal Ref. No. 162 of 1942, Decided on 1st September 1942, made by Sess. Judge, Farrukhabad, D/- 19th January 1942.

(a) U. P. Municipalities Act (2 of 1916), Ss. 321, 318, 211 and 2 (1) — Executive officer is Board within S. 211 — Order passed by him cannot be questioned by Court of law by reason of S. 321.

Section 2 (1) read with Sch. 2 of the Act makes it clear that the executive officer is the Board within the meaning of S. 211. No doubt his order is subject to appeal to the whole Board, but if no appeal is made or if the appeal being made is rejected, then the order of the executive officer stands and is an order by the Board. An appeal lies against that order under S. 318 and therefore it cannot be questioned in a Court of law by reason of S. 321. But even if no appeal lay it could not be questioned by a Court of law inasmuch as S. 321

a says nothing about appeals. All it says is that any order or direction mentioned in S. 318 cannot be questioned in any way other than that laid down in the section and since an order or direction under S. 211 is mentioned in S. 318 it cannot be questioned in a Court of law. [P 442*e,f*]

(b) U. P. Municipalities Act (2 of 1916), S. 211 — Notice issued to *M* not in his name but in name of firm of which he was partner—Notice must be taken as issued to *M*.

A firm is not a legal person but a convenient name for the individuals composing it. [P 442*g*]

Where a notice under S. 211 is issued to *M* not in his name but in the name of the firm of which he is a partner the notice must be taken to have been issued to every member of the firm and therefore to *M* who was member of that firm. [P 442*g*]

b **C. P. C. —**

('40) Chitaley, O. 30, R. 1, N. 1 Pts. 4, 9; N. 3 Pt. 1; O. 30, R. 3, N. 1 Pts. 2, 3.
('41) Mulla, Page 1002 Pt. (y); Page 1006 Pts. (x) (y), (b).

(c) U. P. Municipalities Act (2 of 1916), S. 211 —Notice under S. 211 to partner of firm — Service of notice on munib of firm is valid.

The munib of a firm is not a servant of a corporation called after the firm name but of the firm which means the individuals composing the firm. Therefore a notice under S. 211 issued to a partner of a firm must be taken to have been validly served when it is served on the munib of the firm. [P 442*g,h*]

C. P. C. —

c ('40) Chitaley, O. 30, R. 3, N. 4.
('41) Mulla, Page 1005 N. "Service of summons."

Deputy Government Advocate — for the Crown.

ORDER. — This is a reference by the learned Sessions Judge of Farrukhabad recommending that this Court should set aside a sentence of fine passed under S. 307, Municipalities Act, against one Mathura Prasad. It appears that a notice was issued to Mathura Prasad to demolish certain projections which had been constructed on property of which he was a trustee and which was said to project over a municipal drain. This was a notice apparently under S. 211, U. P. Municipalities Act, and was issued by the Executive Officer. Mathura Prasad did not appeal against the order either to the whole Board or under S. 318, Municipalities Act, to the d officer appointed to hear such appeals. He was then prosecuted. The Courts would not go into the question whether the order issued by the Executive Officer was justified by the facts. The learned Judge seems to have thought that this was a mistake on the part of the Courts below and it is for this reason that he has recommended that this Court should interfere. In my judgment the learned Judge is not right upon this point. Under S. 321, Municipalities Act, no order or direction referred to in S. 318 shall be questioned in any other manner or by any other authority than is provided therein. An order or direction under S. 211 is mentioned in S. 318 and therefore it cannot be questioned by any authority other than the officer appointed by the Local Government or failing such appointment by the District Magistrate. It follows that it cannot be questioned in a Court of law.

There seems to have been some argument in the Court of the learned Judge that the order or direction issued by an Executive Officer did not come e within the provisions of S. 318 because an appeal lay from this order to the whole board. I do not quite understand this argument. The definition of the term 'board' in S. 2 (1), Municipalities Act, includes in any case where a power is expressed as being conferred on a board . . . . . an officer of the board authorised to exercise that power. Under S. 211 the power is conferred upon the board to require by notice the owner or occupier of a building to remove or to alter a projection or a structure in certain circumstances. Under Sch. 2 of the Act, the Executive Officer is authorised to exercise this power. It follows, therefore, that the Executive Officer is the board within the meaning of S. 211. It is true that his order is subject to appeal to the whole board, but if no appeal is made or if the appeal being made is rejected, then the order of the Executive Officer stands and this is an order by the board. The result is that an appeal lies against that f order under S. 318, Municipalities Act, but even if no appeal lay, S. 321 says nothing about appeals. All it says is that any order or direction mentioned in S. 318 cannot be questioned in any way other than that laid down in the section and, therefore, it cannot be questioned in a Court of law. It seems to me, therefore, that the learned Judge was wrong in thinking that the criminal Court should have gone into the facts as if it had been hearing an appeal against the order of the Executive Officer directing that the projection should be removed.

The learned Judge has mentioned certain other points which formed the subject of objections in the application before him. The first is that notice instead of being issued to Mathura Prasad himself who was a trustee of the temple on which the projections existed was issued in the name of the firm g Mathura Prasad Manohar Das of which Mathura Prasad was a member. The learned Judge seems to have thought that this was an irregularity, but he has overlooked the point that a firm is not a legal person. It is merely a convenient name for the individuals composing it and therefore the notice as expressed was issued to Mathura Prasad who was a member of the firm and to every other member of the firm. If any of these individuals objected to the order, he could have appealed either to the whole board or later to the District Magistrate. Another point is that the notice was served upon the Munib of the firm and it was apparently argued that he should not be treated as the servant of Mathura Prasad. This objection is of no avail to Mathura Prasad for the same reason, namely, that the munib is not the servant of a corporation called Mathura Prasad Manohardas but of the firm which means h the individuals composing the firm, that is, he is the servant of Mathura Prasad among others. In my judgment there is no reason for interference with the order of the Court below and I reject the reference.

G.N./R.K. *Reference rejected.*

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ALLSOP J.

Master Bhanpal Singh — Decree-holder — Appellant

v.

Siya Ram and others—Judgment-debtors — Respondents.

Exn. Second Appeal No. 143 of 1941, Decided on 31st July 1942, from decision of District Judge, Aligarh, D/- 8th November 1939.

a **Civil P. C. (1908), Ss. 48, 47 and O. 6, R. 17— Nature of execution application explained—On objection steps mentioned in execution application found ineffective — Court must dismiss application — It cannot allow decree-holder in effect to file new application by amending old one when new application is barred by limitation.**

It is incorrect to say that there is some general application for the execution of a decree and that the various steps in aid of execution are subsidiary thereto. There is no such thing as an application for execution of a decree properly so-called. There is an application for the attachment and sale of certain property in execution of a decree or an application for the arrest of the judgment-debtor in execution of a decree or an application asking the Court to take some other steps. If on objection taken it is found b by the Court that the steps mentioned in the particular application cannot be taken, the application must be dismissed. The Court cannot give opportunity to the decree-holder to amend it so as to execute the decree by some other means and thus allow the decree-holder in effect to present a new application by amending the old one when the presentation of a new application is barred by limitation.

[P 443*d*,*e*]

C. P. C. —

('40) Chitaley, S. 48, Notes 4, 6 and 7; O. 6 R. 17, N. 5 Pts. 3 and 4.

('41) Mulla, Page 201, Note "Successive applications for execution of decrees of Courts other than chartered High Courts;" Page 593 Pt. (o).

C. B. Agarwala — for Appellant.

c JUDGMENT. — This is an appeal against an order dismissing an application for execution of a decree by attachment and sale of certain property. When the property was attached, an objector came into Court and said that the property was his because he had acquired it at a sale held for the purpose of recovering Government dues. It is true that the property was attached in pursuance of this application before the sale took place, but it is not contended that the Government dues did not have a prior claim. The sale, therefore, in favour of the objector was a perfectly good one and as the property became his, it could not be sold in execution of this decree against another person. Learned counsel has argued that the objection might be allowed and still his application for execution should not be dismissed because he will now be barred by limitation from d making any further application for execution of the decree in some other way. It seems to me that his argument is based on a wrong assumption that there is some general application for the execution of a decree and that the various steps in aid of execution are subsidiary thereto. This presumption is not justifiable. There is no such thing as an application for execution of a decree properly so-called. There is an application for the attachment and sale of certain property in execution of a decree or an application for the arrest of the judgment-debtor in execution of a decree or an application asking the Court to take some other steps. If, on objection taken, it is found by the Court that the steps mentioned in the particular application cannot be taken, it must follow that the application must be dismissed. Learned counsel says that the Court might have allowed the objection and not dismissed the application in which case he might have been allowed to amend the application so as to execute the decree by some other means. The Court has not allowed him to amend the application and speaking for myself I think it would have been quite wrong to allow him to do so that is, in effect to present a new application merely by amending the old one when the presentation of a new application was barred by limitation. There is no force in this appeal and I dismiss it. I pass no orders for costs as the opposite party has not appeared. e

G.N./R.K. *Appeal dismissed.*

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ALLSOP J.

Ram Dayal Misra — Applicant

v.

Mt. Jagdamba Debi and another — Opposite Party. f

Criminal Revn. Appln. No. 255 of 1942, Decided on 25th August 1942, from order of Sess. Judge, Cawnpore, D/- 6th January 1942.

(a) Criminal P. C. (1898), Ss. 439 and 133 — Order under S. 133 — Procedure irregular — High Court will interfere only if substantial injustice has been done.

The High Court in revision will not interfere with an order under S. 133 merely because the procedure followed by the Magistrate was irregular. The High Court will interfere only if substantial injustice has been done. [P 444*a*]

Cr. P. C. —

('41) Chitaley, S. 133 N. 31 Pt. 1; S. 439 N. 1 Pt. 1.

('41) Mitra, Page 305 N. 335; Page 1428 N. 1205. g

(b) Criminal P. C. (1898), S. 133—Proceedings under S. 133 are intended to protect public as a whole against inconvenience and not to settle private disputes between different members of public—Person wishing to enforce private right must go to civil Court.

The proceedings under S. 133 are not intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. If a person has any private right which he wishes to enforce, he should take his troubles to the civil Court.

[P 444*b*]

Cr. P. C. —

('41) Chitaley, S. 133 N. 3 Pt. 2.

('41) Mitra, Pages 292-93 N. 320.

E. V. David — for Applicant. h

Sri Narain Sahai — for Opposite Party.

Deputy Government Advocate — for the Crown.

ORDER. — This application in revision arises out of proceedings under S. 133, Criminal P. C. The applicant, Ram Dayal Misra, lodged information with a Magistrate that the opposite party, Mt. Jagdamba Devi and Suraj Prasad had built a platform which encroached upon and obstructed a public way. The Magistrate called for a report from a qanungo who supported Ram Dayal Misra. The Magistrate then issued a conditional order under S. 133, Criminal P. C. The opposite party, Mt. Jagdamba Devi and Suraj Prasad, appeared and contested the report. They said that there had been no encroachment. The Magistrate then called for a report from another qanungo who also supported Ram Dayal Misra. On further objection the tahsildar was requested to inspect the locality and he

reported that there was a slight encroachment but it did not cause any real obstruction. On this report the Magistrate filed the papers and took no further action. Ram Dayal Misra made an application to the Sessions Judge to take action in revision. The learned Judge said that the Magistrate's order was not very clear but he considered that it meant that although there had been an encroachment on public land, the encroachment was trifling and such inconvenience as was caused was caused personally to the complainant and not in general to the public. He refused to make any recommendation to this Court. It is argued before me that the procedure of the Magistrate was irregular. This Court, however, is not a Court of criminal appeal and it will only interfere if substantial injustice has been done. The application is based upon a misconception that these proceedings are intended to settle private disputes between different members of the public. They are in fact intended to protect the public as a whole against inconvenience. If the applicant has any private right which he wishes to enforce it, he should take his troubles to the civil Court. There is no force in the application and I reject it.

G.N./R.K. *Application rejected.*

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ALLSOP AND VERMA JJ.

Brij Jiwandas and others—Defendants — Appellants

v.

Smt. Kawal Mani Bibi and another — Plaintiffs — Respondents.

First Appeal No. 369 of 1938, Decided on 3rd August 1942, from decision of Addl. Civil Judge, Benares, D/- 27th July 1938.

(a) U. P. Agriculturists Relief Act (27 of 1934), S. 2 (2) — Assessment to income-tax — Assessee cannot be deemed to be agriculturist during year of assessment.

A person who is assessed to income-tax cannot be deemed to be an agriculturist during the year of assessment. There is nothing in the Act which suggests that it is necessary to go into the question upon what basis that assessment was made. The fact that the assessment was on the income of the previous year is irrelevant. [P 444*h*; P 445*a*]

(b) Civil P. C. (1908), O. 34, Rr. 4 and 11 — Interest should ordinarily be allowed at contractual rate on principal upto decree and thereafter upto date of payment fixed under R. 4—For good reasons interest may be disallowed altogether—But if allowed it must under O. 34, R. 11 (1) be allowed at contractual rate—Court must give reasons for not acting according to Rr. 4 and 11.

Under O. 34, Rr. 11 and 4 interest should ordinarily be allowed at the contractual rate on the principal amount due, in the first place up to the date of the decree and in the second place from the date of the decree to the date fixed for payment under O. 34, R. 4. It is possible that in some circumstances, for good reasons, a Judge may disallow interest altogether, but if he does allow interest, he must under the provisions of O. 34, R. 11 (1) allow it on the principal amount at the contractual rate, if there is such a rate. The Court must give reasons for not acting in accordance with those provisions. [P 445*b*,*c*]

C. P. C. —

('40) Chitaley, O. 34 R. 11 N. 2 Pts. 2 and 22.
('41) Mulla, Page 1097 Pt. (x).

(c) Hindu law — Alienation — Joint family—Necessity — Son in mother's womb at date of alienation by father can raise question of necessity — Creditor cannot plead that he was not aware of possible birth of son.

In a joint Hindu family a son has a vested right in the family property from the date of conception and therefore a son who was in his mother's womb at the date of alienation by the father, can raise the question of legal necessity. It may be that the creditor was not aware of the possible birth of a son but any person who lends money to a Hindu is supposed to know the law. The creditor must be aware that he makes advances under the risk of claims being made by other members of the joint Hindu family, and if he does not take sufficient care to satisfy himself that there is nobody to make a claim or that there is really legal necessity for the advance of the money which is requested of him, then he must bear the consequences. [P 445*d*,*e*,*f*]

Hindu law —

('40) Mulla, Page 318 Pt. (n).
('38) Mayne, Page 510 Pt. (y).

(d) Hindu law—Joint family — Family business — No evidence that money was borrowed for family business — Creditor can fall back on plea of bona fide inquiry.

In the absence of evidence that money was borrowed for the joint family business the creditor can fall back upon the plea that he was assured that the money was required for the purposes of a business and he had in the circumstances made sufficient inquiry to justify him in acting in the belief that the representations made to him were true. [P 445*e*]

Hindu law —

('40) Mulla, Page 269 Pt. (d).
('38) Mayne, Page 399 Para. 308A.

Gopi Nath Kunzru and Brij Ratan Das — for Appellants.

Harnandan Prasad and Govind Das — for Respondents.

ALLSOP J. — This appeal arises out of a suit for the sale of certain property on the basis of a simple mortgage executed by Brij Jiwan Das, the appellant, on 2nd August 1935, to secure a debt of Rs. 5000. The mortgage was in favour of the plaintiffs-respondents. The defence taken to the suit by the two sons of Brij Jiwan Das was that the mortgage was not for legal necessity and that no decree for sale could be passed on the basis of it. Brij Jiwan Das himself raised the plea that he was an agriculturist and that the provisions of the Agriculturists' Relief Act applied to his case. This plea of his was overruled by the Court below upon the ground that he was assessed to income-tax in the year 1935, when he executed the deed of mortgage. It is upon this point that Brij Jiwas Das and his sons have appealed. Their contention is that Brij Jiwan Das was an agriculturist because, although he was assessed to the payment of income-tax in the year 1935-1936, that assessment was made on the income of the year 1934-1935, and that the question whether he was or was not an agriculturist should not depend upon payment of income-tax in the year of assessment but on the receipt of income in the year upon which the assessment was

based. In our judgment there is no justification for this argument. The rule in the Agriculturists' Relief Act, S. 2 (2), is that no person shall be deemed to be an agriculturist if he is assessed to income-tax with certain provisos with which we are not here concerned. There can be no doubt that Brij Jiwan Das was assessed to income-tax for the year in which he executed the deed of mortgage, and there is nothing in the Act which suggests that it is necessary to go into the question upon what basis that assessment was made. In our judgment there is no force in the appeal and we must dismiss it.

On the other hand, there is a cross-objection by the respondents in which they have raised two points. One is that the learned Judge of the Court below was not justified in disallowing interest for the period between the institution of the suit and the date of the decree and that he should have allowed interest at the contractual rate up to the date which was fixed for payment under the provisions of O. 34, R. 4. It seems to us that the learned Judge of the lower Court must have been guilty of a mere slip when he directed that interest would be levied at the contractual rate up to the date of the institution of the suit, because he has suggested no reason at all why interest should not be allowed pendente lite. Under the provisions of O. 34, R. 11 and O. 34, R. 4, interest should ordinarily be allowed at the contractual rate on the principal amount due, in the first place up to the date of the decree and in the second place from the date of the decree to the date fixed for payment under the provisions of R. 4. It is possible that in some circumstances for good reasons a Judge may disallow interest altogether, but it seems to us, if he does allow interest, he must under the provisions of O. 34, R. 11 (1) allow it on the principal amount at the contractual rate, if there is such a rate. The learned Judge of the Court below has not given any reason why he has not acted in accordance with those provisions, and, as we have already stated, we think that he merely made a slip. We therefore propose to pass a decree modifying his decree in this respect.

The second point raised in the cross objection is on the subject of legal necessity. The learned Judge of the Court below held that the mortgage was binding only to the extent of Rs. 1016-12-0 which was paid to a certain Bhagwan Das in satisfaction of an antecedent debt due from Brij Jiwan Das and for the rest of the amount due the property was not liable but that Brij Jiwan Das was personally liable to pay. It is argued in support of the cross-objection upon this point that the evidence was sufficient in the circumstances to justify the conclusion that the whole amount was borrowed by Brij Jiwan Das for legal necessity. It is pointed out that neither of his sons had been born at the date when the mortgage was executed, although one of them was then in his mother's womb. It is admitted that this son had a vested right from the date of conception and therefore that the question of legal necessity did arise, but the suggestion is that the mortgagees could not know that there was any likelihood of the transfer being challenged by any son of Brij Jiwan Das, and they could consequently not be expected to make any extensive enquiry. Their case is that they were assured by Brij Jiwan Das, or on his behalf, that the money was being borrowed partly for the payment of antecedent debt and partly for the purposes of business. We have examined the evidence and have been taken through the judgment of the learned Judge of the lower Court and we are satisfied that we would not be justified in saying that his decision was wrong on the questions of fact. There is really very little evidence to show that any part of the money was really borrowed for the purposes of a business. Brij Jiwan Das certainly was carrying on a business, but the evidence of a dismissed servant of his that the money was borrowed for the business has with justification not been relied upon by the learned Judge of the Court below. The mortgagees might have fallen back upon the plea that they were assured that the money was required for the purposes of a business and they had in the circumstances made sufficient enquiry to justify them in acting in the belief that the representations made to them were true, but unfortunately for them they did not take this plea in their pleadings and there is no evidence that they made any inquiry at all. It may be that they were not aware of the possible birth of a son to Brij Jiwan Das, but any person who lends money to a Hindu is supposed to know the law and most people who advance money do know it. They must be aware that they make advances under the risk of claims being made by other members of the joint Hindu family, and if they do not take sufficient care to satisfy themselves that there is nobody to make a claim or that there is really legal necessity for the advance of the money which is requested of them, then they must bear the consequences. It has not been established that any part of the money was used by Brij Jiwan Das for the purposes of his business, that there was any real need for him to borrow money for these purposes or that the respondents on enquiry made were satisfied that the money was to be borrowed for legal necessity. The remainder of the money was alleged by the respondents to have been advanced for the purpose of discharging a debt due from Brij Jiwan Das to one Rammu Seth. The respondents maintain that they have paid the money to Rammu Seth, but the learned Judge has disbelieved their evidence. In view of the fact that Rammu Seth has not been called as a witness and there is no documentary evidence either of the existence of the debt or of the receipt by him of the money, we are not in a position to say that the learned Judge was wrong in holding that legal necessity for this part of the advance was not established.

The result is that we dismiss the appeal with costs. We allow the cross-objection in part and direct that the decree of the lower Court shall be modified in so far as it is a preliminary decree passed under O. 34, R. 4. In place of the declaration made by the lower Court that a sum of Rs. 1411-15-0 was due at the date of the decree we substitute a direction under the provisions of O. 34, R. 4, in conjunction with O. 34, R. 2 (1)(a), that an account be taken of what was due to the plaintiffs at the date of the preliminary decree for principal and interest on the mortgage at the contractual rate and costs of the suit, and direct further that the learned Judge of the lower Court shall fix the amount due on an account being taken and thereafter shall fix a date for payment within six months of the date when he signs the account, and that the plaintiffs shall receive subsequent costs, charges and expenses between the date of the signing of the account and the date fixed for payment together with interest during the period from the date of the preliminary decree up to the date fixed for payment at the contractual rate on the principal amount found due. We have already awarded the respondents their costs of the appeal. We hereby direct that those costs shall not be the subject of a separate personal decree in this Court, but shall be included in the

costs of the lower Court for the period between the date of the preliminary decree and the date fixed for payment and shall be charged in the decree against the property. The same direction will govern the costs of the cross-objection. This cross objection is valued only at a sum of Rs. 100 and as it has succeeded on the subject of interest we think the whole costs should be allowed to the objectors. Learned counsel on behalf of the respondents, that is the mortgagees, has urged that this Court should determine the rate of future interest, that is, the rate at which interest will be payable after the date fixed for payment if the payment is not made upto that date. It seems to us that this a matter for the final decree, if any. The question of interest after the date of payment will not arise until it is known that payment has not been made, and it is impossible at this stage to decide what costs, interest and so forth may be due at some future time. The preliminary decree will of course contain a provision required by O. 34, R. 4 (1) that the plaintiffs on failure of payment shall be entitled to apply for a final decree with the directions mentioned in the rule. The part of the decree which is a simple money decree will stand.

G.N./R.K. *Order accordingly.*

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BAJPAI AND DAR JJ.

Mt. Prem Wati—Defendant—Appellant

v.

Municipal Board, Agra — Plaintiff — Respondent.

Second Appeal No. 1196 of 1938, Decided on 11th August 1942, from decision of District Judge, Agra, D/- 5th May 1938.

(a) U. P. Municipalities Act (2 of 1916), Ss. 151 and 152 — Notice by owner of vacant building under S. 151 (3) remains effective till notice of occupation is given.

No doubt the house and water tax under the Act is an annual tax and ordinarily it is expected to be collected six monthly, and the remission which is mentioned in S. 151 (1) has to be every year on the basis of the annual tax ; but when law requires a person to give a notice about a matter and as soon as that notice is delivered it remains operative and effective unless the notice is withdrawn or its period is determined by a statement in notice, by act of parties or by operation of statute. There is nothing in S. 151 (3) to indicate that the notice provided for therein would come to an end on the expiration of 12 months. Therefore a notice served under S. 151 (3) by the owner of a vacant building remains effective and in operation till a notice of re-occupation under S. 152 is given. It is not necessary for the tax-payer if he wants to claim benefit of remission under S. 151 (1) to give notice every year in case the house continues to be vacant for a longer period than 12 months : S. A. No. 677 of 1936, *Approved* ; 14 Mad. 467, *Not approved.* [P 448*c*,*d*,*g*]

(b) U. P. Municipalities Act (2 of 1916), Ss. 151 and 152 — Whether particular building has remained vacant and owner is entitled to remission are questions of fact.

The question whether a particular building has or has not remained vacant and whether the owner is or is not entitled to remission on account of vacancy are questions of fact to be determined in each case on evidence. [P 448*g*]

C. P. C. —

('40) Chitaley, Ss. 100 and 101, N. 28, Pt. 3.

('41) Mulla, Page 367, Note "No second appeal lies on the ground of an erroneous finding of fact."

Gopal Behari — for Appellant.

Din Dayal — for Respondent.

BAJPAI J.—This is an appeal against a judgment and decree, dated 5th May 1938, of the District Judge of Agra, by which he substantially varied a judgment and decree, dated 2nd February 1938, of the Additional Munsif of Agra in a suit for recovery of house and water tax with regard to certain premises in the city of Agra. The defendant, Mt. Premwati, is the owner of a house at Mohalla Gokalpura in the city of Agra which has been assessed to house and water tax and bears the number 2096. From 5th December 1924 to 28th January 1927, and again from 3rd January 1928 to 23rd March 1934, and again from 11th September 1936 to 31st March 1937, the said house had remained vacant and unproductive of rent and the owner of the house had several notices of vacancy and of re-occupation to the Municipal Board of Agra. One notice of vacancy was served in December 1924 and of re-occupation in January 1927 and another notice of vacancy was served in January 1928 and of re-occupation of the house in March 1934. There was a difference of opinion in the Courts below with regard to the service of notice of vacancy on 11th September 1936, but the finding of the lower appellate Court—which is binding on us in second appeal—is that a notice was duly served with regard to the vacancy on 11th September 1936 also.

On 12th April 1937, the Municipal Board of Agra raised an action in the Court of the Munsif of Agra against Mt. Premwati for recovery of sum of Rs. 319-9-3 arrears of house and water tax with regard to the said house from 1st April 1925 to 31st March 1937, for a period of 12 years. Mt. Premwati contested the claim inter alia on the ground that the Municipal Board was not entitled to claim any tax with regard to the period for which the house had remained vacant and unproductive of rent, in other words, for the periods specified above. Other contentions were also raised in defence, which it is not necessary to particularise for the purpose of this appeal. The trial Court found that the defendant was entitled to the remission which she claimed excepting for the period beginning from 11th September 1936 to 31st March 1937, and on this finding after making allowance for the remission it decreed the claim for a sum of Rs. 123-14-3. Against that decree the Municipal Board of Agra made an appeal to the District Judge of Agra and Mt. Premwati filed cross-objections. The learned Judge found differing from the trial Court that a notice of vacancy was given by Mt. Premwati to the Municipal Board with regard to the period beginning from 11th September 1936, and ending with 31st March 1937. The District Judge further found again differing from the trial Court that Mt. Premwati was not entitled to remission for the entire period for which the house had remained vacant, but for a shorter period and the view of the learned Judge was that the notice which was given by Mt. Premwati for the vacancy of the house in December 1924 and in January 1928 remained operative only for a period of 12 months and although as a matter of fact the house remained vacant for a longer period than 12 months, as Mt. Premwati did not give notice each year after the expiration of 12

months from the date of her notice she was not entitled to claim any remission for a longer period than 12 months for each notice. On this finding the learned Judge recast the account and gave a decree for a sum of Rs. 285-10-8 to the Municipal Board against Mt. Premwati.

Against that decree Mt. Premwati has made this second appeal and the only question which has been argued before us is a purely legal one, namely whether under the Municipalities Act an owner who wants to claim remission for a vacant building has to give notice every year during the period the building has remained vacant or one notice of vacancy is sufficient to enable the owner to claim the remission for all the time the house is occupied again. It is agreed before us that if Mt. Premwati's contention is found correct and one notice was sufficient to enable her to claim the remission, the decree of the lower appellate Court will have to be set aside and the decree of the trial Court will have to be restored with this difference that a sum of Rs. 14-6-4 will have to be disallowed from the sum decreed by the trial Court; in other words, the Municipal Board will be entitled to a decree for a sum of Rs. 109-7-11 instead of Rs. 123-14-3. The controversy in this case is about the interpretation of certain clauses of Ss. 151 and 152, United Provinces Municipalities Act (Act 11 of 1916) and these are as follows:

"*151.* (1) In a municipality other than one situated wholly or partly in a hilly tract, when a building or land has remained vacant and unproductive of rent for 90 or more consecutive days during any year, the board shall remit or refund so much of the tax of that year as may be proportionate to the number of days that the said building or land has remained vacant and unproductive of rent.

(3) Provided that no remission shall be granted unless notice in writing of the fact of the building or land being vacant and unproductive of rent has been given to the Board, and that no remission or refund shall take effect for any period previous to the day of the delivery of such notice.

(4) The burden of proving the facts entitling a person to relief under this section shall be upon him."

"*152.* (1) The owner of a building or land for which a remission or refund of the tax has been given under the last preceding section shall give notice of the re-occupation of such building or land within 15 days of such re-occupation.

(2) Any owner failing to give the notice required by sub-s. (1) shall be punished upon conviction with a fine which shall not be less than twice the amount of tax payable on such building or land for the period during which it has been re-occupied without notice, and which may extend to fifty rupees or to ten times the amount of the said tax, whichever sum is the greater."

The contention of the Municipal Board is that the house tax and water-rate are laid on the annual value of buildings or lands under S. 128 (1) and (x), that the tax is an annual tax though under the rules framed by the Board for collecting tax it is payable in two equal instalments due respectively on 1st April and 1st October of each year, and that under R. 3 of the rules framed by the Municipal Board of Agra both the water rate and house tax are payable half-yearly in advance on 1st April and 1st October each year. Rule 32 of the rules framed by the Municipal Board of Agra further provides:

"When any house or any portion of the house which is liable to the payment of either tax is demolished or removed otherwise than by the order of the board or falls vacant, the owner shall give notice thereof in writing to the board within 15 days of such demolition or removal of the house falling vacant. Until such notice is given the person aforesaid shall continue liable to pay such taxes as he would have been liable in respect of such house if the same or any portion thereof had not been demolished or removed or fallen vacant. The period of exemption will begin to run from the 15th day previous to the date on which the notice is actually received by the Secretary; only provided that such day does not fall on any date previous to the actual date on which the house became vacant."

The Municipal Board further contends that the remission which is provided for in S. 151 (1), U. P. Municipalities Act (Act 2 of 1916) is an annual remission on the basis of an annual tax and consequently it is necessary for the tax-payer, if he or she wants to claim the benefit of remission under S. 151 (1) of the Act to give notice every year in case the house continues to be vacant for a longer period than 12 months; and a notice given by the owner about the vacancy of a house automatically expires at the end of 12 months and a fresh notice is necessary in a case where the house has continued vacant for a longer period than 12 months if the tax payer wants to claim the remission under S. 151, cl. (1) and for this contention reliance is placed on 14 Mad. 467,[1] in which on a construction of S. 51 of the Madras Act 3 of 1871, which is as follows:

"When any sum is due for or on account of any rate or tax leviable under Ss. 41 to 47 of this Act, the Commissioners shall cause to be presented to the person liable to the payment thereof a bill for the amount. Such bill shall contain a statement of the period and a description of the property for which the charge is made."

Shephard and Weir JJ. observed as follows:

"The next contention had reference to the notice which an owner of property may give in order to entitle himself to remission of the house tax. The tax is an annual one and the language of S. 51 of Act 3 of 1871 appears to us to show that an annual notice was intended."

Reliance is further placed on a passage in P. D. Aiyangar's Law of Municipal Corporations in British India (Edn. 2) at p. 352, which is as follows—"The period in respect of which the remission is made is calculated from the date of the delivery of the notice, and during every half-year fresh notice will have to be given, the notice given in any particular half-year having no effect thereafter. The tax is an annual one, and the notice which an owner of property must give in order to entitle himself to a remission of the house-tax is an annual notice." and for this last observation the authority of the Madras case referred to above is quoted. Mt. Premwati does not dispute that the tax is an annual one and is collected six-monthly nor does she dispute the fact that in order to claim remission each year's tax and account will have to be considered separately but the contention on her behalf is that a notice of vacancy once given by an owner of a house runs and takes effect till it is withdrawn or cancelled. She further contends that under general law if a person gives notice about a matter, the notice is treated as operative and running till it is withdrawn and unless by act of parties or by operation of statute a notice is terminated it will continue to run. She further contends that Ss. 151, and 152, Municipalities Act, nowhere lay down expressly or by neces-

1. ('91) 14 Mad. 467, Purushottama v. Municipal Council of Bellary.

sary implication that the notice given by the owner would terminate within 12 months. The only clause which deals with the notice is cl. (3) of S. 151 and it nowhere provides for the termination of a notice at the end of 12 months. Consequently, although remissions can only be claimed on the basis of annual tax for each year under S. 151, cl. (1), it is not necessary that if remissions are claimed year after year for every year a fresh notice should be given and one notice would be sufficient under cl. (3) of S. 151, Municipalities Act. It is further contended that by enacting S. 152, Municipalities Act, the Legislature contemplated that the owner of a building who had given notice of vacancy would also give a notice of re-occupation and certain penalties are provided for not giving notice of re-occupation. Therefore, it is argued that the presumption is that the Legislature itself recognized that the notice would continue till it was terminated by a notice of re-occupation; and for this interpretation of S. 151 reliance is placed upon an unreported decision of Rachhpal Singh J. in Second Appeal No. 677 of 1936,[2] in which the learned Judge in the course of his judgment observed as follows :

" Defendant 1 had given notice when the house became vacant. Learned counsel for the appellant argued strenuously that respondent 1 should have given notice to the Municipal Board every year stating that his portion of the house was vacant. There is no such law in these provinces. The Municipality has a duty of its own and that is to keep watch and see whether notices given under S. 151 by the house owners are true or not. In the present case it appears that the Municipal Board must have been very negligent, because its notice relating to taxes due for the year 1922 and onward was not instituted till about 1934."

We have given due weight to these contentions and we have come to the conclusion that an annual notice is not imperative under the statute. It is true that the tax is an annual tax and ordinarily it is expected to be collected six-monthly. It is also true that the remission which is mentioned in S. 151, cl. (1) has to be every year on the basis of the annual tax ; but it cannot also be disputed that when law requires a person to give a notice about a matter and as soon as that notice is delivered it remains operative and effective unless the notice is withdrawn or its period is determined by a statement in notice, by act of parties or by operation of statute. We must also keep in mind that we are dealing with a question where the right to claim remission for a vacant building given by the statute has or has not been taken away by reason of not giving of notice, in other words, we are dealing with an enactment which takes away a valuable right of a tax-payer. It is doubtful whether a right like this can be taken away by implication or an express statute is required for it. But even assuming that a right like this could be taken away by necessary implication of a statute, the implication must be clear and inevitable. Now it is not disputed that in cl. (3) of S. 151 there are no words which say that notice provided for in that clause would come to an end on the expiration of 12 months. But the argument is that cl. (3) must be referred back to cl. (1) and the two taken together clearly imply that the notice must be annual. Now the first difficulty which strikes us on this construction is that if it is going to be an annual notice where would the period of 12 months end. Would it end from the date of notice or would it end on 1st January every year or would it end on 1st April every year which is the financial year of the Board. The view of the learned District Judge of Agra was that it should end in 12 months from the date of the notice. The view set out in Aiyangar's Law of Municipal Corporations at one place is that it should end every half year and in the Madras case without any discussion of the subject the view was expressed that the notice should be annual without indicating the period with which 12 months of the notice would end. There is no warrant for the view taken by the learned District Judge that the notice would terminate at the end of 12 months from the date of notice and the word 'annual' should have reference to the date of notice and not to the gregorian year or to the financial year. If, however, annual notice may be interpreted as ending with the gregorian year or with the financial year, then apart from the uncertainty as to which of the two is meant, this interpretation of the annual notice may cause in certain cases real inconvenience. Suppose, a house becomes vacant or unproductive of rent on 1st December of a year and the owner finds that for next six months the house would not be in a habitable condition and he gives a notice to the Board of six months vacancy on 1st December, would such a notice terminate automatically on 31st December or on 31st March and the owner would be under a necessity to give fresh notice for the remaining period about which he had already given notice or should the notice given by him on 1st December be treated as sufficient for six months. There seems to be no reason why a definite notice of six months should not be treated as sufficient notwithstanding the fact that it goes beyond 31st December or beyond 31st March of a year.

In a case like this we must go by the plain language of the statute and words should not be read into it which are not there. In our view, a notice served by the owner of a vacant building remains effective and in operation till a notice of re-occupation is given. The question whether a particular building has or has not remained vacant and whether the owner is or is not entitled to remission on account of vacancy are questions of fact to be determined in each case on evidence, but if, in fact, the building has remained vacant for a longer period than 12 months a notice of vacancy given about it and not terminated by a notice of re-occupation should be sufficient and it satisfies the condition of the statute. We accordingly allow this appeal, set aside the decrees of both the Courts below and in lieu thereof grant a decree to the plaintiff against the defendant for a sum of Rupees 109-7-11. This sum will carry pendente lite and future interest at the rate of 6 per cent. till realisation and a decree would be prepared under O. 34, R. 4, Civil P. C., in favour of the plaintiff giving the defendant three months' time for payment of the amount. The plaintiff will have one-third of its costs in all Courts and the defendant will bear her own costs.

G.N.B.K. *Appeal allowed.*

2. Second Appeal No. 677 of 1936, decided on 26th July 1939, Municipal Board of Agra v. Madan Mohan Gargh.

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